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ESTELLA MAY TRUTE, ADMINISTRATRIX, APPELLEE, V. DALE HOLDEN, APPELLANT.

FILED MAY 3, 1929 No. 26479.

1. **Appeal:** INSTRUCTIONS. "The instructions of the court should direct the attention of the jury only to the facts in support of which evidence has been introduced upon the trial. When an instruction is not founded upon the evidence, and is calculated to mislead the jury in considering the facts of the case, the judgment must be reversed." *Mannion v. Talboy*, 76 Neb. 570.
2. ———: REVERSAL. "A verdict so clearly wrong as to induce the belief on the part of the reviewing court that it must have been found through passion, prejudice, mistake, or some means not apparent in the record, will be set aside and a new trial awarded." *Garfield v. Hodges & Baldwin*, 90 Neb. 122.

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

Reavis & Beghtol, Jay C. Moore, Brogan, Ellick & Raymond and *Charles A. Dafoe*, for appellant.

Jack, Laughlin & Vette, contra.

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

BLACKLEDGE, District Judge.

This was an action in the district court for Johnson county commenced by Estella May Trute, as administratrix of the estate of William Trute, deceased, plaintiff, and against Dale Holden, Lionel Elza Shurtleff, and the city of Tecumseh, defendants. The suit was instituted to recover for the alleged wrongful death of plaintiff's intestate. Before submission to the jury, the city of Tecumseh and the defendant Shurtleff were dismissed from the case, and the case was submitted to the jury upon the issues and evidence as between the plaintiff and the defendant Dale Holden.

The plaintiff alleged in substance that she was the duly qualified administratrix of the estate of William Trute, deceased, and was also his widow, and that she and a son, 20 years of age, were the only next of kin of the deceased. Plaintiff further alleged that on July 3, 1926, the defendant

Holden wrongfully shot and killed said William Trute, who before his death was an able bodied man capable of earning $1,200 a year, that he contributed all his earnings to the support of his next of kin, and that certain expenses for medical and surgical treatment and funeral expenses had been incurred, and she asked for a recovery in the sum of $26,000. The answer of the defendant Holden was a general denial.

It appears without conflict in the evidence that Trute and his wife resided at Tecumseh, and that on the occasion a Fourth of July celebration was in progress; that the defendant Shurtleff was a special police officer appointed by the governor, and that he had deputized the defendant Holden to assist him upon the occasion in question, in which their principal purpose seems to have been to look for violations of the liquor law. They discovered a jug of liquor concealed in a barn, otherwise unoccupied, on the premises occupied by the Trute family, and upon its discovery Shurtleff went to interview the proper county officers for the purpose of procuring a search warrant, and left the defendant Holden to guard the liquor and with instructions to arrest and hold any one coming for it until his return. The liquor was partly concealed at the foot of the stairway on the ground floor of the barn. At the suggestion of Shurtleff, Holden took his position up a flight of stairs in the loft of the barn. Holden was a young man 22 years of age, of rather slight build, weighing approximately 140 pounds. Trute, the deceased, was a man 48 years of age, by occupation a carpenter, 5 feet 10 or 11 inches in height, physically strong, and weighed approximately 200 pounds.

Much of the record is devoted to a disclosure of the fact that there was considerable feeling existing in reference to the enforcement of the prohibitory law, that there was probably some hard feeling between the deceased Trute and the officer Shurtleff, who had before that time come into contact with each other, and the record discloses an atmosphere of rather intense feeling between many of the parties concerned.

The conflict in the testimony as to the actual occurrence begins with the transactions which took place in this barn as between the deceased and the defendant Holden. The deceased, William Trute, was wounded by a shot from a revolver which Holden had, and, after receiving the wound, both he and Holden walked to the Trute residence, where Trute waited until Holden caused a physician to be called and soon others gathered there. Trute died of the wound July 5.

The physician, Dr. Fitzsimmons, upon administering to the wounded man, determined that he should be taken to a hospital, and, after calling for an ambulance, inquired of him how it had happened. Within a few minutes Mrs. Trute arrived and also inquired of her husband how it had happened. During this time the defendant Holden was present. It was stated by William Trute, as related at the trial by both Dr. Fitzsimmons and Mrs. Trute, that when he entered the barn a light was flashed down on him from above and he was commanded to hold up his hands; that he asked who was there and, receiving no answer, started up the stairway and was shot down. This is the theory of the plaintiff's case as disclosed by this testimony and by the brief of her counsel in this court, wherein they say that it was the theory of the plaintiff that the deceased was shot by defendant as he went up the stairway to the loft, defendant crouching near the head of the stairs; and, in another place, "he courageously started up the stairway to see who was unlawfully trespassing on his premises and without further warning received a fatal wound."

It was the theory of the defendant that the wounding of the deceased occurred in the barn loft after the deceased had ascended the stairs and in a struggle between himself and Trute in which the deceased was endeavoring to wrest from Holden the pistol which he held in his hand, and that in the struggle the defendant Holden having his flash-light in one hand and the pistol in the other, it was accidentally discharged resulting in the wounding of William Trute.

This is an outline of the principal issues as between the parties. The case was tried and submitted to the jury upon

these theories. A verdict was returned signed by ten jurors awarding the plaintiff a recovery of $13,150. The trial court upon the motion for a new trial required a remittitur to be made of $4,400, and thereupon overruled the motion for a new trial and entered judgment for $8,750, from which the defendant Holden appeals.

Appellant makes in this court ten assignments of error. The first three, that the verdict is not sustained by the evidence, that it was the result of passion and prejudice, and that the judgment is excessive, may be considered together. The eighth assignment has to do with instruction No. 4 which was given by the court upon request of plaintiff. In view of the conclusions reached upon these propositions, we do not consider it necessary to discuss the other assignments of error.

It is urged that the statement made by William Trute as to how the shooting took place could not be true, and for these reasons: It appears without contradiction that the bullet entered Trute's body in the region of the navel and passed backward and upward, without encountering any hard tissue or bones which might have deflected its course, and was found just under the skin near the spine at a point more than two inches higher on the body than the point of entrance, and that this fact conclusively precludes any inference that the shot came from above downward as would be the case if Trute was shot when starting or ascending the stairs; also, that early the following morning the sheriff and two assistants upon examination of the barn loft found in the northeast corner thereof the cap worn by William Trute and near the center of the loft the hat worn by defendant Holden; also, that the stairway went up adjacent to the south wall of the barn; and that the trousers worn by Trute showed a powder burn on them where the bullet had entered, and in experiments later made it was established that a similar powder burn appeared when the muzzle of the revolver was held not more than nine inches from the goods, but at a distance of twelve inches or more no powder burn appeared.

The only attempted reconcilement of any of these facts with the statement of Trute, that he was shot while starting or ascending the stair, was by the testimony of Dr. Fitzsimmons to the effect that, "if he should be at the top of the stairs and Mr. Holden was crouched under the wall and fired from the distance he would fire, the bullet would pass through at the point where it showed about in William Trute's body." This statement or supposition, however, is in conflict with the plaintiff's theory of the case and the testimony concerning Trute's *ante mortem* statement on which it is based. That statement is clearly to the effect that he started up the stairs and was shot. This statement of the witness is but a supposition as to what could have happened if the parties were in a position in which nobody on either side claims they were when the shot was fired. There is no explanation attempted of how, if the plaintiff's theory is true, there could be the powder burn on the trousers or the hat or cap found as located in the barn loft. It is true that, a fatal shooting having taken place, the inference would be that it was unlawful, and in the absence of any explanation as to how it occurred that inference might be sufficient to support a finding. The only other evidence as to what actually did occur at the time is the testimony of the defendant Holden, and it is corroborated by these undisputed physical facts which at the same time tend to show that the statement of Trute, as testified to by the witnesses who heard it was not correct.

There is a mass of testimony concerning the earnings of William Trute and the portion thereof contributed to the support of his family, involving collaterally an inquiry whether Mrs. Trute had complained of his nonsupport and domestic difficulities between them on that ground, all of which was perhaps properly submitted to the jury and need not be noticed here further than to note that, although the plaintiff contends in her brief that the evidence shows he earned approximately $1,000 a year, the trial court found and states in a memorandum opinion that the verdict was grossly excessive and placed a *post mortem* value on plain-

tiff's intestate far in excess of his living worth, and that the largest annual earning that the plaintiff was able to actually prove was $400.

The verdict in favor of the plaintiff was for $13,150. It, of course, was attacked in the motion for new trial, and a large part of the record is devoted to the showing made as to alleged misconduct of the jury. This need not be noticed here, except the fact that immediately after the verdict was received one Knowles made an examination of the jury-room, finding ten slips of paper, apparently ballots, on each of which was written an amount in figures. These varied in sums from $2,500 to $20,000, and there is also an additional slip on which each of these amounts is written, the total ascertained and a division made by ten giving the result of $13,150. The verdict was rendered by ten jurors and this amount so ascertained was the exact amount of the verdict. We do not overlook the rule established in this court concerning quotient verdicts. Nevertheless, that rule does not make these facts to be of no significance whatever, and we think that the affidavit of the foreman of the jury in attempted explanation fails to help the situation out to any extent. It rather appears to be an instance of one undertaking to see how closely he can walk to a precipice without actually stepping over, and while not basing our determination of the case upon this single proposition, we feel that it, in connection with the other facts disclosed by the record, is entitled to serious consideration and that it contributes materially to the final result.

In the submission of the case to the jury we note the complaint made as to the giving of instruction No. 4 on the request of the plaintiff. The court had in instruction No. 3 undertaken to cover that phase of the case and we think had sufficiently done so by instructing the jury as follows:

"It appears from the evidence that Lionel E. Shurtleff, the deputy state sheriff, called the defendant Dale Holden to assist him in apprehending violators of the prohibitory law in the state of Nebraska, and that, after receiving information which indicated that there might be intoxicating liquor

on the premises occupied by William Trute, Shurtleff, and the defendant Holden, without a search warrant, entered a barn on the premises of Trute and found what they determined was a jug partly filled with intoxicating liquor, that Shurtleff left to get a search warrant and directed the defendant to stay in the barn and watch for the person who came for the liquor, that the owner thereof might be detected and arrested.

"If you believe from the evidence that while defendant Holden was watching the liquor William Trute came to the barn, and that the defendant Holden told Trute to hold up his hands, and that thereafter Trute ascended the stairs and advanced upon defendant Holden for the apparent purpose of injuring him and attempted to take the revolver from him by force, and in the scuffle which ensued the revolver was accidentally discharged and produced the death of William Trute by accident and without fault of the defendant and without the intent of the defendant to discharge the revolver, you should find for the defendant.

"If you should find that the defendant Holden unnecessarily and intentionally killed William Trute, you will find for the plaintiff. The issue in this case under the pleadings and the evidence, gentlemen, is whether the shooting was accidental or intentional.

"If William Trute, after entering the barn, on being told to hold up his hands, asked who it was and received no response thereto and started up the stairs to ascertain who was there and was purposely shot by the defendant Holden, such shooting would not be justified and the defendant Holden must respond therefor in damages.

"The defendant Holden was rightfully in the barn seeking to apprehend a violation of the liquor law, but he had no right to shoot William Trute merely because he caught him violating the liquor law. Defendant is civilly responsible for the death of Trute if Trute died as the result of a gunshot wound wrongfully inflicted by defendant, even though defendant did not intend to actually kill Trute. One must respond in damages for the injury caused by his wrongful

act even though the exact result was not intended. When an injury is caused by violence to the person by the use of weapons the intent to injure is presumed and can only be rebutted by a showing that the injury was accidental, justifiable or excusable under the circumstances."

Conceding that instruction No. 3 correctly stated the law applicable, and we do not notice any particular fault to be found with it other than the clause, "but he had no right to shoot William Trute merely because he caught him violating the liquor law," which does not seem to have any logical or proper place in the instruction, it fully covered the issues and stated to the jury that "the issue in this case under the pleadings and the evidence, gentlemen, is whether the shooting was accidental or intentional." As the case was tried and submitted to the jury, that was indeed the only issue in the case.

Notwithstanding this situation, the court then upon the request of the plaintiff gave instruction No. 4, which is as follows:

"You are instructed that, even if you believe from the evidence that the jug partly filled with liquor and put in evidence was in the barn of William Trute with his knowledge or even that it belonged to him, it could constitute nothing more than a mere misdemeanor on his part and did not in itself in any way authorize or justify defendant Dale Holden in shooting William Trute, and no lawful authority to shoot William Trute on account thereof could be given to him by the defendant Shurtleff."

The vice in this instruction is not only that it substantially repeats and emphasises the questionable clause contained in instruction No. 3, above referred to, but in addition instructs the jury that this misdemeanor on the part of Trute did not in any way authorize or justify the defendant in shooting Trute, and states that no lawful authority on account thereof could have been given to him by the defendant Shurtleff. It is true, as contended by the appellant here, there was no issue in either the pleadings or evidence which raised any question of justification or claimed authority or

right on the part of the defendant Holden to shoot Trute because of his possession of liquor or for any other reason; and there was no claim by the defendant of any authority given or attempted to be given to him by Shurtleff for that purpose. This instruction is not only inconsistent with No. 3 in its statement to the jury that the only issue was whether the shooting was accidental or intentional, but it injects into the case issues not pleaded and as to which there was no evidence to warrant the giving of the instruction. A closer analysis of the language of the instruction indicates that it might not unreasonably be held to have another vice in that it assumes that the defendant Holden did shoot Trute. To say that one shot another implies a voluntary act; and the whole case of the defendant was upon the theory that the shooting was not voluntary or intentional, but was involuntary and unintentional. The instruction did not even say that these circumstances *would* not authorize a shooting, but assumes both the fact and the shooting and necessarily implies some claim of authorization or justification. The wording is: "*Did* not in itself in any way authorize or justify defendant Dale Holden *in shooting* William Trute."

"The instructions of the court should direct the attention of the jury only to facts in support of which evidence has been introduced upon the trial. When an instruction is not founded upon the evidence, and is calculated to mislead the jury in considering the facts of the case, the judgment must be reversed." *Mannion v. Talboy,* 76 Neb. 570. To the same effect is *Sabin v. Cameron,* 82 Neb. 106, and *McCormick Harvesting Machine Co. v. Willan,* 63 Neb. 391, and as long ago as the time of *Meredith v. Kennard,* 1 Neb. 312, it was said by Mason, C. J.: "When, as in this case, it plainly appears the court, in charging the jury, gave instructions not required nor called for by any evidence, and it appears that such unnecessary charge was calculated to, and we think did, mislead the jury in considering the facts of the case, the judgment ought to be reversed."

We find that this instruction was erroneous and the giving thereof sufficient to work a reversal of the case.

Concerning other aspects of the case to which reference has been made in this opinion, while we do not wish to be understood as now holding that either of the things criticized, if standing alone, would be adjudged sufficient grounds for reversal, yet we do believe they point unmistakably to a verdict that in justice ought not to be permitted to stand. It is, of course, for the jury to determine the weight and sufficiency of the evidence. But when it appears that the jury have failed to respond truly on the real merits of the controversy and to administer substantial justice to the parties in the case, and that the conclusion reached by the jury is, upon the record as made, manifestly wrong, then the court should not hesitate to set aside the verdict that the case may be resubmitted to another jury. *Garfield v. Hodges & Baldwin,* 90 Neb. 122; *Tyler v. Hoover,* 92 Neb. 221; *Parker v. Wells,* 68 Neb. 647.

Upon the record in this case we do not think the erroneous verdict could be cured by the mere filing of a remittitur. Although the trial court was of the opinion that the plaintiff should have a judgment for some amount, it found that this verdict as returned was grossly excessive. If its finding as to the largest annual earnings of the deceased is correct, then we think the judgment remains excessive even after the remittitur. The manner in which the verdict was returned, although there may have been no previous agreement to be bound by the quotient so obtained and although a confirmatory ballot was afterwards taken, does not indicate that the jury gave to the case that consideration in respect to the determination of their award which they were directed by the instructions of the court to give, and which the law contemplates and requires.

The result so reached, and in view of the evidence and undisputed physical facts to which reference has been made, all have cumulative weight in convincing the court that the judgment of the trial court should be reversed and the cause remanded, which is accordingly done.

REVERSED.

VERA GRIFFEN, APPELLEE, V. LINCOLN TRACTION COMPANY, APPELLANT.

FILED MAY 8, 1929. No. 26470.

1. **Carriers: BUS COMPANIES: CARE REQUIRED.** Bus companies operating after the manner of the defendant herein are common carriers of passengers and are liable as other common carriers upon common-law principles. They are required to exercise the utmost skill, diligence and foresight consistent with the business in which they are engaged for the safety of the passengers, and they are liable for the slightest negligence.
2. ———: **LIABILITY.** Common carriers of passengers are liable for personal injuries to passengers produced by concurrent negligence of its servants and third persons.
3. **Evidence** examined, and *held* to support the judgment.

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

Hainer, Flansburg & Lee, for appellant.

Littrell & Patz and *Reavis & Beghtol, contra.*

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

EBERLY, J.

In this case the Lincoln Traction Company, hereinafter referred to as the defendant, appeals from the judgment of the district court for Lancaster county, in favor of Vera Giffen, who will hereafter be called the plaintiff. The action was brought by the plaintiff for injuries alleged to have been received on the 30th day of April, 1927, while a passenger in the city of Lincoln in one of defendant's buses, and which are charged to be due to the negligence of defendant's servants in the operation of the bus upon which she was a passenger. The defendant denies the existence of the injuries and the negligence alleged, but did not plead contributory negligence. The jury determined the issues adversely to the defendant's contentions. The defendant challenges this determination as unsupported by the evidence.

On the day of the accident the plaintiff boarded a bus belonging to and operated by the defendant in the downtown district of the city of Lincoln. She was going to her home near Thirtieth street of that city. The route of this bus was over R street and across Twenty-fourth street and Thirtieth street intersections. The scene of the accident was on R street, west of the Twenty-fourth street intersection. As the bus in question was, on this occasion, proceeding east on R street, which runs east and west, and as it approached Twenty-fourth street, which runs north and south, defendant's evidence is that it was traveling a little south of the center of R street and was proceeding eastward at a rate of from 14 to 18 miles an hour. The only evidence in the record is that the paved portion of Twenty-fourth street is approximately 30 feet in width and that the paved portion of R street is approximately 40 feet in width.

The evidence of plaintiff's witnesses is at this time while this bus was only 10 to 12 feet from the south curb there was a turn to the right (south) followed instantaneously by a sharp swerve to the left (north); "it seemed for an instant like the bus would tip over" and the bus then stopped. Plaintiff testifies that during this trip the bus had been filled to its capacity and, in addition, a number of passengers, including plaintiff, had been compelled to stand; that plaintiff was then standing in the rear of this conveyance where, owing to the plan of its construction and the presence of so many passengers, there were no handholds or other means of support available to her; that due to this sudden, sharp and unexpected movement she was thrown against a seat and received injuries of which she complains.

Defendant's driver says in part that as he approached Twenty-fourth street he saw a "roadster or coupé" going north, "following the west side of Twenty-fourth street, and going at, I should judge, about 35 miles an hour, and as he got just about to the intersection, instead of going straight ahead, as I thought he would, I slowed up, thinking he would go straight ahead. * * * He turned a circle,

and started coming toward the front of the bus. I pulled as near the curb as I could; thought he would see me and turn to the right. * * * Q. Did you notice any other occupants in the car? A. I noticed one of them. Q. Did you notice what direction they were looking? A. They were looking directly away from where they were going, to the northeast; they were looking to the right and turning to the left. Q. And they came directly toward your bus? A. Yes, sir; making a turn, appearing to be making a circle; that is, they were making a circle and turning. Q. How close to the corner, the southwest corner of the intersection, did they come? A. Well, somewhere around from 10 to 15 feet, I could not say exactly, kind of swung out toward the center of it, making another turn. Q. They cut across the corner? A. Cut across the corner. Q. Between the center of the intersection and the curb to the southwest? A. Yes. Q. Then you turned to the north (south?) didn't you? A. I turned to the north (south?) first thinking they would see me and go to my left or their right, where they should have gone. Q. And then you turned which direction? A. Then I turned to the left, and across in front of them, and saw they were not looking and knew they could not stop in that time. Q. How far was the bus from Twenty-fourth street when this coupé came to the corner headed at you? A. I would not say exactly, somewhere around 30 to 40 feet when it came around the corner. Q. And where was your bus when you came to a stop? A. Well, it was about 6 feet away from the northwest curb, the front end of the bus somewhat in the intersection. Q. To the north of R street? A. Yes; on the north side of R. Q. And to the west of Twenty-fourth street? A. It was on the west side of Twenty-fourth street. Q. How close did this car come to hitting the bus as it went by? A. The Ford car, you mean? Q. Yes. A. Barely missed it about a foot, I should judge. Q. Your actions there turning toward the curb and turning away was all one action, almost instantaneously? A. Yes."

H. K. Watson, a witness for the defendant, who designated the automobile that came north on Twenty-fourth

street and caused the trouble as a "Star car," testified on cross-examination as follows: "Q. I thought you said that after this Star car had turned the intersection of Twenty-fourth and R it was headed straight at this bus, while the bus was going east and the Star car was going west? A. Yes, sir. Q. Well then did the Star car turn any after that? A. Yes, sir. Q. Which direction did it turn? A. Turned west. Q. Well, it was already going west? A. It was going northwest. Q. Well, then, all right then, it was not going west directly at this bus when it turned the intersection, if that is right. Now let us start over again. Did you see this Star car as it left Twenty-fourth street and entered R street? A. Yes, sir. Q. What direction was it going then? A. Going northwest. Q. And how far did it continue to go northwest? A. Not quite to the middle of R street. Q. Then what direction did it go? A. Turned west. Q. Turned west and then went straight west, didn't it? A. Yes, sir. Q. And then after that did it make any turn? A. No, sir. Q. Well, how did it get past the bus? A. The bus turned at the same time; the bus turned northeast at the same time the car turned west. Q. That is when the bus driver started to get his bus out of the middle of the street the Star car was headed northwest making this turn? A. Yes, sir. Q. Then the bus driver got his car out in the middle of the street and this fellow with the Star car turned around to get back past the bus on the south, didn't he? A. Yes, sir."

It is admitted that the driver of the bus gave no alarm by horn or otherwise.

Without assuming to determine the ultimate facts in this controversy, but only for the purpose of determining whether the evidence in the record supports the inferences necessary to sustain the verdict of the jury, it may be said to be fairly established that the car going north on Twenty-fourth street "cut the corner" turning into R street, but was at least "10 or 15 feet" from the "southwest corner of this intersection" at the time of leaving the same, and then still proceeding in a northwesterly direction; and that it

continued in a northwest course, until not quite in the middle of R street. The moment the bus changed its course from "east to northeast," the Twenty-fourth street automobile changed its course from "northwest to west." This evidence, if believed, amply sustains the conclusion that there was a zone of perfect safety of from "10 to 15 feet" in width extending from the west boundary of the Twenty-fourth street intersection along the entire south side of R street which was at no time passed over by the interfering automobile and the security of which was at no time even threatened. The maneuver of the driver of the bus in turning the same to the left and away from the "zone of safety" was as a matter of fact not only unjustified, but inevitably exposed his passengers to increased dangers both of collision and of injuries due to the sudden and violent swerving of the bus.

The principles defining the liability of common carriers of passengers in this jurisdiction as applicable to the situation above disclosed have been clearly announced. Bus companies operating after the manner of the defendant herein are common carriers of passengers and are liable as other common carriers upon common-law principles. They are required to exercise the utmost skill, diligence and foresight consistent with the business in which they are engaged for the safety of the passengers, and they are liable for the slightest negligence. *Lincoln Traction Co. v. Webb*, 73 Neb. 136.

Even if it be conceded that the acts of the driver of the interfering automobile in the instant case, that turned west into R street from Twenty-fourth street, constituted negligence that contributed to cause the injury complained of, still it was incumbent upon the defendant driver, in view of the circumstances in the case, and the presence of the emergency created thereby, to continue to exercise the utmost skill, diligence and foresight. While due regard must be given to the sudden peril which confronted him, yet if lack of such due care of defendant's driver, under these circumstances, contributed to plaintiff's injuries, the rule ap-

plicable would be that common carriers of passengers are liable for personal injuries to passengers produced by concurrent negligence of its servants and third persons. *St. Joseph & G. I. R. Co. v. Hedge,* 44 Neb. 448; *Pray v. Omaha Street R. Co.,* 44 Neb. 167. But it is thought that the situation in the instant case is not one to which the rule quoted is applicable. Here there was an adequate zone of safety along the south side of R street. By statute: "Whenever any persons, traveling with any carriages, shall meet on any road in this state, the persons so meeting shall seasonably turn their carriages to the right of the center of the road, so as to permit each to pass without interfering or interrupting." Comp. St. 1922, sec. 2770.

"The term 'carriage' as used in this article, shall be construed to include stage coaches, wagons, carts, sleighs, sleds and every other carriage or vehicle used for the transportation of passengers and goods or either of them." Comp. St. 1922, sec. 2777.

It was therefore the duty of defendant to comply with the terms of the statute, and in view of its admitted failure to do so and the circumstances connected therewith, the implication of negligence cannot be escaped. Indeed, even in a case wherein it is applicable, we recognize the difficulty in the rule which defendant seeks to invoke, which would authorize or would require a traveler proceeding within the law of the road to technically violate it, by turning to the left in order to avoid the consequences of the wrongful act of an approaching traveler who is on the wrong side of the road. This is true, because, although a traveler "on the right" may know that if the oncoming vehicle maintains its course there will inevitably be a collision, still he cannot know that the driver of such car will not turn out in time to avoid a collision.

Even in the extreme case the better course would seem to be for him either to hold his course, on the right side of his highway, or to stop, relying on the other driver changing his course in time, and it is so held in some jurisdictions. *Cupples Mercantile Co. v. Bow,* 32 Idaho, 774.

In any event, even if this rule on which defendant relies is to be ultimately accepted in this jurisdiction, a matter which we do not determine, it is wholly inapplicable to the controlling facts of this record. In the present case, in view of the facts disclosed by the evidence, the jury were fully justified in determining that there was no excuse for the technical violation of the terms of our statute by the driver of the bus. This conclusion is proper, even though his action be not judged by the rule and measurement of a calm calculation, but determined by its reasonableness in the light of the circumstances as then existing, as they must have appeared to him in the situation he found himself at the time of the occurrence of the accident. For plainly there was then, as we have already seen, "a reasonably safe place for the driver of defendant's bus to turn out to the right."

We also find that the evidence in the record is ample to sustain the verdict both as to the question of the nature and extent of injuries suffered. We have given due consideration to alleged errors in the instructions to the jury, complained of by the defendant, and do not find that, in view of the instructions actually given, the defendant's rights were in any manner prejudiced by the failure to give the instructions requested by it, nor by the giving of any of the instructions excepted which were given by the court on its own motion.

It follows that the judgment of the trial court is right and it is

AFFIRMED.

Note—See Carriers, 10 C. J. 607 n. 74, 867 n. 40, 1058 n. 37; 4 A. L. R. 1499; 31 A. L. R. 1202; 45 A. L. R. 297.

AARON B. CLARK, APPELLANT, V. CEDAR COUNTY, APPELLEE.

FILED MAY 8, 1929. No. 26611.

1. **Highways: ACTION FOR FLOODING: INSTRUCTIONS.** In a case in which the defense is that the flood was so extraordinary and unprecedented as to amount to an "act of God," an instruction

that "the county was not required to provide against an extraordinary rainfall or flood" was not a correct statement of the law of the case. In order for a flood to come within the term "act of God," it must have been so extraordinary and unprecedented a manifestation of nature as could not have been reasonably anticipated or foreseen.

2. ———: CONSTRUCTION: LIABILITY. Where a county, in the construction of a highway under its control, elevates the grade of the highway where it crosses the flood channel of a natural stream, without providing a bridge, culvert, or spillway for the natural drainage across said highway, the county is liable for the damages resulting from the accumulation of water due to such construction.

3. Waters: FLOOD CHANNELS. Where a natural stream is accustomed at times to overflow its banks, and the overflow water, running through a depression, returns again to the stream, the course it follows from the time it leaves said stream until it returns is a natural flood channel, and, as such, as much a part of the stream as the ordinary channel.

4. ———: ACTION FOR FLOODING: INSTRUCTIONS. The evidence in this case is uncontradicted that the flood channel of the stream crossed the highway, and that the water was accustomed to flow through that channel in times of flood. An instruction was therefore erroneous which stated to the jury that, if the lands across which the highway in question was constructed were higher at the time said road was opened for traffic, or the land immediately east of plaintiff's land was higher than plaintiff's land, then plaintiff cannot recover. Such instruction suggests to the jury that they may find that the natural drainage of the land was not across the highway, when there is no evidence to support such a finding of fact.

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

Fred S. Berry, H. E. Burkett, and *J. E. Brittain,* for appellant.

Clarence E. Haley and *A. R. Millard, contra.*

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

DAY, J.

Aaron B. Clark brought this action against Cedar county to recover damages alleged to have resulted from the con-

struction of a highway, which caused water to back up and overflow his land. From a verdict and judgment in favor of Cedar county, the case is appealed.

The appellant is the owner of the north half of section 21, township 28, range 3, east of the sixth P. M., in Cedar county. A natural stream, known as "Baker Creek," flows in an easterly direction across the entire length of the farm. This creek drains the territory to the west, comprising more than 25,000 acres. Along the east line of plaintiff's farm runs the highway, the construction of which he claims obstructs the natural drainage of the flood waters. Prior to 1924, when the flood complained of occurred, the grade of this highway had been raised more than two feet. It is usual in time of heavy rains for Baker creek to overflow on the plaintiff's land, and then to drain east across the highway and flow back into Baker creek at a lower point. On June 25, and August 1, 1924, heavy rains occurred, which caused Baker creek to overflow over plaintiff's land, and the waters became so deep that they flowed over the highway as raised, and thence back into the creek as they had been accustomed to go. The plaintiff complains that, because the grade of the highway had been raised over two feet and on account of failure to provide suitable culverts and spillways over the embankment, the water stood over many acres of his land, damaging his crops and injuring the land. The appellee denied that the flood was caused by the construction of the highway, and claimed that the plaintiff's land was lower than the land upon which the highway was constructed and lower than the land immediately to the east of the highway. Its apparent contention in this matter was that the natural drainage of the water of this flood channel of Baker creek was not across the highway. The appellee also claimed that the damages which the plaintiff suffered were due to conditions over which the defendant had no control, meaning thereby, as indicated by the briefs of appellant and appellee, that the injuries were caused by an "act of God."

There are two assignments of error presented by the plaintiff which we find it necessary to consider. These two assignments of error have to do with two instructions given by the trial court to the jury concerning the law of the case.

The first instruction of which complaint is made is one wherein the jury are informed as to the legal duty of the county in the construction of a road. It is as follows:

"The jury are instructed that it was the duty of the defendant to so construct and maintain its highway along the east side of plaintiff's land as not to interfere with the natural drainage thereof, and to provide suitable ditches, bridges, culverts or spillways in and across the embankment raised, to allow the ordinary flood waters from plaintiff's land to follow the natural course of drainage. * * * But that it was not required to provide against an extraordinary rainfall or flood."

We believe that the last sentence of the above instruction is a misstatement of the law. It does not correctly state the law with reference to an "act of God." The rule as stated in 27 R.C.L. 1106, sec. 40, is: "The law does not hold anyone to the exercise of extraordinary prevision, and a person obstructing a natural watercourse by the erection of a bridge, dam, railroad embankment, or other structure, is not required to build in anticipation of or preparation for floods or freshets which are not only extraordinary but unprecedented, and cannot reasonably be foreseen, such a flood being in contemplation of law an 'act of God.'" It was the duty of the court to define in a proper instruction what would be regarded by the law in this case as an "act of God." The jury would only then be able to determine whether, under the facts of this case, the flood would be such as to be termed an "act of God."

The county contends that this instruction should be considered together with all the other instructions in the case and if sufficient, when considered in their entirety, then one ought not to be held erroneous. That rule is abundantly established by the cases cited; but, when we attempt to apply it to this case, our difficulty is that it is the only in-

struction or portion of an instruction that deals with the question. Consequently, it is the only statement of the law, within the instructions, relative to this question. Is it a correct statement of the law? In effect the court told the jury that in the building of the road the county was not required to construct a highway with regard to the natural drainage of the land through which it runs, to the extent that it should provide against an extraordinary rainfall or flood. We do not so understand the law. It is the duty of the county to so construct the road that it will not interfere with the natural drainage of the land, as correctly stated by the trial court in this case, which rule was later modified by the erroneous part of said instruction. The evidence in this case supports the claim of the appellant that this water overflowed from Baker creek and across appellant's farm across the road and thence back into the channel of the creek; that this was then the natural flood channel of this creek. In a case where the facts were almost similar, this court, through Letton, J., said in substance that, if overflow waters which flow in an accustomed course through a depression into the same stream at a lower point have their course negligently obstructed by a railroad embankment, the railroad company is liable for damages to crops caused by waters so retained. *Murphy v. Chicago, B. & Q. R. Co.*, 101 Neb. 73. The flood channel of a 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. *Hofeldt v. Elkhorn Valley Drainage District*, 115 Neb. 539.

Section 2747, Comp. St. 1922, makes the county specifically liable in a case where it so constructs a highway as to damage any person from accumulation of water. The purpose of the court in giving this instruction must have been to submit to the jury the theory of the county that the damage in this case, if any, was caused by such a rain as amounted to an extraordinary manifestation of nature, the occurrence of which could not reasonably have been anticipated or foreseen. The record discloses that the different

witnesses had different ideas as to whether the rains involved in this case were extraordinary ones. The evidence in this case discloses that floods, like this one, were likely to occur annually. We do not think that this instruction informed the jury as to the nature of a storm which would be so extraordinary as to relieve the county from liability for damages resulting from the accumulation of water. Obviously, it is not the duty of the county to drain the land above the highways, but it is the duty of the county not to hold water by the construction of its highways in such a way as to interfere with the natural drainage. Where an instruction assumes to define the whole law of the case, and omits a material element from the definition given, it is reversible error, which may be relied upon, although no proper instruction has been requested by the party seeking to take advantage of the defect. *City of South Omaha v. Hagar*, 66 Neb. 803. "It is the duty of the trial judge to instruct the jury correctly upon the law as applied to the issues presented by the pleadings, if supported by the evidence, whether requested or not." *Hall v. Rice*, 117 Neb. 813.

However, even if this instruction had contained a proper statement of law, the evidence in this case does not justify the giving of such an instruction. The evidence in this case, without contradiction, establishes the fact that there were other rains which brought the water to the top of the grade. It had not been unusual for the water to run over the old road, and the appellee complains only because the road is now higher than formerly, and floods his land more than before.

The so-called cloudburst of August did not flood any more land than the somewhat lesser rain of June. When the water came to a level with the grade it ran over the road and covered no more land regardless of the amount of rain thereafter. Any rain heavy enough to overflow the banks of Baker creek and bring the water to a level with the grade would do as much damage as the most extraordinary flood, so unusual and unforseen as not to have been anticipated

from the general experience of men residing in that vicinity. Again, the record does not disclose that the county made any provision whatsoever for the water running through the flood channel of the creek to pass across the highway. It had apparently made no provision to provide for the natural drainage, even though water often ran over the old road. The reason for raising the grade of the road was to prevent the water running over the road.

The other error of which the appellant complains is the giving of instruction No. 6, and is as follows:

"If you find from the evidence that the lands across which the highway in question was constructed were higher than the plaintiff's land, then plaintiff cannot recover and your verdict should be for the defendant."

For the sake of brevity, we do not discuss this as a correct statement of the law. There can be no question that it is not applicable to this case. The undisputed evidence in this case is that the water under similar circumstances for 37 or more years had been accustomed to run across this road on the land below, and thence back to the channel of the creek. It was proved that some places on appellant's land were lower than the road or the land across the road. This does not refute the fact that this was a natural drain when the water was at a certain level. In fact, ever after the construction of this road, when the water got to a level higher than the road, it followed this channel. The county would not be liable for water that would not drain naturally, but the liability is for the accumulation of water due to the construction of a highway. There is evidence in the record tending to prove that this grade raised the level of the water two or more feet, and it was a question of fact to be submitted to the jury whether this extra accumulation of water had resulted in any damage to appellant. This instruction, not being justified by any issue supported by the evidence, was so prejudicial to the appellant that it is reversible error. *Hitchcock v. Shager,* 32 Neb. 477. This instruction submitted to the jury a question not supported by the evidence. Without any evidence whatever to support the find-

ing, it, in effect, told the jury to determine whether as a matter of fact the natural flood channel of the stream did cross this road. We believe that the plaintiff is entitled to have the question properly submitted to the jury as to whether or not he has been damaged by an accumulation of water upon his land due to the construction of this highway, obstructing the natural drainage of the land. If they find that he has been damaged, then he is entitled to a determination of the amount of damage he may have sustained resulting directly from the accumulation of water caused by the construction of the highway.

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

REVERSED.

Note—See Waters, 59 L. R. A. 877; 6 R. C. L. Supp. 252; 27 R. C. L. 1106; 3 R. C. L. Supp. 1546; 40 Cyc. 556 n. 25.

WILLIAM J. KELLY, APPELLEE, V. WILLIAM KANNARR: HINDS STATE BANK, INTERVENER, APPELLANT.

FILED MAY 8, 1929. No. 26626.

1. **Pleading.** A defendant or intervener may present any defense, legal or equitable, in any case.
2. **Appeal:** DIRECTED VERDICT. "In determining whether a peremptory instruction was justified, the party against whom the verdict is directed is entitled to have every controverted question of fact resolved in his favor, and to have the benefit of every inference that reasonably can be deduced from the facts in evidence." *Schmelzel v. Leecy*, 104 Neb. 672.
3. **Chattel Mortgages:** AGREEMENT FOR MORTGAGE. It is a well-settled principle that an agreement to give a mortgage for a valuable consideration upon a crop to be grown the following year is regarded in equity as the creation of the mortgage itself, even though the crop be not *in esse* at the time of said agreement. And in such case its lien will be given precedence over a mortgage taken by a party who has notice of the rights of the equitable mortgagee.

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

Jack, Laughlin & Vette, for appellant.

J. A. McGuire, Bartos, Bartos & Placek and *Grant G. Martin, contra.*

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

SHEPHERD, District Judge.

This is a case in replevin. Plaintiff Kelly sued in the Eighteenth district to foreclose a chattel mortgage on a 1927 crop of corn, and defendants Kannarr and intervener Hinds State Bank defended, denying generally the allegations of the petition, denying in particular that the plaintiff's mortgage had been properly filed, asserting that the described mortgage was obtained by fraud from the Kannarrs who executed and delivered the same, and asserting that it was in any event second and subject to a mortgage of later date made by said Kannarrs to the intervening bank, the latter mortgage having been given in pursuance of an agreement theretofore made by the parties in 1926. In answer to this the plaintiff denied the fraud and contended that an agreement made in 1926 for a mortgage on a 1927 crop could not give the bank a priority because the crop was not then in existence.

The Hinds bank, intervener, cross-petitioned for the corn. In general it may be said that the parties all presented their respective claims and contentions by appropriate pleadings, and made due denial in such pleadings of all conflicting matters of fact alleged by their adversaries.

Trial was had to a jury and a verdict was returned giving plaintiff a priority on 1,350 bushels of corn. Judgment was entered on the verdict.

The trial court excluded from evidence exhibit A, which was a 1926 chattel mortgage from the Kannarrs to the Hinds State Bank, containing the before mentioned agreement to give a similar chattel mortgage on the 1927 crop. And it also excluded exhibit C, to the same effect, and excluded the oral testimony of Hinds and others as to the actual knowledge of the plaintiff concerning the said agree-

ment, together with the testimony of the Kannarrs in regard to false representations to induce the giving of the plaintiff's mortgage. In addition to this, the court gave its instruction numbered 3 directing a priority in favor of the plaintiff—practically directing the verdict.

Complaint of these things was made by the intervener and by the defendants, both by motion for new trial and in assignments of error here presented.

We are constrained to agree with defendants and appellants. The district court was in error in these holdings and rulings, and so prejudicially in error that the judgment must be reversed.

It was alleged by the defendants and by the intervener that when the Kannarrs gave plaintiff his mortgage they told him that they had previously pledged the property to the bank. And the Kannarrs testify very positively upon trial that, not only did they so inform the plaintiff, but that they supposed they were giving only a second mortgage to him, he having stated that it was drawn subject to the bank's claim and was a second mortgage. The older Kannarr also testified that at the time he signed he did not have his glasses with him and was unable to read, and that he accordingly relied on the plaintiff to inform him as to the facts.

The court struck out this testimony and directed a verdict in favor of the plaintiff upon the theory, evidently, that the Kannarrs should have known what they were signing, and should not be permitted to dispute the contents of the written instrument. It does not appear that they were unable to read and there is some force to the theory. But there was an intervening circumstance when Kannarr was called upon to act, and we are of the opinion that, since the mortgage was obtained when the signer was without immediate means of reading, and since he depended and relied upon the mortgagee to inform him of the contents of the mortgage and then procured his son to sign, acting somewhat hurriedly in order that he might promptly return the instrument to the mortgagee by mail, the strict

rule should not be applied. Under the circumstances, supposing that the testimony of Kannarr is true, the mortgagee is not to be relieved of the consequences of his duplicity because the mortgagors failed to exercise the last degree of care. Having signed the instrument and promised to have his son sign it, all in dependence upon the mortgagee's statement, Kannarr would naturally go through with his agreement exactly as he did.

The ruling of the court in this connection took from the jury the matter of fraud. The evidence was sufficient to have made a *prima facie* case. It tended to show fraud on the part of the plaintiff, and the determination of the question by the court was an invasion of the province of the jury. "In determining whether a peremptory instruction was justified, the party against whom the verdict is directed is entitled to have every controverted question of fact resolved in his favor, and to have the benefit of every inference that reasonably can be deduced from the facts in evidence." *Schmelzel v. Leecy,* 104 Neb. 672.

The trial court held that the 1926 agreement of the Kannarrs to give the bank a mortgage on their 1927 corn crop was not sufficient, even though the plaintiff was advised of it, to make the bank's mortgage superior to that of the plaintiff. There is plenty of evidence that said promise was made. It appears in exhibit C above referred to—a chattel mortgage for additional security given to the bank by the Kannarrs in December, 1926. It was first received upon trial, and afterwards excluded. And the witness Hinds testified absolutely that the plaintiff had admitted to him that he had actual knowledge of the agreement so contained in said mortgage. The direction contained in the court's instruction numbered 3 was such as to take the question entirely from the jury.

Under such circumstances, it is beyond question that the trial court erred. The defendants and the intervening bank had a right to present the facts stated as an equitable defense and as a basis for the cross-petition which they filed. The defendant or intervener may present any de-

fense, legal or equitable, in any case. The agreement to give a mortgage on the 1927 crop stated expressly that it was to be done on or about the 1st day of May, 1927. Said mortgage was not, in fact, given until the 22d day of October, 1927. But the delay was not sufficient to avoid the promise and to deprive the bank of its equitable right.

While the rule of law undoubtedly is that one may not mortgage a thing not *in esse*, this court has often held that a valid promise may be made in a lease or other contract to give a mortgage upon a crop when it comes into being, and that such promise may be enforced. The case at bar is ruled by the decision of this court in *Weigand v. Hyde*, 109 Neb. 678. In that case it was held as follows: "Where a lease provides that the lessee shall on demand execute a chattel mortgage on the crops to secure the payment of the rent, but lessee fails to do so, and executes to a third person a first chattel mortgage on the same crops, the execution thereof constitutes a fraud on the part of the lessee, as between himself and the landlord, against which a court of equity may grant relief at the suit of the lessor. In such case, the mortgagee, if he had notice of the provisions of the lease, and of the landlord's right thereunder, is not a mortgagee in good faith, and, in an action by the lessor for specific performance of the terms of the lease, the mortgagee's rights will be subordinated to those of the lessor."

And the court further say in the opinion: "It is a well-settled principle that an agreement to give a mortgage for a valuable consideration upon property which is sufficiently specified is in a court of equity regarded as the creation of the mortgage itself. This is held for the reason that equity will treat that as done which ought to be done. And, in such case, a lien will be given precedence over a mortgage or other lien taken by a party who has notice of the rights of the equitable mortgagee." And later it was held by this court, quoting *Weigand v. Hyde*, 109 Neb. 678, and *Skala v. Michael*, 109 Neb. 305, that the principle applies, even though the agreement be made before the property

came into being. *American State Bank v. Keller*, 112 Neb. 761.

It appears, therefore, that there were questions for the jury which the court, by its rulings and by the instruction referred to, refused to present, with the consequent result that the court decided such questions, instead of the jury.

There was some question upon trial as to whether the Hinds State Bank had properly intervened. But this seems to have been abandoned by the plaintiff, and to have stood undecided. However, the case proceeded upon the theory that the bank was a party, and since the parties took this attitude it will be concluded that the bank was duly in the case as an intervener.

For the reasons above stated, the judgment of the lower court must be reversed and the cause remanded, and it is so ordered.

REVERSED.

WILLIAM A. EHLERS ET AL., APPELLANTS AND CROSS-APPELLEES, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLEE AND CROSS-APPELLANT.

FILED MAY 25, 1929. No. 26513.

1. **Eminent Domain:** INTEREST. The rule that the value of privately owned land taken for a railroad right of way should be estimated as of the time of the filing of the petition for the assessment of damages does not necessarily require the railroad company to pay interest on the appraisers' award from that date, where the owner retains possession and use of the land until a later date.
2. ———: ———. In a proceeding to condemn land for railroad purposes, alleged delay of the railroad company in procuring the assessment of damages *held* not to create a liability for interest on the award of the appraisers under the circumstances outlined in the opinion.
3. ———: ———. In a proceeding to condemn land for railroad purposes, the railroad company does not necessarily create a liability for interest on the appraisers' award from its date by notifying the county judge, when he accepted a deposit therefor, to retain the money until expiration of the time to appeal, where

the owner of the land challenged the railroad company's power to exercise the right of eminent domain, declared the land was not subject to condemnation and failed at the time of such deposit to waive the right of appeal.

4. ———: "OWNERS." In a proceeding to condemn land for railroad purposes after it has been sold for delinquent taxes, the holder of the tax sale certificates is an "owner" within the meaning of the law granting to railroad corporations the right of eminent domain.

5. ———: ———. In a proceeding to condemn land for railroad purposes, all persons having an interest in the land are "owners" within the meaning of the statute granting to railroad corporations the right of eminent domain.

6. ———: AWARD: CONCLUSIVENESS. "A landowner who fails to appeal from the freeholders' award in a condemnation proceeding, is conclusively bound by it." *Omaha Bridge & Terminal R. Co. v. Reed*, 69 Neb. 514.

7 ———: TAXES. According to the revenue laws, the holder of tax sale certificates is entitled to the amount of the taxes paid therefor with interest at the rate of 12 per cent. per annum until paid and cannot be deprived of that right in a proceeding to condemn the land for railroad purposes, where the award of the appraisers exceeds in amount all liens.

8. COSTS: ATTORNEY'S FEES. As a general rule the allowance of attorney fees as costs must be authorized by statute.

APPEAL from the district court for Douglas county: HERBERT RHOADES, JUDGE. *Affirmed.*

William A. Ehlers, for appellants.

Byron Clark, Jesse L. Root, J. W. Weingarten and *C. W. Krohl, contra.*

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

ROSE, J.

This is a controversy over interest on an award by a commission appointed by the county judge of Douglas county to assess damages resulting from the taking of real estate for railroad purposes in a condemnation proceeding wherein the Chicago, Burlington & Quincy Railroad Company exercised the right of eminent domain. The proper-

ty condemned is described as the south 90¼ feet of lot 5 and all of lots 6 and 7, in block 221 of the original plat of Omaha. On one of the lots there were three houses occupied by tenants.

The present action is an independent suit in equity in the district court for Douglas county for enforcement and distribution of the award with interest from the time the railroad company filed its petition in the office of the county judge, for an order restraining the railroad company from interfering with the occupancy of the tenants pending litigation and from collecting or receiving rents. Plaintiffs herein are William A. Ehlers and Margaret C. Ehlers, who procured title to the lots after the condemnation proceeding was instituted, and the defendants are the Chicago, Burlington & Quincy Railroad Company, Bryce Crawford, county judge, and William Haffke, holder of tax sale certificates. The answers of these defendants challenge the alleged right of plaintiffs to interest on the damages awarded from the beginning of the condemnation proceeding. From a judgment of dismissal plaintiffs appealed.

The record shows the regularity and the validity of the condemnation proceedings. Following are material dates and facts:

September 15, 1924, lots sold by the county treasurer to Haffke, who received three tax sale certificates—No. 7,703 for $2,657.96, No. 7,704 for $2,824.42, No. 7,705 for $2,824.46; September 15, 1924, Haffke paid subsequent taxes amounting with accrued interest to $423.33; December 5, 1924, petition of railroad company for condemnation filed in the office of the county judge and commissioners appointed; February 17, 1925, view of premises by commission after due notice to all parties interested; February 18, 1925, report of commission awarding property owners $15,528.30 filed in the office of the county judge—to Haffke $9,176.17 for taxes including interest at 12 per cent. per annum from September 15, 1924, to February 17, 1925, and to the Ehlers $6,352.13; February 24, 1925, award of

$15,528.30 paid to the county judge by the railroad company; March 24, 1925, plaintiffs herein commenced in the district court for Douglas county a suit demanding from the railroad company $6,618.78 with interest from December 5, 1924, applying for and procuring an order restraining the county judge from paying to Haffke any sum in excess of $8,730.17, with interest at 12 per cent. per annum from September 16, 1924, to December 5, 1924, and also applying for and procuring an order restraining the railroad company from interfering with the occupancy of the premises by the tenants and with the collection of the rents; March 25, 1925, suit last described removed by the railroad company to the federal court and shortly afterward plaintiffs filed and procured a dismissal in the state court—an order which the railroad company considered void, leaving the case pending in the federal court; April 1, 1925, plaintiffs commenced the present suit for the purposes already stated and the railroad company filed a petition April 3, 1925, for its removal to the federal court; May 1, 1925, parties stipulated that the railroad company waived its right to remove the present action to the federal court, and that out of the award of $15,528.30, $9,176.17 should be paid to Haffke and the remainder or $6,352.13 to plaintiffs, reserving to the respective parties the right to litigate herein the questions involving interest; May 1, 1925, award distributed by the county judge according to the terms of the stipulation.

It is contended by plaintiffs that their damages were necessarily determined by the commission under the law as of the date on which the railroad company instituted the condemnation proceeding and that therefore they were entitled to interest therefrom on the award until paid or from December 5, 1924, to May 1, 1925. In the argument on this question plaintiffs cited the statute granting to railroad corporations the power of eminent domain and three former cases. Comp. St. 1922, sec. 5278; *Missouri P. R. Co. v. Hays*, 15 Neb. 224; *Northeastern Nebraska R. Co. v. Frazier*, 25 Neb. 53; *Fremont, E. & M. V. R. Co. v.*

Bates, 40 Neb. 381. The statute cited does not mention interest nor specifically provide that the damages shall be assessed as of the date on which the petition for condemnation is filed but does contain the following proviso:

"No appropriation of private property for the use of any corporation provided for in this chapter shall be made until full compensation therefor be first made or secured to the owners thereof." Comp. St. 1922 sec. 5278.

In the present instance compensation was not made or secured when the railroad company filed its petition for the assessment of damages. In the case first cited, however, the court ruled as follows:

"The valuation of property taken for right of way for a railroad should be made as of the time of the filing of the petition for the assessment of damages to the land." *Missouri P. R. Co. v. Hays*, 15 Neb. 224.

In the opinion therein it was stated: "The authorities seem to agree pretty generally that the damages in such cases must be assessed as of the time of taking." The court took the view that the definite location of the line of the road and the application for the appointment of commissioners to assess the damages constituted a taking within the meaning of the statute. On this point the other cases cited by plaintiffs are of the same import. The rule quoted, therefore, is based on the premise that the taking occurs when the condemnation proceeding is commenced. The definite location of the line of railroad or the right of way was a material factor in fixing the time of the taking. The land here involved is not taken for a right of way. While the lots have been condemned for railroad purposes, plaintiffs themselves protested before the commission that the railroad company was without power to appropriate their property on the ground that it was too far from the right of way. In addition the evidence herein shows without contradiction that the railroad company did not take the lots or possession thereof when they commenced the condemnation proceeding December 5, 1924. The owner received and retained the rents for that month. The rents

for January and February were collected but not paid to the railroad company. Uninterrupted possession was not acquired until later. After possession was taken plaintiffs interfered by means of equity suits and restraining orders. Possessory rights were not definitely determined until May 1, 1925, when the award without interest was distributed pursuant to stipulation. Under the different circumstances outlined herein the statute and the cases cited are not authority for the allowance of interest on the award from December 5, 1924.

It is argued further that interest on the award should be allowed on the ground of delay by the railroad company in procuring the assessment of damages. It is insisted that possession could have been taken upon 10 days' notice authorized by law. Comp. St. 1922, sec. 5290. The statute does not require possession or condemnation within 10 days. Two nonresidents interested in the land were notified by publication. Plaintiffs acquired title to the lots after the petition for condemnation was filed in the office of the county judge and they were brought into the initial proceeding by a supplemental petition after December 5, 1924. There is nothing to show unreasonable delay, lack of diligence or bad faith on the part of the railroad company.

Plaintiffs contend also that in any event interest should be allowed from the time the condemnation money was deposited with the county judge February 24, 1925, until it was distributed May 1, 1925. This contention is based on the proposition that the railroad company, when depositing the award with the county judge, directed him to retain it during the period of 60 days allowed for an appeal—the time fixed by a statute upon which reliance was placed. Comp. St. 1922, sec. 5284. There seems to have been justification for that course. When the commissioners were engaged in the performance of their duties, while viewing the premises, they were told in substance by William A. Ehlers, in the hearing of a railroad representative, that the railroad company was a nonresi-

dent without power to exercise the right of eminent domain and that the lots were more than 100 feet from the center of the main line of the railroad and not subject to condemnation for railroad purposes. It was a reasonable precaution to assume that these questions, owing to the hostile attitude of plaintiffs, would be raised and urged on appeal. Plaintiffs did not waive their right of appeal May 1, 1925, and then demand their award as they might have done. Under the circumstances neither equity nor law calls for the allowance of this item of interest.

Plaintiffs present another question by challenging the right of Haffke, holder of the tax sale certificates and the tax liens, to interest after commencement of the condemnation proceeding December 5, 1924, or after the date of the award February 17, 1925. In this connection it is insisted that the commissioners went beyond their powers in allowing such interest, that they thus deprived plaintiffs of a portion of their damages and that therefore the award to Haffke was, to that extent, void. In the argument on this issue plaintiffs assert and assume that Haffke acted for and represented the railroad company. There is nothing in the pleadings or the evidence to support that view. Haffke's rights were asserted in his own behalf throughout the proceedings though his attorneys represented the railroad company also. He bought the lots at tax sales in his own name, paid the taxes and procured the certificates evidencing his liens. He was an owner of the lots within the meaning of the statute granting to railroad corporations the right of eminent domain. *Graf v. State*, p. 485, *post*. In *State v. Missouri P. R. Co.*, 75 Neb. 4, the following rule was announced:

"Real estate cannot be taken by condemnation proceedings unless payment therefor to the owners is first made or secured. All parties having an interest in the land are 'owners' within the meaning of the statute. A lien for taxes is such an interest in the land."

It was the duty of the commission to assess all damages to the owners, including Haffke. Comp. St. 1922, sec. 5290.

His lien on the lots exceeded in value the equity of plaintiffs. Referring to him the award provides:

"We do find and assess his damages by reason of the taking of said premises by said railroad company for railroad purposes the sum of $9,176.17, with interest at the rate of 12 per cent. per annum from February 17, 1925, up to the date of payment to him out of the condemnation money for his said interest."

The rule applicable to this question was stated in a former opinion as follows:

"A landowner who fails to appeal from the freeholders' award in a condemnation proceeding, is conclusively bound by it." *Omaha Bridge & Terminal R. Co. v. Reed,* 69 Neb. 514.

According to the revenue law Haffke was entitled to the amount of the taxes with interest at the rate of 12 per cent. per annum until paid. He was not deprived of this right in the condemnation proceeding, since the award of the appraisers exceeded all liens. He looked to the land and not to plaintiffs or to the railroad company for payment. Plaintiffs could have stopped the interest on delinquent taxes by paying the liens when they acquired title to the lots but they elected to await payment out of the award and are bound by it since they did not appeal from it.

A claim for counsel fees as costs is urged on a cross-appeal but a statute allowing them has not been cited or found. There is nothing to show that such fees are taxable under an exception to the general rule requiring statutory authority for the allowance of attorney fees as costs. The claim, therefore, is disallowed.

The equity suit by plaintiffs was properly dismissed by the district court.

AFFIRMED.

Note—See Eminent Domain, 20 C. J. 811 n. 16, 848 n. 79, 1065 n. 48—(Interest) L. R. A. 1916C, 1113; 32 A. L. R. 98; 10 R. C. L. 163; 2 R. C. L. Supp. 984; 4 R. C. L. Supp. 656; 5 R. C. L. Supp. 546; 6 R. C. L. Supp. 602—Costs, 11 A. L. R. 895.

CLARENCE D. GRAF V. STATE OF NEBRASKA.

FILED MAY 25, 1929. No. 26563.

1. **Real Estate: "OWNER."** The word "owner," as applied to real estate, is one of wide meaning. Generally speaking, it includes all persons having a claim or interest in the real property, although the same may fall short of an absolute ownership. It embraces not only the owner of the fee, but any person who has an equitable interest in the land.
2. **False Pretenses: PROOF.** In a prosecution for obtaining property by false pretenses, where the charge in the information is that the false pretenses consisted in representing that defendant was the owner and holder of the record title to certain real estate, such charge is not sustained by proof that defendant had stated he owned the land, or said "this is my land."

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

C. B. Ellis, Claude S. Wilson, Roy F. Gilkeson and *Hyman Rosenberg,* for plaintiff in error.

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

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

GOOD, J.

Plaintiff in error, hereinafter called defendant, was convicted of the offense of obtaining property by false pretenses, and was sentenced to a term at hard labor in the state penitentiary. He brings the record of his conviction to this court for review. The conclusion reached makes it necessary to consider but one assignment of error, viz., that the verdict is not sustained by the evidence.

The prosecution was brought under section 9892, Comp. St. 1922, which makes it an offense for any one, by false pretenses, with intent to cheat or defraud, to obtain the signature or indorsement of any person to any promissory note or other instrument in writing, and if the value of the property so obtained is $35 and upwards the offense is a felony.

The second count of the information on which the verdict was rendered charged that defendant falsely represented and pretended that he was the owner and holder of the record title to certain described lands which were subject to a mortgage of $4,000, and that he represented that he had made arrangements with the mortgagee for a new loan thereon of $6,000, and offered to convey such lands to one Krauss, in exchange for certain lands and a note, secured by chattel mortgage, then owned by Krauss, and that defendant would pay a certain note owing by Krauss, for the security of which the note owned by Krauss had been pledged.

The record discloses that a contract for the exchange of properties was entered into between defendant and Krauss, and, pursuant thereto, Krauss indorsed the note, owned by him, secured by chattel mortgage, and delivered the note and chattel mortgage to defendant, and also delivered to defendant warranty deeds executed by Krauss and wife for the lands owned by Krauss, and at the same time defendant executed and delivered to Krauss a warranty deed for the lands which defendant had claimed to own. At the time of this transaction, defendant held a contract for the purchase of the lands he claimed to own, and had paid thereon the sum of $500. A deed had been executed by the owner of the record title to this land, in which defendant was named as grantee, and deposited in escrow, to be delivered to defendant upon payment by him of the balance of the purchase price, amounting to $3,100.

Some time after the making of the contract for and exchange of deeds between Krauss and defendant, the latter voluntarily made payments aggregating more than $1,100 on his contract for the purchase of the lands he had agreed and attempted to convey to Krauss. This is evidence tending to show that defendant was acting in good faith in entering into the contract with Krauss, and tending to negative the charge that he had an intent to cheat or defraud. This evidence, however, is not conclusive, and that question was one for the jury.

A more serious question is raised as to the falsity of the representations which defendant actually made. It is charged in the information that defendant represented that he was the owner and holder of the record title to the land which he was to convey to Krauss. The evidence does not sustain this charge. Defendant denies that he made any such representations, and Krauss, himself, testifies that defendant did not state that he was the owner of the record title. The most that the evidence shows is that defendant said he owned the land and referred to it as "my land." The question then arises: What is the significance of the use of the word "own?" An owner of land may have only a limited interest in it. One may properly say that he owns land, even though it may be incumbered by mortgage for its full value. He may be the owner of the land when he has no record title, but is entitled thereto; and, upon the other hand, one may have the record title when, in fact, he may have nothing but the bare, naked legal title, and another may be the equitable owner. The word "owner" is one of wide and extensive meaning when applied to real estate. It includes a rightful proprietor; one who owns the fee; one who has an estate less than a fee; any one who owns an estate in lands; the person entitled to the legal estate; any one who has an equitable right to or interest in land, or one who has any right which, in law or equity, amounts to ownership in the land. 29 Cyc. 1549, 1550.

In *Severin v. Cole,* 38 Ia. 463, it was held: "The mortgagee of real estate is an owner in such a sense that he is entitled to notice of the assessment of damages for a right of way over such property."

In *Omaha Bridge & Terminal R. Co. v. Reed,* 69 Neb. 514, it was held: "A mortgagee is an owner within the meaning of the statute providing for the taking of land under the power of eminent domain."

In *Board of Commissioners v. Northwestern Mutual Life Ins. Co.,* 114 Neb. 596, it was held: "The word 'landowner' as used in section 1724, Comp. St. 1922, embraces not only the owner of the fee, but mortgagees, whose mortgages are

of record, and notice to them of the proposed organization of a drainage district under article III, ch. 17 (secs. 1718-1743), Comp. St. 1922, must be given before special assessments levied against the land affected can become liens superior to the liens of the mortgagees." In the course of the opinion in the latter case it was said (page 599): "What is the meaning of the word 'landowner' as used in the statute? It has been said that the term 'owner' has no exact technical meaning (1 Hare, American Constitutional Law, 355), but as used in the law has generally been treated as including all persons having a claim or interest in the property although the same might fall far short of an absolute ownership. *Lozo v. Sutherland*, 38 Mich. 168. And in dealing with the word 'landowner' in a statute giving the right of eminent domain upon payment of damages, it was held that the word embraces not only the owner of the fee, but a lessee for years, and any person who has an interest in the property affected by the condemnation proceedings."

We think it must be conceded that defendant had an equitable interest in the land by virtue of the contract and deed to him in escrow from the owner of the legal title, and, under the authorities above cited, defendant could truthfully say that he was the owner of the land, although he was not the owner of the fee and was not entitled to a deed until he had met the payments due to his vendor. But, aside from this, the charge is that he had represented that he was the owner and holder of the legal title. The evidence does not support the charge. Under the circumstances, we are forced to the conclusion that the verdict is not sustained by the evidence.

In view of the testimony of Krauss, the complaining witness, that defendant did not at any time represent to him that he was the owner of the record title, a conviction could not be had upon a subsequent trial.

For the reasons given, the judgment of the district court is reversed and the action dismissed.

REVERSED AND DISMISSED.

FEDERAL LAND BANK OF OMAHA ET AL., APPELLANTS, V. OMAHA NATIONAL BANK, APPELLEE.

FILED MAY 25, 1929, No. 26526.

1. **Damages.** It is not enough that an unauthorized act or injury be done, but the plaintiff must sustain a loss by reason thereof, before he can recover damages therefor.
2. **Banks and Banking:** PAYMENT OF CHECKS. A bank is authorized to pay only to the person designated by the depositor. It cannot charge against the depositor's account an amount paid by it on a forged indorsement of the depositor's check, unless such payment is properly attributable to the negligence or other fault of the depositor, or unless the money has actually reached the person whom the drawer intended should receive it, or the drawer himself.
3. ———: ———. Evidence examined, and *held* to establish that the money paid by the defendant bank on the checks of plaintiff in suit "has actually reached the person whom the drawer intended should receive it" and to whom by law it was payable.

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

Smith, Schall, Wright & Sheehan, F. H. Gaines and *E. F. Dougherty*, for appellants.

Rose, Wells, Martin & Lane and *Edgar M. Morsman, Jr.*, and *Brogan, Ellick & Raymond, contra.*

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

EBERLY, J.

This is an action at law by the Federal Land Bank of Omaha and the New Amsterdam Casualty Company, plaintiffs, against the Omaha National Bank of Omaha, as defendant. Plaintiffs' petition sets forth eight causes of action aggregating $46,620. It alleges that from time to time it deposited in due course of business with the defendant certain sums of money; that the checks in the amounts set forth in the petition were drawn upon said depository by the Federal Land Bank, each payable to the order of two persons, viz., "another" and "N. C. Klein, Sec.-Treas.;"

that each of these checks was in the course of business presented to and paid by the defendant; that none of the checks were indorsed by the joint payees named, save and except in each case N. C. Klein had without authority of either of the plaintiffs, the Federal Land Bank of Omaha or his copayee, indorsed the latter's name in addition to his own on each instrument involved, and that the indorsement by N. C. Klein of his copayee's name constituted a forgery thereof; that the defendant bank had charged the deposit account of plaintiffs with the checks thus paid and refused to reimburse plaintiffs for the same.

The defendant in its answer admits the making of the deposit by the plaintiff, the payment of the checks in suit and charging the same against such deposit, and denies generally the allegations of the petition, and in addition thereto sets forth four additional defenses, in one of which, by apt language, it was in substance alleged that it was the intention of all parties to the transaction, as well as a duty enjoined by law, that said N. C. Klein, as secretary-treasurer of the Sisseton National Farm Loan Association, should collect each of said checks and deposit the proceeds thereof in the Guaranty State Bank of Sisseton, South Dakota, duly designated in the proper manner by Sisseton National Farm Loan Association as the legal depository of such funds pending their distribution to the parties entitled thereto; and that such deposit was in each of the cases set forth in plaintiffs' petition duly made by said N. C. Klein, as secretary-treasurer of said Sisseton National Farm Loan Association, in the manner required by law.

To this answer the plaintiffs filed a general denial. There was a trial to the court, a jury being waived, and judgment for the defendant, and from an order denying a motion for a new trial plaintiffs appeal.

This lawsuit arises out of business transacted under the provisions of the federal farm loan act. This act appears in the United States Code Annotated as chapters 7 and 8 of title 12 and embraces section 641 to section 1129 in-

clusive. This act and its various amendments create three separate agencies: (1) The Federal Farm Loan Board consisting of seven members, at the head of which *ex officio* is the secretary of the treasury of the United States, and which is given a general supervision over the administration of the act; (2) the Federal Land Banks (of which the plaintiff is one) which are separate and independent corporations obtaining their charter from the Federal Farm Loan Board and having such powers only as are granted by the act. They report to the Federal Farm Loan Board and are at all times subject to its supervision and regulation; (3) the National Farm Loan Associations which are authorized to be created by ten or more persons who own farm lands qualified for loans under the act. The application for a charter, as a National Farm Loan Association, which, as appears from its nature, is purely a local association, is sent to the Federal Land Bank in that district, in which the association attempts to be organized, and is by it forwarded to the Federal Farm Loan Board with its recommendation. If granted, this board issues a charter to the association, which becomes, under the act, a separate corporation with the powers enumerated in the act, and subject to the limitations and restrictions prescribed therein.

Section 720 provides as follows: "Upon receipt of its charter such national farm loan association shall be authorized and empowered to receive from the Federal Land Bank of the district sums to be loaned to its members under the terms and conditions of this chapter."

It may be said that the principal function of these local associations is to receive and approve applications from owners qualified for loans, which applications are thereupon forwarded to the Federal Land Bank of its district, which, upon due acceptance and approval, furnishes the funds to complete the loan.

Applicants for farm loans are required to be members of the association and subscribers to its capital stock. Each association elects its own board of directors; each

member or borrower of a farm loan having a voice in the selection. This board of directors in turn chooses the officers of the company, including a secretary-treasurer, who is the only paid officer of this corporation. His compensation is determined by the board of directors and he is paid from the funds of the association.

Section 741 provides: "Any person whose application for membership is accepted by a national farm loan association shall be entitled to borrow money on farm land mortgage upon filing his application in accordance with section 733 and otherwise complying with the terms of this chapter whenever the Federal Land Bank of the district has funds available for that purpose, unless said land bank or the Federal Farm Loan Board shall, in its discretion, otherwise determine."

Section 761 of this chapter provides: "Every national farm loan association shall have power:

"First. * * * To indorse, and thereby become liable for the payment of, mortgages taken from its shareholders by the Federal Land Bank of its district.

"Second. * * * To receive from the Federal Land Bank of its district funds advanced by said land bank, and to deliver said funds to its shareholders on receipt of first mortgages qualified under section 771 of this chapter."

Another requirement of this act is (section 772): "Funds transmitted to farm loan associations by Federal Land Banks to be loaned to its members shall be in current funds, or farm loan bonds, at the option of the borrower."

Section 714 of this act provides: "It shall be the duty of the secretary-treasurer of every national farm loan association to act as custodian of its funds and to deposit the same in such bank as the board of directors may designate, *to pay over to borrowers all sums received for their account from the Federal Land Bank upon first mortgage as in this chapter prescribed,* and to meet all other obligations of the association, subject to the orders of the board of directors and in accordance with the by-laws of the association. It shall be the duty of the secretary-treasurer, acting under

the direction of the national farm loan association, to collect, receipt for, and transmit to the Federal Land Bank payments of interest, amortization instalments, or principal arising out of loans made through the association. He shall be the custodian of the securities, records, papers, certificates of stock, and all documents relating to or bearing upon the conduct of the affairs of the association." (Italics ours.)

It is an admitted fact in the record that N. C. Klein was duly elected and qualified as secretary-treasurer of the Sisseton National Farm Loan Association, and that he, duly qualified, was acting as such during the period covered by the transactions in suit; that the Guaranty State Bank of Sisseton, South Dakota, had been duly designated by the directors of the Sisseton National Farm Loan Association as its depository in which all of its funds and all funds received by it were required to be deposited, and that the state bank last named was such legal depository at the time all the transactions were had, and that each of the checks which are in suit represent proceeds of loans made to members of his association and through it had been received by N. C. Klein, secretary-treasurer, and had been by him duly deposited in the Guaranty State Bank of Sisseton, in strict accordance with the directions of such board of directors, the only iregularity being that he had failed in each case to obtain the indorsement of the person with whom, in each instrument, he was named as copayee.

It thus appears that whatever misappropriation of funds may have been made it was made after the deposit had been completed, as directed by the board of directors of the local association, and that the association, either in its own name, or in the name of "N. C. Klein, as secretary-treasurer," had been duly credited with such deposit on the books of the Guaranty State Bank of Sisseton.

The provisions of the statutes quoted fairly disclose the legislative intent to be that, when farm loans were made, funds arising therefrom should be transmitted by the Federal Land Banks to their several farm associations and to

be by the latter disbursed to the members making the loans.

Indeed, section 772 appears to make this duty mandatory to transmit such funds in "current funds" or farm loan bonds. It thus must be conceded that when the deposit was made in the bank to the credit of "N. C. Klein, secretary-treasurer" of the Sisseton National Farm Loan Association, the course of business intended by those participating therein and contemplated by the terms of the statute had been duly completed, the only irregularity appearing being that the mortgagor making the loan had not subscribed his name as an indorsement on the instrument which transmitted the "current funds," as insisted on by the plaintiffs. Under these circumstances the rule appears to be: "As a bank is authorized to pay only to the person designated by the depositor, it cannot charge against the depositor's account an amount paid by it on a forged indorsement of the depositor's check, unless such payment is properly attributable to the negligence or other fault of the depositor, or unless the money has actually reached the person whom the drawer intended should receive it, or the drawer himself." 7 C. J. 686, sec. 414.

So far as the present transactions are concerned, it must be conceded that the terms in which the legislative intent is expressed, as well as the acts of the parties, and the established course of business disclosed by the record, indicate the person the drawer of these checks in controversy actually intended to receive the money was "N. C. Klein, as secretary-treasurer," representing the Sisseton National Farm Loan Association, to be by him distributed as directed. That was the plain purpose of all concerned. It cannot be gainsaid but that these funds and the proceeds of each check in suit actually came into possession of the Sisseton National Farm Loan Association through the act of its secretary-treasurer in the exercise of the powers of his office, and was by him deposited in the depository duly designated as such in the manner contemplated by the act.

It follows therefore that the amounts covered by the check having actually reached the persons whom the drawer

intended should receive them, notwithstanding the irregularity in failing to obtain the indorsement of the copayee therein named, may not be recovered by the plaintiffs herein. *Bayley v. Hamburg,* 106 Wash. 177; *Andrews v. Northwestern Nat. Bank,* 107 Minn. 196; *Beeson-Moore Stave Co. v. Clark County Bank,* 160 Ark. 385; *Union Bank & Trust Co. v. Lynn,* 73 Mont. 473; *McKaughan v. Merchants Bank & Trust Co.,* 182 N. Car. 543; *Phœnix Nat. Bank v. Taylor,* 113 Ky. 61; *Hunt v. Listenberger,* 14 Ind. App. 320; *Hoffman v. American Exchange Nat. Bank,* 2 Neb. (Unof.) 217.

The decision of this question practically disposes of the issues presented herein. This opinion will not, therefore, discuss, determine or decide the validity of the other defenses set forth in the defendant's answer, nor consider the question of whether they are supported by the evidence.

It follows that the judgment of the district court in the instant case was correct, and it is

AFFIRMED.

Note—See 3 R. C. L. 542; 1 R. C. L. Supp. 849; 4 R. C. L. Supp. 198; 5 R. C. L. Supp. 181; 7 C. J. 669 n. 39, 677 n. 28, 686 n. 94, 687 n. 96.

STATE, EX REL. O. S. SPILLMAN, ATTORNEY GENERAL, APPELLEE, V. FARMERS & MERCHANTS BANK OF KENNARD, APPELLEE: REED O'HANLON, ADMINISTRATOR, APPELLANT.

FILED MAY 25, 1929. No. 26700.

1. **Banks and Banking:** DIVERSION OF DEPOSIT. Where money is deposited in a bank by the executor of an estate, who is also president and manager of the bank, and where false entries are made which indicate that the money has been withdrawn from the bank, when in fact it was not so withdrawn, but diverted to other accounts for the benefit of the bank, such false entries do not terminate the relationship of depositor and banker.
2. ———: ———. In this case, when Kronberg, who was both executor of the estate and president and manager of the bank,

falsified the records of the bank to show payment of the deposit and by a corresponding entry diverted the fund represented by it to other accounts, to the financial benefit of said bank, his acts were done in the performance of banking functions, and not of his duties as executor.

3. ———: ———. In such a case, the books of the bank showing the deposit to be one of trust and the wrongful diversion of the fund for the benefit of the bank, the bank has such knowledge of the character of the deposit as to make it liable to the beneficiary of the trust as to a depositor.

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

Gaines, McGilton, Van Orsdel & Gaines and *O'Hanlon & O'Hanlon,* for appellant.

Crossman, Munger & Barton, contra.

Heard before ROSE, DEAN, GOOD, EBERLY and DAY, JJ., and RAPER and REDICK, District Judges.

DAY, J.

The administrator with the will annexed of the estate of Ole P. Larsen brings this action for an allowance of his claim against the guaranty fund of the state of Nebraska. The present executor was appointed in September, 1924, upon the removal of one Kronberg, who had been appointed in July, 1923. Kronberg was the president and actual manager of the Farmers & Merchants Bank at Kennard, Nebraska, during the time he acted as executor of the estate of Larsen. On April 24, 1924, as executor, he deposited in his bank $8,000 which he had collected of the assets of said estate. At the time Kronberg was appointed executor, there were in the safety deposit box of the deceased in the bank three certificates of deposit issued by his bank; one for $5,000, one for $3,000, and one for $2,000, which items with the $8,000 deposit heretofore mentioned make up the total of the claim of $18,000.

Prior to the time Kronberg became executor of the Larsen estate, he had made some improvident loans of the bank's money, which loans he had been required to take out

of the bank by the bank examiners. In order to make the bank appear solvent and its books balance, he had marked the certificates of deposit as paid, and placed them with paid certificates of the bank; and had also charged the checking account with $8,000. Neither the certificates of deposit nor the $8,000 in the checking account were ever paid by the bank. The trial court found that the executor had withdrawn the deposits from the bank, and the relation of depositor had ceased, consequently the claim was not allowable against the guaranty fund of the state of Nebraska.

As we view this case, the only question presented is whether the manipulations of the records of the bank by Kronberg were of such a nature as to terminate the deposit of the estate in said bank. In the consideration of this case it is difficult not to confuse in our mind the acts of Kronberg as president and manager of the bank and those of Kronberg as executor of the estate of Ole P. Larsen. It is necessary to a proper determination of this case that we keep these two relationships clearly and distinctly separated. It is only difficult because the two official positions were held by the same man. We think, if we remember that this was the money of the estate, held in trust and deposited in the bank by Kronberg as executor, it will help us to avoid confusion. The appellee argues that, had Kronberg as executor brought this action instead of his successor in office, then there would be no doubt but that he as executor could not secure the allowance of this claim against the guaranty fund. If it could be conceived that he had been continued as executor by the probate court, and it was apparent that the estate was in fact a depositor of said bank, that said relationship had not been terminated, then a judgment might have been entered allowing the claim as a deposit, for the benefit of the estate, in the name of Kronberg, as well as in the name of his successor as executor.

If Kronberg as executor withdrew the money from the bank, then the relationship of banker and depositor was terminated and the guaranty fund cannot be charged with this claim. Upon this question the trial court found: "That the

bank president was at the time of the application of these funds to the credit of other accounts in said bank the sole acting executor of said estate with the legal title and power of disposition. Through and by his action, his relationship as a depositor of said bank ceased," The evidence in the case discloses that some loans had been made by the bank to individuals for speculations, which are not usually considered by bankers generally as sound investments. The bank had taken the notes of these individuals to cover these loans. Kronberg had acted for the bank in these transactions and seems to have been personally interested in them. This paper was not considered good and the bank examiner insisted that some $20,000 of these notes be taken from the bank. This made it necessary to replace it with money or security to fill the hole in the assets of the bank caused by the loan of the amount of money represented by the worthless notes. This was accomplished by Kronberg by marking the certificates of deposit (amounting to $10,000) "paid" and placing a memorandum in the bank indicating the withdrawal of the $8,000 deposit. However, no money was withdrawn from the bank, but $13,000 was applied to a shortage in the Storz checking account and $5,000 was used to pay a certificate of deposit. The effect of this transaction, entirely a bookkeeping one, in so far as the estate was concerned, was to enhance the assets of the bank by $18,000. It was $18,000 to which the bank had no right or even claim of title. It is urged by appellee that it was of no benefit to the bank to pay the $13,000 on the Storz account, since the bank had contracted to pay an excessive rate of interest on this deposit. To use the language of *State v. American Exchange Bank,* 112 Neb. 834: "A contract for 6 per cent. is not illegal in the sense of being unenforceable as against the bank. It is simply one not within the guaranty statutes. A depositor may take his choice, receive 5 per cent. and be within the statutes as a depositor, or 6 per cent. and be without, as one holding a loan." So far as the bank was concerned, when it used $13,000 of this money to pay the Storz account, it increased the assets of the bank by that

amount. True, it did not increase the net assets of the bank transferable to the guaranty fund commission, because the commission might have successfully resisted the payment of the deposit. But when the bank ceased to be a going concern and the receiver took charge this was a closed transaction which concluded the bank.

Now the remainder of $5,000 of this account was used to pay a bogus certificate of deposit. Without going into the details of this transaction, suffice it to say that, in so far as the bank is concerned, nothing in the record discloses that it was not the valid obligation of the bank at the time. It follows then that this transaction inured to the benefit of the bank in that it removed from the books of the bank its liability to this depositor, without the payment of any money.

In *State v. American State Bank,* 108 Neb. 98, it is held: "False entries on the books of a bank, whereby one depositor is credited with the funds of another, do not change the relation of banker and depositor in regard to that particular item or relieve the bank from liability for a proper disbursement of the fund, if the bank is chargeable with knowledge of the facts."

Where money is deposited in a bank by an executor of an estate, who is also president and manager of the bank, false entries which indicate that the money has been withdrawn from the bank, when in fact it was not so withdrawn, but was diverted to other accounts for the benefit of the bank, do not terminate the relationship of depositor and banker. The deposit in this case was diverted for the benefit of the bank, and the deposit was not terminated by the entries on the books of the bank, which were not in accord with the actual facts. The evidence forces the conclusion that this was a valuable business transaction for the bank.

The appellee relies upon the holding in the case of *State v. Farmers & Merchants Bank of Walton,* 112 Neb. 840, wherein it is stated: "Where money is deposited in a bank to the credit of an administrator of an estate, the bank is charged with notice of the trust character of the fund, but is not required to see that the same is properly applied or

accounted for, in the absence of notice, or knowledge of facts putting it upon inquiry, that the money is being misapplied." This court has held in several cases that the knowledge of the managing officer of a bank is imputable to the bank, as to the rights of the beneficiary of a trust. *State v. American State Bank,* 108 Neb. 98; *State v. American State Bank,* 108 Neb. 129. In *State v. American State Bank,* 108 Neb. 111, it is held: "Where a trustee deposits in a bank, in the name of a corporation of which he is manager, trust funds belonging to others, the bank at the time having knowledge of the facts, any balance remaining on deposit, when the bank is closed on account of insolvency, inures to the benefit of the beneficiaries of the trust and may be protected in the hands of the receiver as a deposit."

It is not necessary to impute the knowledge of Kronberg as president and manager of said bank to it. The bank had actual knowledge of this whole transaction. The books of the bank disclose the whole transaction. The bank paid out nothing to cancel this deposit and the deposit was not withdrawn but remained a deposit of said bank. In *State v. Farmers & Merchants Bank of Walton, supra,* the writer of the opinion drew the distinction between that case and the case at bar, when he stated: "Where the fund is withdrawn upon checks of the trustee, signed in his official character, the responsibility of the bank with regard thereto is ended." And again: "If he had attempted to apply the fund in payment of an overdraft at the bank or in any other way for the bank's benefit, the bank would be charged."

It is vigorously contended by the appellee that the act of marking the certificates of deposits as paid; that the act of placing an order for the payment of the checking account; and that the bookkeeping transactions incidental thereto, were the acts of Kronberg as executor. All of these things were done within the privacy and seclusion of the cage of the bank. When Kronberg, president and manager of the bank, falsified the records to indicate payment, the act was done by the bank and for the benefit of the bank. It was not done by Kronberg as executor, for as such he did not

have access to the books of the bank. When Kronberg, executor, delivered to Kronberg, banker, the certificates of deposit, then Kronberg as banker and not as executor canceled them with full knowledge of the trust character of the deposit, without the payment of any bank funds. Likewise he falsified the records of the bank to show a withdrawal of the checking account. Had the funds been actually withdrawn, it would have presented a different problem, but such was not the case. The things Kronberg did relative to this deposit, he did in the performance of banking functions.

Having reached the conclusion that there was no withdrawal of the funds of the estate from the bank by the executor and that the false entries on the books indicating a withdrawal were the acts of the bank made with a full knowledge of the trust character of the funds, we find that at the time the bank ceased to be a going concern and was placed in the hands of the state the executor of the estate of Ole P. Larsen had a deposit of $18,000 therein which is a valid claim against the guaranty fund of the state of Nebraska. The trial court should enter judgment according to the views herein expressed.

REVERSED.

WALTER R. KENT, APPELLANT, V. STATE OF NEBRASKA, APPELLEE.

FILED MAY 25, 1929. No. 26828.

1. **States:** CONSENT TO BE SUED. By consenting to be sued, the state simply waives its immunity, and gives a remedy to enforce a preexisting liability. It does not thereby concede its liability, nor create a cause of action not previously existing.
2. ———: LIABILITY FOR TORTS OF OFFICERS: AUTHORIZATION TO SUE. A resolution by one branch of the legislature, authorizing an individual to maintain action against the state to determine the amount and liability for damage alleged to have been sustained by reason of the negligence of the state's officers, does not, in the absence of a statute making the state liable therefor, render the state liable. *Shear v. State*, 117 Neb. 865.

APPEAL from the district court for Box Butte county: EARL L. MEYER, JUDGE. *Affirmed.*

S. L. O'Brien, Allen G. Fisher and *Charles A. Fisher,* for appellant.

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

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

BLACKLEDGE, District Judge.

In this case the plaintiff seeks to recover for a loss alleged to have been sustained by him in the consumption of a large part of his crop of corn grown and standing on his premises in Box Butte county by wild ducks and other game birds. He bases his right to maintain the suit upon the resolution adopted by the state senate April 8, 1927, which purports to authorize a suit by plaintiff against the state to determine the amount and liability for the damage claimed to have been sustained by plaintiff.

The case was determined in the district court upon demurrer to the plaintiff's petition, which demurrer was sustained and a judgment of dismissal entered. It is difficult to determine from an examination of the petition whether the plaintiff bases his claim for recovery fundamentally upon the theory that the state has a certain ownership in migratory game birds and having assumed control of them for the purposes of protection, propagation and conservation and committed such control to a department of the state and created a fund for that purpose, is liable for any depredations that may be committed by said wild game birds, as in alighting in flocks upon a field of grain and consuming a portion thereof for food; or whether he bases his right upon the theory that it was the duty of the game wardens, sheriffs and police officers in the enforcement of the regulations provided by law for the protection of such wild fowl to, as stated in his petition, "herd the game birds of defendant off and away from the crops of plaintiff." The petition alleges

that the defendant and its officers failed and refused to perform such duty and to feed and conserve the game birds on defendant's own lands, preserves and refuges, but intentionally permitted the birds to escape from defendant's premises and upon the cultivated lands of plaintiff and eat and depasture the lands and crops. It is apparent that, whether considered as a tort action strictly, the action sounds in tort; and it is to be noted that the resolution of the senate refers to a determination of damage sustained.

Considering either theory, however, we find it unnecessary to discuss propositions suggested in the briefs further than to say that the senate resolution does not purport to either recognize an existing liability or create one, but states that its purpose is to permit a determination of both "the amount and liability for such damage," and this case is ruled by the decision of this court in *Shear v. State,* 117 Neb. 865, wherein it is said:

"The legislature has not by law granted to any one the right to recover against the state damages for negligence of any of its officers, agents, or employees, and until such legislation is enacted, no recovery against the state can be had for such negligence. A resolution of one branch of the legislature, even if sufficient to permit suit, does not render the state liable for such negligence, and it therefore follows that the district court properly sustained the demurrer and dismissed plaintiff's action."

The judgment of the district court is therefore

AFFIRMED.

Note—See States (1) 25 R. C. L. 416; 4 R. C. L. Supp. 1588; 6 R. C. L. Supp. 1475; 7 R. C. L. Supp. 846—(2) 13 A. L. R. 1276; 42 A. L. R. 1477; 50 A. L. R. 1408.

HERBERT R. BRANNAN, APPELLEE, V. CHICAGO & NORTHWESTERN RAILWAY COMPANY, APPELLANT.

FILED MAY 25, 1929. No. 25699.

1. **Evidence** examined, and *held* not to establish any actionable negligence on the part of defendant.

2. **Former opinion**, reported in 223 N. W. 21, set aside.

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

Wymer Dressler, Robert J. Neely and *Hugo J. Lutz*, for appellant.

J. A. McGuire, Bartos, Bartos & Placek and *Grant G. Martin, contra.*

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

REDICK, District Judge.

Appeal by defendant from a judgment for plaintiff for $40,000 in an action for negligence. The case was presented at a prior term of this court and an opinion rendered January 16, 1929, affirming the judgment upon condition that a remittitur of $12,000 be filed within 20 days. A motion for rehearing was duly filed and allowed, the case reargued, and the same is now before us for final disposition.

Plaintiff entered the employ of the defendant in March, 1924, as a machinist, whose duty it was to repair engines, and continued in such employment until the day of his injuries, July 23, 1924, and for some time thereafter. The place of plaintiff's employment was the roundhouse of defendant at Chadron, Nebraska. The roundhouse was built in the usual form of a segment of a circle, partly surrounding a turntable by means of which engines were introduced into their respective stalls in the roundhouse. The turntable was of the usual construction and the roundhouse was provided with engine pits over which the engines were placed in order that convenient access might be had for the purpose of making repairs to the under portions thereof. These pits were about 60 feet in length and slightly less in width than the distance between the rails. Among these pits were two known as 24 and 25, which were intersected at right angles and connected by a drop pit about 3 feet deeper than the engine pit. At the point of intersection with the engine pit the drop pit was boarded over with

planks. The engine pit was provided with an outlet drain to the city sewer, such drain having a quarter-inch mesh iron screen at its inlet for the purpose of preventing rubbish from clogging the drain. The floor of the roundhouse was paved with wooden blocks which, and as is quite usual, exhibited some surface inequalities, by reason of which, at times, shallow pools of water existed thereon. Each stall was provided in front with folding doors and one with a drop door, all of which, in the summer time, remained open day and night. The engine pits were used, not only in the making of repairs to engines, but also for the purpose of cleaning and blowing out the boilers, the water from the boiler together with scale and mud from the engine tubes finding its way into the drop pit, from which the water was siphoned, and the debris cleaned out when necessary, generally about once a week. At times the screens over the drain inlets would become clogged and considerable quantities of water retained in the pits, which would then have to be siphoned out or the screens cleaned. In such event the drop pits and the debris therein would be wet, but the engine pits would remain reasonably dry and in fit condition for use.

The drop door at one end of the roundhouse did not fit closely to the sill and at times of rain some quantity of water would follow the sides of the rails and flow under the drop door, when closed, into the roundhouse, and find its way into pit 24.

The territory in front of the roundhouse and around the turntable was covered with cinders. There were some weeds permitted to grow at the ends and around the outside of the roundhouse, and about 300 feet to the rear there existed a swale in which, after rains, a shallow pond would be formed, with the usual wild vegetation surrounding it. In general, the territory surrounding the roundhouse was flat with numerous inequalities in which water would collect after a rain and evaporate.

The petition of the plaintiff is lengthy and much involved, and his claim will be best exhibited by an epitome thereof

contained in the brief of his counsel in the following language:

"Briefly stated, the plaintiff alleged that the defendant was negligent in permitting the grounds about its roundhouse to become wet and covered with pools of water, and weeds to grow therein and about its roundhouse; that its said premises next to said roundhouse and in the vicinity thereof for the distance of 150 yards and about 15 feet wide inclined and sloped toward the door of said roundhouse, which door was directly in front of the place where the accident happened; that the rainwater falling on the roof of said roundhouse was collected and discharged through eave gutters and eave troughs into a drainage pipe, which said drainage pipe was located immediately at said door and was maintained in a bad condition, in that it leaked rainwater and discharged the same on the premises immediately into said door and into said doorway and flowed into said drop pits 24 and 25; that said hanging door was so constructed that a space of something like two inches was left entirely open between the bottom thereof and the floor of said roundhouse and water was permitted to drain from said opening therein; that the floor of said roundhouse was so constructed that it sloped to the center of said roundhouse, causing said rainwater to flow into said roundhouse and into said drop pits 24 and 25; that the floor of said roundhouse was kept in an unsanitary condition in that large and deep holes in the same were permitted to exist in which large amounts of water accumulated and were permitted to remain in the immediate vicinity of said stalls 24 and 25; that debris, weeds, grass and rubbish were permitted to grow and remain on the premises which slopes toward said roundhouse, thus causing dirt, debris and weeds to become wet and damp from the waters permitted to flow on said premises, which made a place for snakes and vermin; that the defendant permitted said premises to remain in such condition, well knowing that the same was damp and wet, and by reason thereof attracted snakes and vermin; that defendant permitted the engine pits and drop pits to accumulate water,

mud and cinders, and permitted the drains therefrom to become clogged, so that for long periods of time said drop pits retained stagnant water both from the outside and the inside and thereby was made a fit place for snakes and vermin to infest and tenant; that the sewers were left uncovered and unprotected; that these conditions were all well known, or should have been known, to the defendant company, and by reason thereof said defendant failed and negligently disregarded its duty to furnish plaintiff a safe place to work and perform the duties required of him as a machinist; that, as a result of defendant's negligence, plaintiff, in the performance of his duties, was bitten by a snake and suffered the injuries complained of, which acts of negligence on the part of the defendant were the proximate causes of the injuries received by the plaintiff while in the performance of his duties."

Plaintiff claimed to have sustained injury by being bitten by a small snake 10 to 14 inches long which dropped into the gauntlet of his glove while he was in the engine pit about to make repairs to the engine; that the snake crawled into the palm of his hand and between the fingers and bit him on the upper side of the ring finger.

The answer of the defendant admitted that it was engaged in interstate commerce, that on July 23, 1924, plaintiff was employed as a machinist in the roundhouse which was used for storing, repairing and otherwise caring for locomotives of the defendant. Defendant, for want of sufficient information, denied that plaintiff was bitten by a snake, but alleged that, if so, "said bite was due to a hazard common to mankind, to wit, danger from wild or untamed creatures, and was a risk which plaintiff assumed wherever he might be and for which defendant is not liable." Defendant further alleged that the diseases of which plaintiff complained as consequent upon the snake-bite were a continuation of the same physical conditions which had previously existed, and not attributable to the snake-bite, if suffered. Defendant further alleged that it was deceived by the plaintiff's claim of snake-bite and his concealment of

his previous physical condition, and expended about $4,600 in the treatment of plaintiff, for which amount it prayed judgment by way of cross-petition. Plaintiff replied denying in general the allegations of new matter in the answer.

Plaintiff prayed for damages in the sum of $65,000, the jury allowed him $40,000, and by the former opinion of this court the judgment was reduced to $28,000. The appeal is by the defendant.

Reduced to its legal terms, the claim of the plaintiff is for negligence of the defendant in negligently failing to provide the plaintiff with a safe place to work, and the theory and basis for this claim is well exhibited by a hypothetical question propounded to the witness, Dr. D. D. Whitney, a professor of zoology in the state university, in the following language:

"Q. Now, Doctor, from what you have told us about the places that those water snakes like to infest, assume a place like this, a large roundhouse, which is situated in a low part of the country, this roundhouse having 27 or 28 large double doors which are open day and night, and that there are rails and tracks in and out of each one of those doors, and that in this roundhouse practically every hour of the day there are used large quantities of water so that the interior of this roundhouse is damp more or less all the time, and that in this roundhouse there are several large pits constructed of concrete which are of a length of 60 to 90 feet, about 8 feet wide, and 3½ feet deep, and that on some of these pits are constructed at right angles what are known as drop pits, which are 7 or 8 feet deep, and that in those drop pits there has been allowed to remain for sometimes a week at a time water, sometimes nearly to the top of this drop pit, and that the territory immediately outside of this roundhouse is so drained that rainwater from the outside drains into one of these drop pits that I have described, and that on the outside of this roundhouse there are permitted to grow large weeds within a few feet of the door of this roundhouse, and that about a block away from the roundhouse is a large marshy place about a block in area, and

that within 20 or 30 feet of the roundhouse after large rains there are sometimes pools of water 30 or 40 feet in area and several inches deep, and that this lagoon marsh is 300 or so feet from the roundhouse, and that about a half mile away is a creek, and that at various times there have been seen in this roundhouse and on the outside garter snakes and other kinds of snakes and that there have been seen there salamanders and frogs, and on one occasion a muskrat was even seen there, and that this condition existed about ten days after a large rain and hail storm: Have you an opinion as to whether that would be such a place as a water snake would be found?"

The question was objected to for no sufficient foundation and not a proper subject for expert testimony, which objection was overruled and the witness answered:

"A. Well, the presence of a snake would depend on the food supply a great deal. If food was available, also your water. Those water snakes, feed and water would determine a good deal the location of the snake. If there was plenty of water in sight and plenty of food, it would be a favorable place for the water snakes. Q. Assuming, as I said, that there had been innumerable frogs seen around there and salamanders? A. Yes, that would indicate the food supply. Q. And would a snake such as you have described be more likely to go to such a place than it would if this place was kept dry from weeds and water? A. He would be more likely to stay there if there were water there; it might be difficult to say whether he would go there or not."

Reduced to its simplest terms, the claim of the plaintiff is that the defendant was negligent in maintaining the above described conditions in and surrounding the roundhouse, which are said to constitute an invitation to the snake to enter the roundhouse and inhabit the place where plaintiff was required to work, thereby subjecting him to being bitten.

The evidence of plaintiff tends to establish the conditions above described, and in addition that "frogs, water puppies,

salamanders and lizards," especially after heavy rains, were seen in considerable numbers in and surrounding the roundhouse. Their presence was unaccounted for except that one witness gave it as his opinion they came down with the rain. Railroad corporations undoubtedly have great power and influence, but we have serious doubt that they extend to the production of animal life or its prevention. There is a vast amount of evidence of a similar character which we deem it unnecessary to notice. As to the presence of snakes, the plaintiff testified that in May, 1924, he saw a blue racer sliding out of the roundhouse, and on July 20, following, he and his helper killed a snake about 18 inches long in stall No. 12, and on July 23 the snake by which he claims to have been bitten, which he called a water moccasin, but which the evidence tends to show must have been an ordinary water snake or garter snake which inhabits that territory. These snakes are nonpoisonous and harmless except under provocation. He also testified that two or three times a week he would see a little garter snake dodge under the corner of the wash-house, an outbuilding outside the roundhouse. Another witness testified that during his employment at the roundhouse, covering 18 years, he had seen two or three or four snakes, one in the fall of 1924, but none in the last 4 or 5 years. There was other evidence of snakes having been seen in the vicinity, but none in the roundhouse about the time in question except the three mentioned by the plaintiff. At the close of all the evidence the defendant moved the trial court to instruct the jury to return a verdict for the defendant, which motion was overruled, such ruling presenting the principal assignment of error relied upon for reversal.

It is the contention of the defendant that the evidence is insufficient to support the verdict, for the reason that no actionable negligence of the defendant is shown which is the proximate cause of plaintiff's injuries. Of course, in the determination of this question it is well established that such facts favorable to the plaintiff as the evidence reasonably tends to prove are to be considered as established,

and that the plaintiff is entitled to credit for all inferences which the jury, as reasonable men, may properly draw from such facts. This, however, does not include facts or inferences clearly refuted by the evidence in the case, such as, for example, the claim of plaintiff that the roundhouse was located in a swamp, or that there was a rain of two inches on July 10. The evidence clearly fails to establish either of these propositions, and, with reference to the latter, the records of the weather bureau show that only .50 of an inch of rain fell from the 7th to the 13th, .05 on the 23d, a trace on the 28th, and .04 of an inch on the 30th of July. The evidence fails to establish any connection between the rains and conditions in the roundhouse at the time of the accident. We take judicial notice that late July is ordinarily a dry, hot season in this climate, and the amount of rainfall shown was entirely inadequate to produce a swampy condition, or appreciably increase damp conditions in the roundhouse.

It is conceded that under the federal employers' liability act by which we are governed, a railroad company is not liable for injury to its employees except for negligence proximately causing such injuries. It is not contended by plaintiff, and, if it were, such contention would be untenable, that the mere presence of a snake in the roundhouse, not proved to be due to any negligent act or omission of the defendant, would support an action by plaintiff. He therefore attempts to show such negligence by the existence of the conditions in and surrounding the roundhouse as above described; his argument being that because of such condition the snake was attracted to the roundhouse and invited there by defendant. This is the crucial point of plaintiff's case and must be established by evidence of facts which warrant the jury in drawing the inference suggested. It is not sufficient to show a mere possibility or probability that the snake in question was attracted by the conditions, but the evidence must be such as points to the suggested inference as the proper one logically to be drawn from the facts proved. As was held in *Patton v. Texas & P. R. Co.*, 179 U. S. 658: "It is not sufficient for the employee to show

that the employer may have been guilty of negligence. The evidence must point to the fact that he was. And where the testimony leaves the matter uncertain, * * * it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause, when there is not satisfactory foundation in the testimony for that conclusion." In that case a step on the engine was loose, but the evidence failed to disclose how it became loose, such condition being the negligence charged. In other words, the inference may not be based upon mere conjecture or guess, but requires some logical basis for its support.

It is a matter of common knowledge that snakes do enter houses under varying conditions. Doubtless the dominating factor in every case is a desire for food, and instinct may direct the snake in its search to a place more likely than others to bring results; but it would seem to be quite impossible to discover by what factors a snake was governed in selecting a particular place for his journey. What is there in all this evidence tending to authorize the inference that the snake was attracted to the roundhouse by reason of the fact that the drop pits were not cleaned out more than once a week, or by the presence of frogs, salamanders, and so forth, in the vicinity of the roundhouse, as against an inference that in his search for food he entered the roundhouse the same as any wild animal might have done? The evidence merely shows a *possibility* that the snake *might* have been attracted by those conditions. It does not show even a slight probability in that regard. Plaintiff's expert naturalist, Dr. Whitney, was unwilling to say that a snake would be so attracted. The farthest he would go was that it would remain where water and food were abundant. On the other hand, Naturalist Cook, called by defendant, said it was "most extremely unlikely" that a snake would be attracted by the conditions surrounding the roundhouse, and "highly improbable and almost certainly impossible" for a snake to gain entrance through the sewer. When circumstantial evidence is relied upon to prove a fact, the circum-

stances must be proved and not themselves presumed. *Chicago, M. & St. P. R. Co. v. Coogan,* 271 U. S. 472. The circumstances proved are the damp conditions at the roundhouse and that such conditions are attractive to snakes. The fact to be proved is that the snake in question was so attracted. On this the evidence is silent and the existence of the fact rests upon presumption and conjecture only.

It seems to us that the selection of one inference in preference to the other is a matter of pure conjecture. Suppose a man is found at an airport and the pivotal question to be determined is how he arrived there, whether by aeroplane, automobile or walking? Would evidence that the port was particularly adapted to landing aeroplanes, that more aeroplanes than other type of vehicle landed there; that the roads for automobiles were inconvenient or in bad condition, or that the port was at so great a distance from any other point that it was burdensome and very unusual for any one to walk there, tend in any manner to establish the precise mode of the man's arrival? Would the facts set forth warrant the inference that he came in one of the particular modes rather than the other? The probabilities might favor the aeroplane, but an allegation that he traveled by that means would remain unproved.

It clearly appears that the conditions present in the roundhouse, so far as the existence of water in the drop pits and on the pavement is concerned, were the natural consequences of the transaction of the railroad business therein, except as they may have been temporarily aggravated in some degree by occasional rains. The process of washing out engines necessarily caused water to flow in the pits, and other activities, at times, accounted for water on the floor, which might remain for a time due to small inequalities. In so far as such conditions may have operated to attract a snake is concerned, it would appear to carry the doctrine of master and servant to an absurd degree to hold the master responsible for consequences of the ordinary and proper conduct of his lawful business. We think that no one would contend that a butcher would be responsible in

damages if a stray dog, attracted by the meat hanging on hooks in the butcher shop, should enter and bite a customer upon the leg, because of the failure of the butcher to keep the door of his shop closed or screened in the summer-time. Nor would the proprietor of a flower store be liable in damages to a customer who was stung by a bee which entered his shop attracted by the floral display. Would a host be liable to his guest, sitting on the lawn, where a stray dog, attracted by a female dog of the host, entered the yard and bit the guest, because there was no fence or the gate had been left open? In all these instances the proposed defendant owed a duty to exercise ordinary care to protect the invitee from injury while on the premises. If the existence of water and debris in the pits and upon the floor at times is the ordinary result of the proper conduct of the business of the roundhouse, as appears from the evidence, and plaintiff's theory is correct that such conditions attracted the snake, we think it must be conceded that such conditions would not convict the railroad company of actionable negligence. The risk of injury in such case would be an ordinary one arising out of the nature of the servant's employment and assumed by him.

The evidence shows that 144 engines were washed out over the pits in July, six of them on the 23d. How can it be logically claimed that, because at some particular time there was more water and debris than at others, the snake was attracted by the excess and an inference of negligence permitted? At what point is the line to be drawn by the jury, or by what standard may the question be determined between liability and nonliability? May the jury say that the railroad company is not liable for a few gallons of water and a wagon load of debris, but is responsible when the water and the debris exceed those amounts? It seems to us the question carries its own answer. In a case where the negligence charged was the failure to provide more than one guard against strikers, it was held "that the jury should not have been allowed to conjecture what might have happened if an additional guard had been present." *St. Louis & S. F. R. Co. v. Mills*, 271 U. S. 344. So here the jury should not

be permitted to guess that the snake would not have been attracted if the pits had been oftener cleaned and the water prevented from standing on the floor. It is not claimed that defendant knew of the presence of the snake which plaintiff claims bit him, but that it ought to have known of the possibility of it being there and prevented it; but, as was said in *Chicago & E. R. Co. v. Dinius,* 170 Ind. 222, 231, one is not negligent in failing to take precautions against an event that "is only remotely and slightly probable." "A wrongdoer cannot be held responsible for a consequence which is merely possible according to occasional experience, but only for a result or consequence which is probable according to the ordinary and usual experience of mankind"—citing cases.

The claim of the plaintiff that the roundhouse was infested by snakes finds no support in the evidence to warrant such a characterization. The snakes must have been so numerous as to have become annoying or dangerous. The evidence as to the number of snakes in the roundhouse will not fit the definition of that word. Only one witness besides plaintiff ever saw a snake in the roundhouse and that four or five years before the trial.

The plaintiff, doubtless, recognizing the remarkable character of his claim against the defendant, sought by the allegations of his petition to suggest the manner in which the entrance of snakes to the roundhouse might have been prevented by alleging the defendant disregarded its duty "in not furnishing and erecting proper screens, gates or other barriers covering said roundhouse, sewers and pits, so as to keep out all reptiles and snakes, which it was the duty of the said defendant to furnish and maintain." Of course, the plaintiff would not have suffered his injury if the roundhouse or the pits had been surrounded by a snake-tight screen or barrier, for in such case it could not have been used and plaintiff would not have been employed therein. This is absurd. It is further suggested that the screens at the outlet of the engine pits were sometimes left off and that, when they became clogged, holes would be punched in

them half an inch in diameter for the purpose of clearing them; and it is suggested that the snake which bit the plaintiff might have entered the roundhouse by way of the sewer which had its final outlet in a river a mile and a quarter distant. This might furnish a slightly probable explanation of the presence of the snake, but the probability and even the possibility of such is clearly negatived by the evidence as to the character of the contents of the sewer, being dirty and extremely hot water from washed-out engines with a covering of oil and impregnated with soda ash and other chemicals used in the washing process; and in addition he would have to pass through a series of septic tanks maintained by the city of Chadron. It would seem to the ordinary mind not to be reasonably possible to absolutely prevent the entrance of a snake into a building, the ordinary uses of which required the doors to be kept open 24 hours a day. So far as preventing the entrance of the snake is concerned, the evidence suggests no reasonable method. When there is no evidence that it was feasible or practicable by the exercise of ordinary care to prevent the injury, there is no liability. *Conklin v. Central N. Y. T. & T. Co.*, 130 App. Div. (N. Y.) 308. For aught that appears in the evidence, we are compelled to the conclusion that the snake got into the roundhouse in some manner unexplained and unexplainable.

Upon a careful reconsideration of all the evidence, we have reached the conclusion that actionable negligence of the defendant has not been established. It will, therefore, be unnecessary to consider other matters presented by the record. We are further of the opinion that a retrial of the case would be of no benefit to the plaintiff. It follows that the former opinion in this case is set aside, judgment of the district court is reversed, and case dismissed.

REVERSED AND DISMISSED.

EBERLY, J., dissents.

LEONA GROSH V. STATE OF NEBRASKA.

FILED MAY 29, 1929. No. 26877.

1. **Intoxicating Liquors: UNLAWFUL POSSESSION: PRESUMPTION.** The finding of intoxicating liquor on defendant's premises creates the presumption of unlawful possession.
2. **Criminal Law: QUESTION FOR JURY.** "Under our practice in a criminal case tried to a jury, no matter how strong the proof of an affirmative fact presented by the state, and notwithstanding there may be no contradiction thereof, still it is for the jury to say whether or not the fact is established." *Osborne v. State*, 115 Neb. 65.
3. ———: **REQUEST FOR INSTRUCTION.** "If either party desires an instruction which would serve only to guide the jury in weighing certain features of the evidence in connection with the issues, he must request such specific instruction. The proper time to make the request is when the evidence is concluded, and the proper manner of making it is by submitting in writing the instruction desired." *Osborne v. State*, 115 Neb. 65.

ERROR to the district court for Lincoln county: J. LEONARD TEWELL, JUDGE. *Affirmed.*

James T. Keefe, for plaintiff in error.

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

Heard before ROSE, DEAN, GOOD, EBERLY and DAY, JJ., and RAPER and REDICK, District Judges.

DEAN, J.

Mrs. Leona Cady, defendant, was informed against and charged in Lincoln county with having had in her possession in North Platte, June 14, 1928, "certain intoxicating liquor, to wit, 319 pints of beer and 101 quarts of beer commonly called home-brew." The complaint also charged that defendant had previously been prosecuted and found guilty in the same county of a like delinquency, namely, the unlawful possession of a quantity of intoxicating liquor, and that in the former action she was subjected to the payment of a fine of $100. Upon trial to a jury in the present case a verdict of guilty was returned and defendant was thereupon

sentenced to imprisonment for 30 days in the county jail. Twice defendant's counsel moved for a directed verdict herein, but both motions were overruled. Defendant appealed.

Very recently before the present action was begun the defendant and George Grosh were married. But the defendant was complained against as Mrs. Leona Cady, that being her name by a former marriage. During the five years preceding this prosecution, the defendant lived with a 14-year old daughter in the North Platte apartment where the liquor was found by the officers. The defendant was then a seamstress. After she married Grosh the family residence was maintained in the same apartment. Grosh was not engaged in any business enterprise in North Platte. In Kearney he had a combined pool-room and cigar store. From defendant's evidence it appears that, at the time the search was made and the liquor was found, her husband was in Kearney, where he had been very recently called because of the illness of a relative. The defendant admitted that she owned the household goods in her home and also the refrigerator which contained some of the beer which was seized by the sheriff, but testified that her husband was the owner of the beer in question here. The defendant's husband testified that the beer was his and was used by him on the premises as a beverage, but he denied that he had made it.

Sheriff Salisbury was accompanied by the North Platte chief of police, Smith, and a federal agent when the defendant's apartment was searched. The sheriff testified that upon arrival there he addressed the defendant as Mrs. Cady and told her the object of their call, and that she made no objection to her premises being searched. Pursuant to the demand of the writ, the sheriff searched the premises and found 319 pints and 101 quarts of beer in the defendant's apartment. Some of the liquor was in a bathtub, some was in a washbowl, some was in a bedroom, some in a refrigerator, and some was in cardboard containers. The sheriff testified that he was acquainted with what is commonly

called home-brew, though sometimes called "hooch," and that the beer found on the defendant's premises was intoxicating. The sheriff testified that the defendant did not inform him that she was married to Grosh, nor did she say to him that the liquor belonged to her husband. The sheriff informed the defendant that she would be notified when to appear in court for unlawful possession of liquor. The sheriff's material evidence was corroborated by the chief of police.

It has been held that the finding of liquor on defendant's premises creates the presumption of unlawful possession. 33 C. J. 744, sec. 479; *Cura v. State,* 110 Neb. 476; *Shaffer v. State,* 111 Neb. 357. "Marriage does not deprive the wife of the legal capacity to commit a crime; and coverture is no defense where a married woman is shown to have willingly participated in the commission of a crime. The wife may be indicted and convicted alone." 30 C. J. 790, sec. 419. "Under our practice in a criminal case tried to a jury, no matter how strong the proof of an affirmative fact presented by the state, and notwithstanding there may be no contradiction thereof, still it is for the jury to say whether or not the fact is established." *Osborne v. State,* 115 Neb. 65.

The court of its own motion submitted eight instructions to the jury, to which no exceptions were taken at the time they were offered, nor at any time thereafter until the motion for new trial was filed. But the instrument in the record purporting to be a motion for a new trial fails to come within the rules of practice. The instrument follows:

"Comes now the defendant and moves the court for a new trial in this case for the following reasons affecting materially her substantial rights: 1. That the verdict is not sustained by sufficient evidence. 2. That the verdict is contrary to law. 3. Error of law occurring in the trial. 4. The court erred in giving the following instructions: Instruction No. 1 which was duly excepted to by defendant. Instruction No. 5 which was duly excepted to by defendant. Instruction No. 6 which was duly excepted to by defendant. Instruction No. 7 which was duly excepted to by defendant."

There was nothing presented to the trial court to show that the verdict is not sustained by sufficient evidence, nor that it was contrary to law, nor that error of law occurred at the trial, nor that the court erred in giving the instructions submitted to which defendant excepted. In *Osborne v. State*, 115 Neb. 65, we held: "If either party desires an instruction which would serve only to guide the jury in weighing certain features of the evidence in connection with the issues, he must request such specific instruction. The proper time to make the request is when the evidence is concluded, and the proper manner of making it is by submitting in writing the instruction desired."

Upon examination of the instructions given by the court, we conclude that, when considered in their entirety, they were not prejudicial to any of the lawful rights of the defendant. We further conclude that the great weight of the evidence amply supports the verdict in every essential particular. The record does not disclose reversible error. The judgment is therefore

AFFIRMED.

JOHN STUTZMAN, APPELLANT, V. FRED A. BATES ET AL., APPELLEES.

FILED MAY 29, 1929. No. 26399.

Evidence examined, and *held* to support the findings of fact of the referee on conflicting evidence confirmed by the district court after hearing on exceptions thereto, and the judgment by it entered thereon.

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

H. M. Sullivan and *Squires & Johnson*, for appellant.

N. T. Gadd, contra.

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

EBERLY, J.

Action by the plaintiff, Stutzman, against defendant, Bates, for an accounting in a ranch adventure carried on by the parties for a period of approximately three years.

The district court appointed a referee, who after an extended hearing of the parties submitted his report and findings with recommendation of a judgment for the defendant upon his counterclaim. Plaintiff filed exceptions thereto, which after hearing were overruled by the district court and the report and findings of the referee approved and judgment rendered as recommended in favor of defendant and against the plaintiff. The motion for a new trial was thereupon filed and overruled, and plaintiff prosecutes an appeal to this court.

The only definite assignment of error contained in the brief is that the district court erred in approving the report of the referee wherein said referee charged all of the grain and feed for the first year of operation to the plaintiff, John Stutzman. Other alleged errors are, however, commented upon in the argument which appears in plaintiff's brief. However, all questions presented by the plaintiff upon analysis plainly appear to be mere questions of fact. The bill of exceptions discloses that all of these questions, as determined by the referee, were adjudged by him on fairly conflicting evidence and present a case wherein the referee's determination is plainly binding on this court. As to none of the items relied upon by the appellant as being erroneous is there sufficient support in the bill of exceptions to overcome the presumption of correctness that surrounds this determination of the referee. Indeed, the parties largely testified before him in person. He heard the story of the witnesses and their conduct and demeanor on the witness-stand was necessarily before him during the trial of the case. In short, upon retrial *de novo* of the issues of fact and of law involved and contained in the findings of fact as made by the referee in this case and confirmed by the district court after hearing on exceptions thereto upon the evidence and preserved in the bill of exceptions without reference to the

conclusion reached in the district court, we have determined that the evidence sustains the findings and judgment in the trial court.

It follows, therefore, that the judgment of the trial court is right, and it is

AFFIRMED.

NINE MILE IRRIGATION DISTRICT, APPELLEE, V. STATE OF NEBRASKA, APPELLANT.

FILED MAY 29, 1929. No. 26775.

1. **Nature of Action.** In 1920 the state of Nebraska and Scotts Bluff county built a "state aid" bridge over the North Platte river on a county highway near Minatare. The construction of the bridge proper for the purposes of the highway changed the current of the river so that water no longer ran into the headgate of the Nine Mile Irrigation District canal. This action is not based upon the negligence of the officers, agents, and employees of the state, but upon the wrongful act of the state, in that it damaged the property of the irrigation district, without just compensation, contrary to the provisions of section 21, art. I of the Constitution.
2. **Eminent Domain:** CONSTRUCTION OF BRIDGE: LIABILITY. A bridge constructed under the provisions of sections 8356-8363, Comp. St. 1922, is a joint enterprise of the state and county, and both the state and county are jointly and severally liable for damage to property caused by the construction of such a bridge.
3. ———: LIABILITY OF STATE. The owner of property is protected against the appropriation and damage of it for public use without just compensation by section 21, art. I of the Constitution. This protects property rights from the invasion by the state as well as the subdivisions of the state and corporations.
4. ———: RIGHT TO APPROPRIATE WATER. The right of an irrigation district to appropriate water, acquired in 1893, prior to the time the waters in the streams of the state, not already appropriated, were declared to be the property of the public, is property, as well as the canal and ditches of said district.
5. ———: DIVERSION OF WATER. By the acquisition of a right of way for a highway by condemnation proceedings and the award of damages, neither the county nor the state acquires the right

to divert the water of a natural stream to the damage of the property of an irrigation district.

6. ———: CONSTRUCTION OF BRIDGE: LIABILITY. Where the state constructs a bridge jointly with a county under the provisions of sections 8356-8363, Comp. St. 1922, which provides, among other things, that the state shall furnish the plans and supervise the construction, it is jointly liable with the county for the damage resulting from said construction, under section 1103, Comp. St. 1922, as a matter of justice and right.

7. ———: DIVERSION OF WATER: LIABILITY. What is just and right in this case is determinable from the application of section 21, art. I of the Constitution, providing that "the property of no person shall be taken or damaged for public use without just compensation therefor," to the facts in this case.

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

C. A. Sorensen, Attorney General, and *George W. Ayres,* for appellant.

Morrow & Morrow, contra.

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

DAY, J.

The Nine Mile Irrigation District brought this action to recover damages from the state of Nebraska, sustained by the construction of a bridge across the North Platte river on a county highway in Scotts Bluff county. From a verdict and judgment in favor of the district, the state appeals.

The claim for damages is based upon the proposition that the bridge which was constructed under the provisions of the act providing for state aid (sections 8356-8363, Comp. St. 1922) was so constructed as to divert from its course water in the North Platte river in such a manner that the district was unable to get water into the headgate of its canal, except at great additional expense. The canal was constructed and secured its appropriation of water from the river in 1893. This county road was established on the line in 1900, and in 1901 the first bridge was built

over the river at this point. The bridge is located about one and one-fourth miles above the headgate of the canal. About one-quarter of a mile above the bridge the river divides into a north channel and a south or main channel, with numerous islands dividing the two channels from that point down the river to a point some distance beyond the headgate of the canal. The headgate of the canal takes its water from the north channel of the river. The bridge was constructed over the south channel with fills from both ends, the longest fill being at the north end and entirely obstructing and damming the north channel of the river. In addition to obstructing all flow of water in the north channel, it was constructed in such a way that the heavy current in the south channel was deflected and turned southward at the bridge. About 500 feet below the bridge there was a shallow channel between islands, where water formerly flowed freely into the north channel from the south, but the deflection of the heavy current for the protection of the north fill made it necessary for water to run herein away from the current. It did this in times of high water, but due to lack of current deposited silt, and when the water in the river receded water did not run through, and the north channel was without water from which the irrigation district could get water through its headgate. For seven years the district tried to get water into the north branch by digging this channel deeper at a great and almost prohibitive expense. By also constructing a levee out into the current of the south or main branch they were able to get some, though not sufficient, water into the north channel and thence to their canal. But when the water of the river was high again it washed away the levee and filled the channel with silt and each year it became necessary to repeat the operation. Finally they induced the state engineer to open the fill and permit the water to again run through the north channel of the river. But, as a condition precedent, he required the district to construct a floodgate at the point above the bridge where the river separates to protect the fill in times of flood. It then became

necessary to clean out the old north channel above the fill, which had filled with silt and grown up with brush and other vegetation. The district asks that the state be required to reimburse it for the expense incurred in the construction of the floodgate; for the expense in restoring the old north channel of the river, and for the annual expense incurred from 1921 to 1927, inclusive, in an effort to get water through the channel down stream from the bridge.

This action was brought against the state of Nebraska by authority of a resolution adopted by the house of representatives on February 17, 1927. The resolution contains a recital of the alleged claim against the state and concludes: "Therefore, be it resolved that the said Nine Mile Irrigation District be authorized to sue the state of Nebraska in the district court of Scotts Bluff county for the purpose of ascertaining, determining and obtaining an adjudication of its claim and the liability of the state of Nebraska for the payment thereof." The state contends that this resolution passed by the house of representatives merely waives its immunity from suit. In a recent case we held: "Where the legislature has not by law provided for the recovery by an individual or corporation against the state for damages caused by the negligence of an officer, agent, or employee of the state, there can be no recovery for such negligence until the legislature expressly by law makes the state liable therefor." *Shear v. State,* 117 Neb. 865.

In the able discussion of this question, in that case, it is clearly stated that, where one branch of the legislature by a resolution grants permission to sue the state, the state merely waives its immunity from suit, but such a resolution does not create a new or extend an existing liability. This case was one to recover for the negligence of the officers and agents of the state, while this action is not maintained to recover damages for negligence of any officer, agent, or employee of the state, but rather to recover damages resulting from the wrongful act of the state itself in the construction of said bridge. *Myers v. City of St. Louis,* 82 Mo. 367.

We are not unmindful of the fact that this court has permitted recovery from railroad companies and from counties of damages caused from the obstruction of the flow of water by an embankment, on the theory that construction which interfered with the flow of the water was negligent construction. *Murphy v. Chicago, B. & Q. R. Co.*, 101 Neb. 73; *Chicago, B. & Q. R. Co. v. Emmert*, 53 Neb. 237, and many other cases.

This is a situation where the state and county, by the exercise of eminent domain, without a determination of payment of consequent damages, have obstructed the channel of the Platte river, turning the water away from the headgate of the appellee's canal. If the public welfare, convenience, and necessity required such a change in the course of the stream, it could and should have been accomplished by a proper and legal method. The right to damages in this case flows as a direct consequence of the injury to plaintiff's property for the public use. If private property is to be appropriated to public use, steps must be taken in the manner prescribed by law to appraise the damages and provide for their payment. *Propst v. Cass County*, 51 Neb. 736. This rule has been held to apply to counties and municipalities so often as to be no longer questioned. Neither can the state under its sovereign power take or damage property for public use, without just compensation. It is bound by the same constitutional restriction, and when it does it creates by implication, at least, the obligation to recompense the owners of the property taken or damaged. *Stehr v. Mason City & Ft. D. R. Co.*, 77 Neb. 641. The state had no right to obstruct the flow of the water in the north channel. This method of construction was deliberately planned and stubbornly executed, notwithstanding the protests of the irrigation district. Even now the state insists that, since this bridge is suitable for highway purposes, the state had a right to build it.

Since our Constitution expressly forbids the taking or damaging of private property for a public use, except upon just compensation, the state itself is thus prohibited from

damaging property for public use without compensation. There is, we think, a clear and definite distinction between an action brought and heretofore sustained by our court for negligence in construction and an action brought to recover for damages resulting from the unlawful taking or injuring of property without compensation. The fact that the state is not liable for the negligence of its officers, agents, and employees does not excuse it from liability, where it in the exercise of business functions, as in this case, for the public good damages property without just compensation. Legislative enactment is not necessary to give effect to this section of the Constitution. *Douglas County v. Taylor*, 50 Neb. 535; *Hopper v. Douglas County*, 75 Neb. 329. The owner of property is protected against the appropriation and damage of it for public use, without just compensation, by section 21, art. I, of the Constitution. This protects property rights from invasion by the state as well as the subdivisions of the state and corporations.

This bridge was constructed in 1920 by the state in conjunction with the county of Scotts Bluff, under the authority given by the legislature for the joint construction of such a bridge by the state and a county. The state engineer shall furnish the plans and specifications for such a bridge, and the construction shall be under the joint supervision of the department of public works and the county board. Comp. St. 1922, sec. 8361. The state and county share the cost of said construction. Comp. St. 1922, sec. 8357. All bridges constructed under the provisions of sections 8356-8363, Comp. St. 1922, and commonly known as state aid bridges, are constructed jointly by the county and the state. If the property of the appellee was damaged as a result of the construction of this bridge, the damage resulted from the joint enterprise of the county and the state, and they are each jointly and severally liable for the damage, provided that under the law the state has any liability for such damage. There is no conflict in the evidence but that the bridge was properly constructed for its purpose as a highway. The central proposition in this case is whether the state is liable

for damages resulting from the construction of such a bridge.

The Constitution of this state provides: "The property of no person shall be taken or damaged for public use without just compensation therefor." Const., art. I, sec 21. Is the right to the appropriation of water from the North Platte river property, so that it comes under the constitutional prohibition? In *Southern Nebraska Power Co. v. Taylor,* 109 Neb. 683, this court held: "Where a riparian owner has appropriated water from a stream for power purposes prior to the time the legislature declared the waters in the streams of the state to be the property of the public, the water-right so acquired by such riparian owner is by virtue of the common law." In such case the right to appropriate water is a vested property right. The district appropriated the waters of the North Platte in 1893, or two years before the legislature declared the waters in the stream of the state, not already appropriated, to be the property of the public. The district having appropriated the water under the common law, prior to the legislative dedication to the public, has acquired a vested property right in the use of the water, and such property right cannot be taken away or interfered with, without just compensation, the same being, entitled to protection under the Constitution. *McCook Irrigation & Water Power Co. v. Crews,* 70 Neb. 115.

Again, the canal and the ditches of the district are property, and while it is urged that the state did not injure the tangible property (referring to the canal headgate and ditches), certainly the diversion of the water in the river by the construction of this bridge, to the extent that it was impossible to get water into this canal, damaged the property of the district. An irrigation canal, without water, from a utilitarian view, would be as useless as a "painted ship upon a painted ocean."

But the state urges that this highway, being on a section line, was a potential highway prior to the appropriation of the water from the river. The appropriation of water was

made in 1893, and the highway was opened in 1900. The question is controlled by the decision of this court in *State v. Western Irrigation District Ditch Co.*, 116 Neb. 736, wherein it was said: "Section 2607, Comp. St. 1922, declaring section lines to be public roads and allowing the county authorities to open them to public travel whenever the public good requires it, but upon appraisal and allowance of damages * * * did not of itself create a lawful public highway along such lines, and that, before it can have such effect, the proper authorities must provide for the payment of damages for the right of way. *Van Wanning v. Deeter*, 78 Neb. 282, affirmed on rehearing, 78 Neb. 284."

But the state contends that since the right of way for the highway in question was secured by condemnation proceeding in 1900, all damages resulting from the proper construction of a highway and a bridge were included in the damages allowed in such proceedings. When the highway was opened and the land condemned by right of eminent domain, for the right of way, the only thing compensated for was the taking of the land. No land or property was taken for said highway from the Irrigation District and no compensation was made to it by reason of opening said highway. From 1901, when the first bridge was constructed, which permitted the usual flow of water in the north channel, no damage was suffered by the district until 1919. It was not until then that the state engineer conceived the plan of the present bridge, which provided for a fill or embankment on the north end of the bridge, extending over 900 feet and completely stopping the flow of the water through the north channel of the river In order to protect this embankment the plan further included a fill built at right angles to it near the bridge to divert the heavy current from the north side to the south side of the river This also tended to prevent the water flowing through the shallow channel below the bridge, in the north channel of the river, except in times of high water The property of the district was not damaged by the opening of the road, but was damaged by the con-

struction of this bridge. This damage was not contemplated by anyone, nor was it included in the damages awarded in the condemnation proceeding. The fallacy of this argument becomes apparent when we follow it to a logical conclusion. In the case of *Hofeldt v. Elkhorn Valley Drainage District*, 115 Neb. 539, an action to recover damages for diverting the water of the Platte river so that it overflowed the land of the plaintiff, there was no claim of improper or negligent construction for the purpose of which the dyke was used. The drainage district had secured their right of way either by purchase or condemnation. They had paid for land taken, but this did not relieve them from liability for damages to land not taken. So, also, in the case of *Roe v. Howard County*, 75 Neb. 448, and *Costello v. Colfax County*, 112 Neb. 40. By the acquisition of a right of way for a highway by condemnation proceedings and the award of damages, neither the county nor the state acquired the right to divert the water of a natural stream to the damage of property of the irrigation district. If the rule were as contended by the state, there would be no damage for accumulated waters flooding the land of one who had been compensated for the right of way. Suppose, that, instead of a natural channel of the river running to the headgate of the district's canal, the district had taken their water from a point above the road prior to the opening thereof. Surely it would not be seriously urged that the state in the proper construction of a road, could fill in the ditch where the road crossed it. The district could not have been compelled to build a bridge over the ditch for said road. In *State v. Western Irrigation District Ditch Co.*, 116 Neb. 736, this court held:

"Where an irrigation ditch or canal was established in 1897 across a section line and no public road was actually ordered or established on said line until May 15, 1925, there is no authority given the county, by virtue of the common law or by statute, and particularly by section 2734, Comp. St. 1922, to compel the owners of said ditch or canal to erect and maintain a bridge over said ditch or canal where it crosses said section line."

Yet in this case the state compelled the district by necessity to contribute to the construction of a highway bridge over a natural stream. After seven years spent in a desperate but fruitless effort, at great expense annually, to induce the water to run into the north channel below the bridge, it was demonstrated that the water would not run that way. The state engineer then agreed to make a 30-foot opening in the highway embankment to permit the water to again run through the north channel, but upon condition that the district construct a floodgate at the place where the north channel of the river separates from the south channel. The purpose of the floodgate was to protect the fill the state had put in there. It served no useful purpose in the operation of the irrigation canal. It was in fact a part of the cost of the construction of this bridge, if the bridge was to be constructed with a legal consideration for the rights of others. The cost of the floodgate, the building of which was required by the state engineer as a condition precedent to the state putting in a bridge allowing water to again flow through the north channel, is a proper item to be considered in allowing damages in this case.

We now come to the dominant and determining factor in this case, which may be stated as follows: In such a case as heretofore described, is the state liable for damages resulting from the construction of what is known as a "state aid bridge," under the provisions of sections 8356-8363, Comp. St. 1922? Our Constitution provides: "The property of no person shall be taken or damaged for public use without just compensation therefor." The property of the district was damaged by the act of the state. The state by statute took over full control of the construction of this bridge. This bridge was built under the supervision of the state engineer, and built as planned by him. It was built this way, over the protest of the officers of the district, because the engineer in charge of the work insisted, and still insists, that a normal amount of water could run through the north channel entering it below the bridge. When a branch of the legislature grants one permission to sue the

state, "the court in which such action may be brought 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." Comp. St. 1922, sec. 1103. Where the state constructs a bridge jointly with a county under the provisions of sections 8356-8363, Comp. St. 1922, which provides, among other things, that the state shall furnish the plans and supervise the construction, it is jointly liable with the county for the damage resulting from said construction, under section 1103, Comp. St. 1922, as a matter of justice and right. What is just and right in this case is determinable from the application to the facts of this case of section 21, art. I, of the Constitution, providing that—"The property of no person shall be taken or damaged for public use without just compensation therefor." *City of Chadron v. State*, 115 Neb. 650. Justice and right demand that the state should compensate for damages to the property of the irrigation district where it was damaged for public use. In *City of Chadron v. State*, 115 Neb. 650, 657, in discussing the liability of the state for interest on the claim for damages as not expressly provided for by statute, the court said: "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 sovereignity 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."

Applying that rule to this case, right and justice require that the state should pay the cost of the flood control gate built solely for the protection of this bridge; that it should pay for the annual expense from 1921 to 1927, inclusive, of an unsuccessful attempt to provide themselves with sufficient of the water appropriated by them for irrigation purposes; that this case should in all respects be affirmed.

AFFIRMED.

GOOD, J., dissents.

Note—See Eminent Domain, 20 C. J. 645 n. 91, 660 n. 73, 756 n. 2, 1164 n. 28, 1188 n. 30, 1227 n. 38; 10 R. C. L. 165; 4 R. C. L. Supp. 656; 5 R. C.L. Supp. 546; 6 R. C. L. Supp. 602.

HARRIET M. LEWIS, APPELLEE, V. DONALD BECKARD, APPELLEE: JENNINGS HAGGERTY, APPELLANT.

FILED MAY 29, 1929. No. 26616.

1. **Appeal:** MISCONDUCT OF COUNSEL. Misconduct of counsel in a personal injury action in claiming that defendant was protected by insurance, when the evidence failed to show that he was so protected, and after being admonished by the trial court to eliminate the subject of insurance from the argument, *held* error requiring a reversal of the case.
2. ———: ———: OBJECTIONS. Where objection is made to improper argument of counsel and the court sustains the objection and admonishes counsel not to refer again to the objectionable subject, it is not necessary to make repeated objections on the same point in the further argument of the case in order to review such conduct.
3. **Jury:** QUALIFICATION. The fact that the wife of a juryman is suffering from injuries similar to those for which the plaintiff is seeking relief does not disqualify him as a juryman, provided it appears from the whole record that he will be or has been a fair and impartial juryman.
4. **Appeal:** REVIEW. A verdict in favor of one of two joint tortfeasors sued together is not the subject of review by the other defendant, where neither in his pleadings asks for any relief against the other.

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

Rosewater, Mecham & Burton and *Frederick J. Patz*, for appellant.

L. R. Doyle, for appellee Lewis.

Wilmer B. Comstock and *John H. Comstock*, for appellee Beckard.

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

LIGHTNER, District Judge.

Suit by Harriet M. Lewis against Donald Beckard and Jennings Haggerty, for injuries sustained in an automobile accident on October 20, 1927, at the intersection of D and Twenty-sixth streets in Lincoln. The defendant Haggerty filed a counterclaim against the plaintiff. The jury found for the plaintiff against the defendant Haggerty in the sum of $5,000. The jury found in favor of the defendant Beckard. The court directed a finding against defendant Haggerty on his counterclaim. Judgment was entered on the verdicts and motions and supplemental motions of Haggerty for a new trial overruled. Plaintiff has not appealed from the verdict and judgment against her in favor of the defendant Beckard.

The main reliance of defendant Haggerty for a reversal is alleged misconduct of plaintiff's counsel in continually claiming before the jury that the defendant Haggerty was protected by indemnity insurance. He also alleges misconduct of a juryman, and claims that he is entitled to a new trial on account of newly discovered evidence. The answer of plaintiff is a denial of the alleged misconduct, and that the verdict rendered was the only one possible under the law and the evidence. Other misconduct is complained of, but inasmuch as it is not likely to occur at a subsequent trial of the case it will not be discussed in this opinion.

The accident in question happened at about 4:45 on the afternoon of October 20, 1927, at the intersection of D and Twenty-sixth streets in Lincoln. D street runs east and

west and Twenty-sixth runs north and south. Mrs. Lewis, driving a Buick coach, was approaching the intersection from the east. The defendant Haggerty was approaching the same intersection from the west, and the defendant Beckard was approaching it from the south. The view of defendant Haggerty to the south as he approached the intersection was obstructed by an embankment and he was therefore unable to see Beckard until he was almost into the intersection. Twenty-sixth street inclines downward from the south toward the intersection and Beckard was therefore traveling downhill. The evidence of the witnesses varies considerably as to the speed at which defendant Haggerty and defendant Beckard were approaching the intersection. Some placed the speed as low as 10 or 12 miles an hour and others fixed it as high as 30 or 35 miles an hour. It seems quite clear from the evidence, however, that neither of the defendants had his car under such control as good judgment and the law would require in entering upon an intersection, dangerous on account of the view being obstructed. It seems to be uncontroverted that Mr. Beckard was unable to stop his car by the application of his brakes at a distance of 30 to 35 feet from the accident, and it seems also that Mr. Haggerty either did not have his car under control or failed to exercise proper care when he saw that an accident was imminent, since he applied the gas and turned to the left and toward Mrs. Lewis' car. Beckard's car struck the Haggerty car on the right side of the same, near the rear wheels, and threw it against Mrs. Lewis' car and she received the injuries for which this suit is brought. By no stretch of the imagination can any fault be ascribed to Mrs. Lewis. Although she had the right of way over the Beckard car, she did not assert it, but when she saw the two cars approaching she drew up to the curb on the north side and stopped a distance back from the intersection, which some of the witnesses say was 5 feet and others 20 or 25 feet. That Mrs. Lewis was injured seems also to be conclusively established from the evidence, but there is a sharp conflict

as to the extent of her injuries. Some of the physicians claim that they were comparatively unimportant and others that they were quite serious. The injuries claimed by her were a cut on the left hand from which she bled profusely and which required three stitches to close, an injury to her knee, but principally various injuries to her back, including a strain of the sacro-iliac joints.

Before proceeding to the main question in the case we will refer briefly to some minor matters complained of by defendant Haggerty. His claim that the juror Bucklin was prejudiced has not been established. Mr. Bucklin was asked if he knew of any reason why he could not sit as a fair and impartial juryman and he answered in the negative. It developed after the trial that his own wife had an injury similar to the one complained of by Mrs. Lewis and defendant Haggerty contends that such fact made him an unfair and prejudiced juryman. The fact that his own wife was suffering from similar injuries, if it had been brought out in the *voir dire* examination, might have been ground for challenge for cause in the discretion of the trial court, but in our opinion it would not have been error to overrule such challenge if he said, as he did in his affidavit made after the trial in opposition to the motion for new trial, that he could be fair regardless of the condition of his wife. The other proposition is that there is newly discovered evidence consisting of certain X-ray pictures taken by Dr. Smith. However, it appears that X-ray pictures of plaintiff's injuries were taken and introduced in evidence, and it further appears that defendant Haggerty's counsel knew of the existence of the Smith X-ray pictures during and before the trial. This contention must, therefore, be overruled.

It will be necessary to examine with considerable care the claim of misconduct of plaintiff's counsel. Part of the alleged misconduct is the following question, or the substance thereof, to each of the jurymen examined for service on the case, namely: "Are you a stockholder in an insurance company known as the International Indemnity Com-

pany of Los Angeles, California?" This question was asked to 18 proposed jurymen, all of whom answered that they did not hold stock in said company. Even in states which do not adhere to the rule laid down in *Jessup v. Davis*, 115 Neb. 1, proposed jurymen may be asked with reference to stock in an indemnity insurance company which has issued a policy to protect one of the litigants. While the question was a proper one to ask, it might have been asked to the jury as a whole, but the method of examining the jury is largely within the discretion of the trial court. No request was made to require counsel for plaintiff to ask the jury the question collectively and no objection on account of its repetition. Most courts leave the method of examining the jury pretty much to the examining counsel, and the fact that he examined each juryman individually and asked him a proper question instead of asking the same question collectively would not constitute error, especially when the record fails to show an objection on that ground. In *Egner v. Curtis, Towle & Paine Co.*, 96 Neb. 18, it is held:

"Where a defendant, in a personal injury action, is indemnified by an employers' casualty insurance company, it is proper for plaintiff's counsel to show such fact when impaneling the jury, and to inquire of each juror upon his *voir dire* if he is a stockholder or agent, or in any manner interested in such company."

Furthermore, the defendant, when he came to examine the jury, asked the same question with regard to the Union Automobile Company which he claims had issued a policy to Mrs. Lewis or her husband. The filing of a counterclaim against Mrs. Lewis was so far-fetched in view of all the circumstances surrounding the accident that one suspects that it was filed in entire bad faith and for the sole purpose of enabling counsel for defendant Haggerty to convey to the jury the idea that Mrs. Lewis was protected by insurance and did not have to rely for recovery on defendants. If it was misconduct for plaintiff's counsel to ask about the International Indemnity Company, it was likewise miscon-

duct for defendant's counsel to ask about the Union Automobile Company, and when both parties are guilty of the same misconduct one cannot complain about the misconduct of the other. We do not feel that any prejudice resulted to defendant Haggerty on account of the *voir dire* examination of the jury.

Defendant Haggerty objected to the following part of plaintiff's counsel's opening statement:

"The testimony will show that we are asking something—it does not make a great deal of difference, but the testimony will show clearly, I believe, that Mr. and Mrs. Haggerty either one of them have their cars insured to protect them in cases of this kind."

The objection was overruled and exception duly taken. Mr. Comstock, who represented the defendant Beckard, made the following statement with regard to insurance, which was not objected to, to wit:

"I just want to make one other thing. I just want to tell you gentlemen of the jury that Mr. Beckard has no insurance of any sort; he stands here alone to defend himself the best he can, without any insurance or insurance company to help him."

The trial then proceeded and lasted for several days, during which time none of the parties made any reference to insurance, so far as the record discloses, until the arguments to the jury were made. During Mr. Doyle's opening argument to the jury the following occurred:

"He was going to prove there was not any insurance on his side of the case. Has he proved any of it? If he has, my ears have been closed to proving any of those things he was going to show. Mr. Rosewater: Counsel excepts to the statement that counsel set out to prove there was not any insurance in the case. Mr. Doyle: You made that in your opening statement. Mr. Rosewater: Defendant objects as prejudicing the case, immaterial, and it is misconduct of the counsel to repeat. Mr. Doyle: I was just touching on his opening statement, your Honor. By the Court: Anyway, his opening statement was not in the record and

the subject of insurance will be eliminated from the argument."

Up to this point we cannot feel that there was error sufficient to justify a reversal. The record shows quite clearly that up to this point at least the plaintiff was proceeding in good faith. In fact, he stated in oral argument before this court that his failure to prove that defendant Haggerty was insured was simply an oversight. The record also indicated that counsel for defendant Haggerty stated in his opening statement that he would prove that his client was not protected by insurance and the court stated at that time that he would permit him to make such proof. Where the question of insurance is so freely mentioned by all counsel connected with the case the misconduct of plaintiff's counsel to work a reversal must be more serious than where he alone interjects the idea of insurance into the case. However, it must not be overlooked that the harm of any subsequent references to insurance or to a corporation or company would be intensified by all of these prior references to insurance in the *voir dire,* opening statement, and argument. Further on in Mr. Doyle's argument the following occurred:

"One of the parties comes to you and says, 'Well, his father is a banker.' They did not show that. They thought he would be. When they filed that they thought he might be on the board of directors. He was not on that. He was a drug-store man. Lay it on Beckard—let me go—let me go back to Omaha and report to the company that he did not get stuck. Mr. Rosewater: Defendant objects to that as a repetition of the same course of misconduct; no evidence of any company in Omaha or anywhere else that I represent. By the Court: What is it that you complain of? Mr. Rosewater: That I would go back to Omaha and report to the company. There is no company in Omaha, in the evidence, in any way, shape or form."

In his closing argument to the jury Mr. Doyle said: "It certainly appears in this case that a corporation is without heart or soul." No objection was made to this state-

ment. At the close of his argument Mr. Doyle said: "Take care of her as though it were your own case, fairly and impartially. Mrs. Lewis will be satisfied and I think everybody will be satisfied, and in doing that I don't think you are going to harm any of the individuals on the other side of the table." Defendant Haggerty claims that this is in effect a statement to the jury that there was a corporation to protect defendant Haggerty and therefore he, as an individual, would not suffer. We cannot give these remarks so sinister a meaning, but think all that Mr. Doyle meant was that the defendants in the case, those on the other side of the table, would not be harmed if Mrs. Lewis was given fair and impartial treatment. The court in his instructions admonished the jury as follows:

"There has been no evidence introduced as to the existence of insurance in this case and, even if there had been, this jury under their oath and statements to consider this matter fairly and without prejudice should decide this case solely on its merits and under the law, without reference to the question of whether there may or may not be insurance interests represented, which has nothing whatever to do with the question as to who, if any one, was at fault in this matter."

Counsel for plaintiff was guilty of misconduct in referring to the question of insurance in his arguments to the jury after the court and counsel called his attention to the fact that there had been no proof of insurance and after the court had admonished him that the subject of insurance should be eliminated from the argument. Unmindful of the fact that there was no proof of insurance and of the admonition of the court, counsel persisted in his misconduct and twice again refers to the subject.

In *Hall v. Rice*, 117 Neb. 813, counsel for plaintiff persisted in the same misconduct after being admonished by the court. A judgment for plaintiff was reversed. The misconduct in that case while more flagrant was of the same general character as the misconduct complained of in this case. In *Johnson v. Jensen, ante*, p. 1, the case was

reversed on account of misconduct of counsel. It is said in the opinion of the court:

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

In an opinion written by Judge Sullivan many years ago in the case of *Ashland Land & Livestock Co. v. May*, 59 Neb. 735, it is said:

"We have little patience with counsel who deliberately seek to achieve success by lawless methods; and we do not hesitate, in any case, to deprive them of advantages thus obtained. In the performance of professional duties, counsel should endeavor always to conform their own conduct to the law which they have been commissioned to assist in administering."

It seems therefore that defendant Haggerty is entitled to a new trial on account of the misconduct of plaintiff's counsel, unless it appears from the whole record that he was not prejudiced by such misconduct. The fact that Haggerty was to blame to some extent for the accident and that Mrs. Lewis was not to blame at all is so clear from the record that we would hesitate to reverse the case if that was the only consideration before us. However, there is a very sharp dispute as to the extent of Mrs. Lewis' injuries, and it seems quite probable to us that the amount of recovery was or might have been affected by the prejudicial remarks of counsel. Dr. W. G. Rickard, of Lincoln, was plaintiff's attending physician for the injuries in question. He took three stitches to close the wound in her wrist, which he says healed nicely and was not serious.

He examined her knees, wrist, back, and so on, and did not find anything more than minor, temporary injuries. He treated her nine times, the last time on November 2, 1927, and she came to his office except on the first occasion immediately after the accident, and he discharged her on November 2, 1927, less than two weeks after the accident, and in his opinion, "so far as any injuries from the accident of October 20, 1927, were concerned, he considered her injuries and condition as healed and cured when he discharged her." He had the benefit of X-rays in making up his mind as to her condition. Several other doctors were positive in their testimony that she was not suffering at the time of the trial from any injuries resulting from the accident. Other doctors of equal credibility, but ones who did not see her for a considerable time after the accident, described her injuries as serious, and if the case had been presented fairly we would not disturb the verdict of the jury; but where the question is close and there has been grave misconduct on the part of counsel and where an examination of the entire record convinces the court that the verdict was probably influenced by the misconduct, the case must be reversed and a new trial ordered.

Another fact in the case which leads us to believe that the misconduct of counsel affected the verdict is the finding in favor of the defendant Beckard. A careful reading of the record by the author of this opinion convinces him that the defendant Beckard was at least equally negligent with the defendant Haggerty. There is no question at all in our judgment but that the defendant Haggerty entered the intersection first and therefore was entitled to the right of way. He was probably not going as fast as the defendant Beckard, and defendant Beckard did not have his car under proper control, for although he applied his brakes 30 to 35 feet back from the accident, and although the defendant Haggerty turned somewhat to the left to avoid a collision, it was impossible to do so, and as a result the accident happened.

Here again the question was for the jury, but the fact

that the jury excused the defendant Beckard and held the defendant Haggerty would indicate that they were prejudiced by the misconduct of counsel. There is no intention to enlarge to any extent the rule laid down in *Jessup v. Davis,* 115 Neb. 1. The fact that a defendant has indemnity insurance is never a reason for finding against him, and counsel should not so contend to the jury, and should not inject the fact that there is protecting insurance in the case for the purpose of prejudicing the jury. It is simply a circumstance that may be considered in connection with all the other facts and circumstances in the case in weighing the evidence. Nothing said in this opinion is intended to in any way prejudice Mrs. Lewis' interests at a future trial of the case.

It is scarcely necessary to discuss defendant Haggerty's counterclaim. There is no evidence in the record indicating that Mrs. Lewis was negligent, and the district court was right in directing a verdict in her favor on such counterclaim. And in our opinion the finding of the jury in defendant Beckard's favor is not presented by this appeal. It is a matter which does not affect the defendant Haggerty adversely and about which he therefore has no right to complain. The general rule is that there is no contribution between joint tort-feasors. However, we do not express an opinion on that point, for the defendants Haggerty and Beckard were not adverse parties in this suit. No question of the liability of one of these defendants to the other was being tried. If Mrs. Lewis finally obtains a judgment against Haggerty and he is compelled to pay it, it could not be pleaded as *res judicata* in a suit by Haggerty against Beckard for contribution. *Warren v. Boston & M. R. Co.,* 163 Mass. 484. The plaintiff might have appealed from the verdict and judgment in Beckard's favor, but she did not do so.

For the reasons above stated, the judgment is hereby reversed and a new trial ordered as to the issues between plaintiff and the defendant Haggerty.

REVERSED AND REMANDED.

EDWIN E. WEST ET AL., APPELLEES, V. DETROIT FIDELITY & SURETY COMPANY, APPELLANT.

FILED MAY 29, 1929. No. 26593.

1. Highways: CONTRACTOR'S BOND: ACTION AGAINST SURETY. One who furnishes labor or supplies to a contractor for the building of a public road may maintain an action in his own name upon the surety bond of such contractor, conditioned for the payment "for materials and supplies used or employed on said contract," as a contract made with a third person for his benefit.
2. ———: ———: ACTION BY ASSIGNEE. Claims for labor and material furnished a contractor for public work may be assigned, and the assignee may bring an action thereon in his own name.
3. ———: ———: RELEASE OF SURETY. A compensated surety upon a bond given for the faithful performance of a contract for the construction of a gravel road will not be released because of an extension of time granted the contractor for the completion of the work without the consent of the surety, unless it appears that the surety has suffered some injury or been subjected to some loss by reason of such extension. The bond of such a surety is in the nature of a contract of insurance, and the rule of *strictissimi juris*, by which the rights of uncompensated sureties are determined, is not applicable thereto.
4. ———: ———: "SUPPLIES." A surety bond was given for the faithful performance of a contract for graveling a public road, conditioned that the contractor "shall pay for all labor, equipment, gasoline, oils, materials and supplies used or employed on said contract." Contracts for hauling the gravel were made with the owners of automobile trucks at a certain price per yard per mile. Arrangement was made by the contractor with certain garage men and mechanics to make repairs to such trucks upon orders from the contractor, to whom they were to be charged. The contractor deducted the cost of repairs from the amount due for hauling. *Held*, that the labor and materials used in making such repairs were "supplies used or employed on said contract," within the meaning of those terms, and chargeable to the surety.
5. ———: ———: ———. Upon entering work upon the highway, an arrangement was made by the contractor with certain merchants to furnish the workmen on the job with groceries upon orders of the contractor, to whom they were charged. Groceries were furnished upon such orders and bills therefor rendered to the contractor, who deducted the amount from the wages of the employees respectively. *Held*, that such groceries

were supplies used and employed on said contract and proper charges against the surety on the contractor's bond.

6. ———: ———: ———. Some of the groceries were delivered upon orders of the contractor to the foreman, whose wife carried on a cook shack on the job, where employees could obtain their meals. The most of these groceries were deducted by the contractor, to whom they were charged, from the foreman's wages. It did not appear that any one other than workmen on the job patronized the cook shack. *Held*, that the supplies so furnished were proper charges against the surety.

7. ———: ———: ———. Gasoline and oil furnished drivers of their own trucks upon coupons furnished by the contractor to the truckmen and charged against their contracts, upon an arrangement to that effect with the furnisher of such materials, which were charged to the contractor, were supplies used or employed on the contract, and the cost thereof a proper charge against the surety.

8. ———: ———: ———. Permanent repairs constituting a betterment to trucks owned by the drivers, such as a new radiator, are not proper charges against the surety.

9. ———: ———: ———. The purchase price of new trucks bought by the drivers for hauling gravel, guaranteed by the contractor, is not a proper charge against the surety.

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

Burkett, Wilson, Brown & Wilson, for appellant.

Pitzer & Tyler and *Lloyd E. Peterson, contra.*

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

REDICK, District Judge.

Action against the surety of the subcontractor to recover for labor and material furnished in the construction of a public highway. The petition declares upon fourteen causes of action, two of which belong to the plaintiffs and the twelve others being assigned to the plaintiffs for the purpose of suit. The plaintiffs dismissed the eleventh and fourteenth causes of action, and a verdict was rendered for plaintiff against the defendant on the other twelve, upon

which verdict judgment was rendered, and the defendant appeals.

The state of Nebraska and Otoe county entered into a contract with Stevens Brothers for the graveling of a certain road from Dunbar to Syracuse in Otoe county, Stevens Brothers and the Northwestern Casualty & Surety Company executed a bond to the department of public works of the state for the faithful performance of said contract. Stevens Brothers sublet the contract to the Interstate Construction Company, and the defendant, Detroit Fidelity & Surety Company, executed a bond to Stevens Brothers containing the following condition:

"Now, therefore, if said Interstate Construction Company as principal, shall in all respects fulfil its said contract according to the terms and tenor thereof, and shall faithfully discharge the duties and obligations therein assumed, and shall pay for all labor, equipment, gasoline, oils, materials and supplies used or employed on said contract, then the above obligation is to be void and of no effect; otherwise, to be and remain in full force and virtue of law."

"The surety on this bond given to guarantee the faithful performance and execution of the work included in the contract shall be deemed and held, any contract to the contrary notwithstanding, to consent without notice: To any extension of time to the contractor in which to perform the contract when each particular extension does not exceed sixty days."

The bond recited the awarding of the subcontract by Stevens Brothers to the construction company, and made it a part of the bond. The original contract between the state and Stevens Brothers provided for the completion of the work by September 1, 1925, but also provided that such time might be extended by the department of public works, and the subcontract contained the following provision: "We, Stevens Brothers, agree to give any extensions of time we may receive from the department of public works to the subcontractors." Five extensions of time were granted as follows: To October 1, 1925; to December 1, 1925; to Feb-

ruary 1, 1926; to April 1, 1926, and to June 1, 1926. The work was completed about June 1, 1926, but the claims for labor and material now held by the plaintiffs remained unpaid, and the action is brought to recover the same from the surety.

The defendant, for the reversal of the judgment, presents three grounds which we deem it necessary to consider:

1. That the petition does not show that the plaintiffs have a right to maintain the action. The point made is that under section 3224, Comp. St. 1922, providing that, in contracts for public work to which the general provisions of the mechanics' lien laws do not apply, and where the mechanics and laborers have no lien to secure the payment of their wages, and materialmen who furnish material for said work have no lien to secure payment for the material furnished in such work, a bond shall be required which shall be conditioned for the payment of all laborers and mechanics and for material used in performing the contract, and providing that such bond "may be sued on by any person entitled to the benefit of this chapter. The action shall be in the name of the party claiming the benefit of this chapter"—plaintiffs are not within the class who may sue. The chapter containing the above section includes the mechanics' lien law, and the argument is that, inasmuch as plaintiffs are not entitled to a mechanics' lien, they have no right of action upon the bond. We think the contention unsound. The very purpose of the section in question was to protect persons who were not entitled to mechanics' liens, and this purpose would be entirely defeated if this construction were adopted. The plain intention of the legislature as expressed here will control general terms; moreover, the greater includes the less, and the right is extended to any one who claims the benefit of any provision of the chapter.

It is further contended on this point that the bond is a substitute for mechanics' liens, and that, inasmuch as the right to a mechanics' lien is not assignable (*Noll v. Kenneally*, 37 Neb. 879), the right to sue upon the bond is not. Neither the case above referred to, nor any other to which

our attention has been called, holds that the account which may furnish the basis for a mechanics' lien is not assignable, but merely that the assignor could not thereafter prove a lien because he had disposed of the claim and that the assignment of the debt did not have the effect to transfer a right to perfect and enforce a lien. In this case the assignment of the various claims to the plaintiffs invested them with the right to sue thereon in their own names, as provided by section 8526, Comp. St. 1922. It is well established in this state that a bond such as the one in suit is a contract made for the benefit of the parties furnishing labor and materials in performance of the principal contract, and that such persons have a right to sue thereon in their own names. *Rohman v. Gaiser*, 53 Neb. 474, was an action on a bond given for the performance of a public building contract, conditioned for the payment of labor and materials furnished the contractor, and it was held: "One not a party to a contract may maintain an action thereon when such contract was made for his benefit or the benefit of a class to which he belongs."

2. That because of the fact that three of the extensions granted were for 61, 62, and 61 days, respectively, the surety upon the bond was thereby released. A number of cases are cited to the proposition that an extension of a contract between the parties thereto, based upon a valuable consideration, without the knowledge or consent of the surety, releases the surety, which is undoubtedly a correct statement of the general rule. Among other cases defendant cites *Schwartz v. American Surety Co.*, 231 Mass. 490, where the condition of the bond of a building contractor was for the faithful performance of a contract to build a house to be completed by November 1, and it was held that an extension of the time for the completion of the house until Christmas of that year discharged the surety. The bond in that case was not conditioned for the payment of the material and labor entering into the construction of the building, and the rights of persons furnishing the same were not in controversy. Also, *Forburger Stone Co. v. Lion*

Bonding & Surety Co., 103 Neb. 202, in which it was held that, as between the contractor and the surety, a failure to give a notice provided by the contract would release the surety; but, as the contract for the performance of which the bond was given provided that the contractor should pay for all materials which he used in the building, it was further held that the contract was of a dual nature, and that materialmen who had furnished material prior to the default in the giving of the notice were not affected thereby and might recover to that extent upon the bond as having been made for their benefit. In all of the cases cited under this rule the claims could have been protected by the filing of mechanics' liens.

In the case of *Doll v. Crume*, 41 Neb. 655, the contract for the grading of a street was involved, containing a provision that the contractor should pay for all labor and material furnished him in executing the contract, and the defendants executed a bond guaranteeing "that the party of the second part (the contractor) will well and truly perform the covenants hereinbefore contained to pay all laborers employed on said work; and if said laborers are not paid in full by said party of the second part, that said party of the third part (sureties) hereby agrees to pay for said labor, or any part thereof," and it was held that an extension of the time for performance of the contract did not release the sureties from their contract to pay the laborers, and that the plaintiff, one of said laborers, might sue upon the contract in his own name as having been made for his benefit.

The rule contended for applies to the case of voluntary sureties who become such without consideration, but it is said in a note to 33 L. R. A. n. s. 513, that "the overwhelming weight of authority supports the proposition that the rule of *strictissimi juris*, by which the rights of uncompensated sureties are determined, is not applicable to the contracts of surety companies, which make the matter of suretyship a business for profit; that their business is essentially that of insurance." To the same effect, see 22 Cyc. 306.

A distinction is made in the cases between a voluntary surety and one who becomes such for compensation as a regular business, that in the former case any extension of time or other change in the contract without the consent of the surety will result in his release; while in the latter case, before such result obtains, it must appear that the surety has suffered some injury or been subjected to loss by reason of the change. *Philadelphia v. Fidelity & Deposit Co.*, 231 Pa. St. 208; *People v. Bowen*, 187 Mich. 257; *Standard Salt & Cement Co. v. National Surety Co.*, 134 Minn. 121; *People v. Traves*, 188 Mich. 345; *Guaranty Co. v. Pressed Brick Co.*, 191 U. S. 416.

It will be noted that two of the extensions exceeded the limit of 60 days by one day and one by two days. In the ordinary use of language one month is generally considered the same as 30 days; one month and 30 days, and two months and 60 days, might be considered as practically synonymous terms. It was held in *People v. Ulrich*, 2 Abb. Pr. (N. Y.) 28, that a notice to quit in thirty days was a substantial compliance with the statute requiring one month's notice, as in that case the notice was given in April, a month containing 30 days. We do not find it necessary to determine this question. The extensions of time in the present case were valid for a period of 30 days and 60 days, respectively, within the terms of the consent of the surety, and we have the situation of an extension for one or two days without such consent. It is not claimed by the surety that it suffered any damage by reason of these extensions, and within the reasoning of the authorities above cited, its release was not thereby effected.

3. It is further contended by the defendant that a large number of items contained in the several causes of action do not come within the terms of the bond. This requires an examination of the various items of the account presented by the evidence.

Objections are made to a number of items allowed by the district court as properly chargeable to the bond, on the ground that they do not fall within the terms of the condi-

tion of the bond that the obligee "shall pay for all labor, equipment, gasoline, oils, materials and supplies used or employed on said contract." The subjects of these objections may be divided into three classes which will now be explained and considered.

(1) A large number of auto trucks were used in the transportation of gravel from the pits for use on the highway. A few of these trucks were owned by the construction company, but many more were owned by the drivers thereof. The drivers who owned their own trucks were paid according to the amount of gravel hauled at so much per yard per mile. At the commencement of the work the construction company made arrangements with several mechanics operating garages to make repairs upon and furnish parts and accessories for all the trucks used on the job, including those owned by the respective drivers. The construction company gave orders to the mechanics for repairs and supplies to the trucks, which were charged to the company and deducted from the amount due the drivers respectively, monthly statements being rendered to the company for this purpose. Upon completion of the work the bills for these repairs and supplies were unpaid, and the claims for the balance due form a part of the first and second causes of action.

The claim of the defendant is, inasmuch as the owners of the trucks were paid by the yard, it was their duty to keep their own trucks in proper repair, and that the repairs and supplies covered by these bills were furnished and properly chargeable to the drivers and not to the construction company as entering into the expense of the project. We think, however, that there is no proper basis for distinguishing between the repairs and supplies furnished to the drivers owning their trucks and those furnished for trucks belonging to the company, under the circumstances above related. The items were not charged to the drivers but to the construction company which used the amount thereof in part payment of the contract price for hauling the gravel. These bills were incurred by the contractor as a part of the cost of

the project, and represented labor, materials and supplies used and employed on said contract. The cost of the work was not increased by the method pursued, for it may be assumed that, if the bills for these materials had not been deducted from the contract price for hauling gravel, such price would not have been paid in full and a claim therefor would be clearly within the terms of the bond. The claimants are in the position of having furnished labor and materials used in the performance of the contract, and are entitled to the protection of the bond. Suppose the owners of the gravel pit had refused to deliver the gravel unless the construction company would consent that the account therefor be charged to it, and, such consent being given, the company charged the cost of the gravel to the contracts of the respective drivers; we are of opinion that, beyond question, the persons furnishing the gravel which was used on the project would be entitled to the protection of the bond. We think the supposititious case presents a true analogy to the one before us. Defendant cites *Nye-Schneider-Fowler Co. v. Bridges, Hoye & Co.*, 98 Neb. 27, holding that "the use of an engine for hoisting materials, the repairs on such engine, and oil and fuel used in operating the same are not guaranteed by the surety." But in that case the bond was only for the payment of laborers, and did not cover "supplies used or employed on said contract."

(2) The second class of charges to which objection is made is for groceries and provisions supplied to the employees engaged on the project. These are presented in the fourth, tenth and twelfth causes of action and may be subdivided into two classes: (a) Supplies furnished individual employees, and (b) those furnished foreman Bell whose wife conducted a boarding shack located on the project. In both classes the supplies were furnished upon written orders of and charged directly to the contractor, by whom the amounts thereof were deducted from the wages of the employees respectively. With reference to class "a," the situation does not differ from the furnishing of repairs and supplies to the drivers of trucks above discussed, and for

similar reasons are proper claims against the bond. The work under the contract was to be performed in a rural community where the laborers might not be able to secure credit for their subsistence while employed thereon. It was quite proper for the contractor to arrange for such supplies to be used in advancing the work to be done under the contract, and in that sense they entered into and became a component part of the work. The cost of these supplies was used by the contractor in part payment of the wages of the employees, was a substitute therefor, and, except as to some items inconsiderable in amount, were consumed on the project. *Bricker v. Rollins & Jarecki*, 178 Cal. 347; *Brogan v. National Surety Co.*, 246 U. S. 257.

As to class "b," the objection is that it was an independent undertaking on the part of the foreman and his wife for the purpose of making a profit. We do not so consider it. The boarding house was established for the convenience of the employees and other persons engaged upon the project, who either paid for their meals or the same were charged to the contractor and deducted from the payroll. Counsel for appellant argues "as to the provisions, it would be charging the provisions for the board and keep of the men who worked by the job, and not only these men, but also their families. If the men who owned the trucks and hauled the gravel should have been farmers residing in that community, it would be just as logical to charge the grocery bills of these farmers to the bondsman as to charge the various articles mentioned in these causes of action to the bondsman." This argument leaves out of consideration the facts that the articles were sold and charged to the contractor and the amounts deducted from salaries and wages. They were, therefore, used and consumed on the project. This is not a case where the employees procured the supplies upon their own credit, in which event they would not be so directly connected with the work as to become a part of it. It is a case where the contractor extended his credit for the purpose of insuring the advancement and accomplishment of the work, thus establishing a direct connection

with the project. It does not appear that the Bell shack was maintained for the benefit of any persons not employed upon the job, and the cost of the supplies thereto were deducted by the contractor from the wages of the employees. In this situation the claim that Mrs. Bell made a profit in conducting the shack would be immaterial. If these supplies had been delivered to the contractor and by him distributed to persons employed on the job, either as raw material or cooked ready for consumption, deducting the price from their wages, we think they would be a proper charge against the bond, and the manner in which the result was accomplished presents no different case in principle. Counsel for defendant say in their brief: "It may be that under the broad provisions of the bond in question it would be liable for provisions furnished the subcontractor," if it "were employing its men at so much a day or at so much per hour, including board. Such is not the case here." In fact, however, the supplies, while delivered to the men, were furnished to the contractor, on his credit. The contractor made no profit on the supplies but simply used them in payment of wages. We think no just differentiation can be made between the two situations. Defendant cites *Brogan v. National Surety Co.*, 246 U. S. 257, holding that supplies furnished for a boarding house conducted by the contractor as an independent enterprise were not a charge against the bond; but it was there held that the furnishing of the board was an "integral part of the work and necessarily involved in it." While in that case the contract of employment included board, we think there is no basis for a substantial distinction where, as here, credit was furnished for board by an arrangement between the contractor and merchant, accepted by and acted upon by the employee. Also, *Silver v. Harriss*, 165 La. 83. The bond in that case covered "work done, labor performed, or material furnished," which is not as broad as the bond in suit which covers "supplies used or employed on said contract." While we think that only such "supplies" as enter into the performance of the contract may be charged to the surety, those for which claim is made

are of that character. The bond does not require that the supplies enter into and become a part of the construction, as is generally the case in mechanics' liens, but only that they be used or employed on said contract. Also, *Carter County v. Oliver-Hill Construction Co.*, 143 Tenn. 649, to the effect that a merchant who cashed in merchandise pay checks of employees of the contractor but took no assignment of the laborers' claims had no claim against the bond. The case was thought to be analogous to that of a bank which cashed pay checks, and the ruling was based upon *United States v. Rundle*, 107 Fed. 227, which presented that situation. While this case may be distinguished from the present one, the bond covering only labor and material "used in the construction of the roads," and the claims being for payment of pay checks or orders, regardless of these differences, we are not inclined to follow it, especially as its analogy with the case cited in its support appears imperfect. In the *Rundle* case the arrangement was for a loan, while in the former, it was merely for convenience in performing the contract. We conclude that the groceries for which claim is made are a proper charge against the bond in view of its broad provisions.

(3) This claim is for gasoline and oil furnished the drivers owning their trucks, and is presented in the thirteenth cause of action. Arrangements were made by the contractor with the claimants to furnish these supplies to the drivers, charging them to the contractor. The drivers purchased from the contractor coupon books calling for the supplies, and these coupons were redeemed by the contractor. These supplies were used and employed on the contract. No objection is made to the allowance for similar supplies furnished for trucks owned by the contractor. The claim was properly allowed against the bond, for reasons already given as to the claims for repairs and provisions.

There are, however, objections to certain items in two of these accounts, which we think are well taken: (1) A charge of $58 for a new radiator for one of the drivers' trucks; (2) three charges for $262.70, $300, and $100, in-

cluded in the sixth cause of action. The radiator was not consumed upon the job but represented the capital invested by the driver. The other three items represent part of the purchase price of new trucks sold to drivers and payment guaranteed by the contractor. We are unable to perceive upon what theory these items are properly chargeable to the bond. They represented the personal obligations of the purchasers of the trucks, and, while the amounts were charged by the contractor to the drivers and deducted from their contracts, the subject of such charges was not consumed on the project but after completion thereof remained the property of the drivers for use elsewhere. The terms "used or employed on said contract" must be understood as including only such articles and supplies as are consumed in the performance of the work. It is perfectly obvious that the price of an automobile, though used and employed on the contract, is not under the protection of the bond.

Objections are made to instruction No. 3 given by the court, but as this related to the defense of a release of defendant by extensions of time, which we have held unavailable, this assignment need not be discussed.

It follows that the judgment of the district court is right, except as to the first cause of action, which is reduced by $55 and interest, $5.35, total $60.35; and the sixth cause of action which is subject to a reduction of $662.70 and interest, which leaves nothing due thereon from the surety. It is therefore ordered that the judgment on the first cause of action be reduced and affirmed to the extent of $1,445.51; that the sixth cause of action be reversed and dismissed; and that in all other respects the judgment is affirmed.

AFFIRMED IN PART, AND REVERSED IN PART.

Note— See Highways, 29 C. J., 611 n. 37, 612 n. 51, 53, 612 n. 67, 613 n. 73, 75—Principal and Surety, 32 Cyc. 191 n. 91; 43 L. R. A. n. s. 65; 44 A. L. R. 383; 46 A. L. R. 511; 22 R. C. L. 632; 3 R. C. L. Supp. 1273; 4 R. C. L. Supp. 1473; 7 R. C. L. Supp. 751.

EDNA B. SMITH, APPELLEE, V. LIBERTY LIFE INSURANCE COMPANY, APPELLANT.

FILED JUNE 4, 1929. No. 26642.

1. **Insurance: FORFEITURE: WAIVER.** Where an insurance company is charged with knowledge of the fact that the insured was beyond the inhibited age expressed in an accident insurance policy at the time the policy was issued, but continues to treat the contract as of binding force by accepting and retaining premiums from the insured until within less than two months before his death, the forfeiture is waived.
2. ———: ———: ———. "A forfeiture incurred by the holder of a life insurance policy or contract is waived, if the company, with knowledge of the facts, subsequently collects premiums, dues or assessments on account of the contract, and retains them without objection until after the death of the insured." *Modern Woodmen of America v. Colman*, 68 Neb. 660.
3. **Estoppel: PLEADING.** "If the facts constituting an estoppel are sufficiently pleaded by a defendant, he will be given the benefit of that defense, although the word estoppel does not appear in his pleading." *Seng v. Payne*, 87 Neb. 812.

APPEAL from the district court for Jefferson county: WILLIAM J. MOSS, JUDGE. *Affirmed.*

Allen & Allen and *Heasty, Barnes & Rain*, for appellant.

Denney & Denney, contra.

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

DEAN, J.

Edna B. Smith, plaintiff, began this action in the district court for Jefferson county to recover $1,200, and accrued interest, pursuant to the terms of an accident insurance policy issued July 2, 1925, to Charles W. Smith, her father, by the Liberty Life Insurance Company, defendant, of Topeka, Kansas, wherein plaintiff is the named beneficiary. Upon submission of an agreed statement of facts, the court rendered a judgment against the company for $1,218, which included interest to the date of judgment. The company appealed.

The agreed "Statement of Facts" follows:

"It is hereby stipulated and agreed by and between the parties to the above entitled action that the facts material to a decision of the question at issue are as herein stated and that said cause shall be submitted to the court for its decision on the facts as herein stated, in lieu of evidence.

"That on July 2, 1925, Charles W. Smith made a written application to the defendant company for an accident insurance policy. A true and correct copy of said application was made a part of the policy which is hereto attached and made a part of this agreed statement of facts. That based on said application the defendant company issued a policy of accident insurance to the said Charles W. Smith on the 6th day of July, 1925, a copy of said policy being hereto attached marked 'Exhibit A' and made a part hereof. That at the time said Charles W. Smith made said application for said policy, to wit, on July 2, 1925, he was 64 years of age. The beneficiary named in said application is the plaintiff in this action.

"At the time said policy was issued applicant paid $5, being the premium on said policy for one year from that time. On June 25, 1926, he paid $5 to defendant as premium for another year. On the 6th day of July, 1927, he paid to defendant an additional $5 as renewal premium for the year beginning July 6, 1927, and the defendant issued and delivered to the said Charles W. Smith a receipt therefor, a true copy of which is hereto attached marked 'Exhibit B' and made a part hereof. That on September 12, 1927, the defendant company tendered the plaintiff $7.57 for unearned premium on said policy paid by said Charles W. Smith, that being the amount paid by him in excess of the amount due when he attained the age of sixty-five years.

"That on the 27th day of August, 1927, said Charles W. Smith received a bodily injury, solely through external, violent and accidental means, and which bodily injury was sustained by the insured, Charles W. Smith, while operating and driving and riding in an automobile, and as a result solely from such injury said Charles W. Smith died on the

27th day of August, 1927, his death not being caused by suicide while sane or insane, or any of the exemptions set forth in section 9, general provisions of said policy, numbered from 1 to 9, both inclusive. That after the death of insured the plaintiff, Edna B. Smith, made proof of loss to the defendant company in conformity with the provisions of said policy. That at the time of his death said insured, Charles W. Smith, was sixty-six years, seven months and 17 days of age, he having been born on January 10, 1861.

"The defendant company is incorporated under the laws of Kansas and is admitted to do business in the states of Kansas and Nebraska and has complied with the laws of said states with reference to carrying on the business of life, health and accident insurance. That the form of policy issued to said Charles W. Smith was authorized and approved by the commissioners of insurance of the states of Kansas and Nebraska, and is in conformity with the laws of said states. That said policy was executed by said defendant company at its office in Topeka, Kansas, on the date herein before stated.

"(Signed) Denney & Denney, Attorneys for Plaintiff.

"(Signed) Allen & Allen, Attorneys for Defendant."

The insurer contends that it should be relieved of its contractual liability and that the action should be dismissed pursuant to the terms of this clause in the policy:

"The insurance under this policy shall not cover any person under the age of 16 years nor over the age of 65 years. Any premium paid to the company for any period not covered by this policy will be returned upon request."

But defendant accepted premiums from the insured for some time after he was over the age of 65 years, notwithstanding he had passed the age inhibited by the terms of the company. And it appears that the insured did not request the return of the premiums so paid, but the company retained such premiums. There is nothing to show but that the company, but for his death, would have continued to accept additional premiums from the insured so long as he lived. But, as we construe it, the above cited provision of

the policy continued it in full force and effect until and unless a return of such premium was requested by the insured. This appears to be the construction given to this provision of the policy by the parties themselves.

In view of the facts before us, we conclude that the company waived the provisions of the above recital in its policy. The age of the insured was written on the face of the application for insurance by the defendant company when the policy was drawn up and the company was, of course, thereby charged with knowledge that plaintiff would be 65 before a year had elapsed. And in due course the company accepted the premiums, not only for the second year, but for the third year of the policy as well, the last premium being paid less than two months before the accident which caused the death of the insured. But the feature of alleged forfeiture, now insisted upon by the insurer, was not disclosed by it to any person until after the death of its patron.

In *Modern Woodmen of America v. Colman*, 68 Neb. 660, we said: "A forfeiture incurred by the holder of a life insurance policy or contract is waived, if the company, with knowledge of the facts, subsequently collects premiums, dues or assessments on account of the contract, and retains them without objection until after the death of the insured." In the case now before us the defendant company with its office records at hand would not, of course, plead that it was without "knowledge of the facts." Nor does it so plead. And in an insurance contract, involving the loss of personal property, we held in an early case that the acceptance of a premium after a forfeiture was a waiver of such forfeiture and rendered the insurer liable for the loss. *Phœnix Ins. Co. v. Lansing*, 15 Neb. 494.

In a standard work on insurance the rule there stated is applicable to the facts in the present case: "To deliver a policy with full knowledge of facts upon which its validity may be disputed, and then to insist upon these facts as ground of avoidance, is to attempt a fraud. This the courts will neither aid nor presume. * * * And any acts, declarations, or course of dealing after delivery by the insurers,

with a knowledge of the facts constituting a breach of a condition of the policy, recognizing the policy as still valid, and from which the insured might fairly infer that he was protected, will amount to a waiver of such breach, and estop the insurers from setting it up in defense." 2 May, Insurance (4th ed.) 1182, sec. 497.

A recognized authority says: "It is also a settled rule of law that where an insurer has knowledge of facts entitling it to treat a policy as no longer in force, and thereafter it receives a premium on the policy, it is estopped to take advantage of the forfeiture. It cannot treat the policy as void for the purpose of defense to an action to recover for a loss thereafter occurring, and at the same time treat it as valid for the purpose of earning and collecting further premiums. Likewise, imposing or collecting an assessment by a mutual insurance company, after the company has knowledge of facts entitling it to consider the policy no longer binding upon it, without its assent, is held to be a waiver of the right to claim the forfeiture which otherwise it might have insisted upon." 14 R. C. L. 1190.

In *Cook v. National Fidelity & Casualty Co.*, 100 Neb. 641, we held that, where an accident occurred after the beneficiary was 60, the company was liable on the ground that such fact when known to the insurer, as in the present case, constituted a waiver by the company of the protection which it might otherwise claim. And in the same case it was said that it was not right that the company should lead the assured and his beneficiary to believe that the policy was in force and then try to avoid the terms of the contract. See, also, *Owens v. Travelers Ins. Co.*, 99 Neb. 560. Where an insurance company is charged with knowledge of the fact that the insured was beyond the inhibited age expressed in an accident insurance policy, and continues to treat the contract as of binding force by accepting premiums from the insured until within less than two months before his death, the forfeiture is waived. *Neiman v. City of New York Ins. Co.*, 202 Ia. 1172. To substantially the same effect are the following: *Baughman v. Niagara Fire Ins. Co.*, 163

Minn. 300; *Billings v. German Ins. Co.*, 34 Neb. 502.

In their brief the defendant company says that plaintiff is estopped from now alleging a waiver of the terms of the policy, because an estoppel is not pleaded in specific terms. We think the argument is ultra technical. We adhere to the rule announced in *City Nat. Bank of Hastings v. Thomas*, 46 Neb. 861, namely: "A party entitled to an estoppel need not in all cases formally plead the estoppel. If the facts constituting the estoppel are in any way sufficiently pleaded, he is entitled to the benefit of the law arising therefrom." And in *Seng v. Payne*, 87 Neb. 812, we said: "If the facts constituting an estoppel are sufficiently pleaded by a defendant, he will be given the benefit of that defense, although the word estoppel does not appear in his pleading."

Under the facts and the law we conclude that the company should not now be permitted to evade liability. The district court did not err in its judgment. The judgment is

AFFIRMED.

Note—See Insurance, 14 R. C. L. 1190; 3 R. C. L. Supp. 354; 4 R. C. L. Supp. 800; 7 R. C. L. Supp. 486; 1 C. J. 424 n. 25—Estoppel, 21 C. J. 1248 n. 52.

STATE OF NEBRASKA V. HENRY GEEST.

FILED JUNE 4, 1929. No. 26855.

1. **Constitutional Law: POLICE POWER.** The police power is an attribute of state sovereignty, and, within the limitations of state and federal Constitutions, the state may, in its exercise, enact laws for the promotion of public safety, health, morals, and generally for the public welfare.
2. ———: ———. The legislature may not, under the guise of police regulations, arbitrarily invade personal rights or private property.
3. **Druggists: SALES ACT: CONSTITUTIONALITY.** A law which restricts to registered pharmacists the sale of such articles as salt, soda, soap, distilled water, corn starch, and other useful but harmless articles, does not tend to promote the public health or welfare, but tends to place in the hands of a limited class a

monopoly of the sale of such articles. Such an act is beyond the scope of the police power and is invalid.

4. ———: ———: ———. In so far as chapter 167, Laws 1927, limits to licensed pharmacists the sale of all articles listed in the United States Pharmacopœia or National Formulary, it transcends the police power and is invalid.

ERROR to the district court for Douglas county: L. B. DAY, JUDGE. *Affirmed.*

Henry J. Beal, Ross L. Shotwell and *Guy C. Chambers,* for plaintiff in error.

David A. Fitch, contra.

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

GOOD, J.

This action is brought to this court on exceptions of the county attorney to the ruling of the district court in a criminal prosecution.

Defendant was charged with practicing pharmacy without a license, in violation of chapter 167, Laws 1927. The record discloses that defendant was operating a retail grocery and therein displayed, offered for sale and sold acetyl salicylic acid, commonly called asperin, and that he had not obtained a pharmacist's license from the state department of public welfare.

Section 120, ch. 167, Laws 1927, *inter alia,* provides: "For the purpose of this article the following classes of persons shall be deemed to be engaged in the practice of pharmacy:

"1. Persons who are engaged in the business of selling or offering or exposing for sale drugs and medicines at retail."

Section 122 of said chapter provides: "For the purposes of this article 'drugs and medicines' shall include all substances and preparations for external or internal use recognized in the United States Pharmacopœia or National Formulary or any substance or mixture of substances in-

tended to be used for the correction, mitigation or prevention of diseases of either man or animals." Other provisions of chapter 167 make it a penal offense for any one to practice pharmacy without a license.

The record discloses that acetyl salicylic acid, or aspirin, is recognized and listed in the United States Pharmacopœia and the National Formulary. It is apparent from the record that, within the terms of the statute, defendant was practicing pharmacy without a license. The trial court took the view that the statute was invalid as constituting an unwarranted interference with the right of defendant to conduct a legitimate business, and tending to grant to licensed pharmacists a monopoly of the sale of many useful, harmless drugs and substances, and that the attempt to restrict their sale to that class of persons did not tend to promote public health or welfare, and for these reasons held the statute invalid and discharged defendant.

The United States Pharmacopœia is a book containing a very extensive list of drugs and remedies, and is compiled decennially by a convention composed of delegates representing the American Medical Association, American Pharmaceutical Association, each state pharmaceutical association, and each state medical association, and representatives of the United States army and navy. Among the items listed in the Pharmacopœia are many articles of general household use, which are, in themselves, harmless but useful, such as (using the common instead of the scientific name) salt, soda, soap, mutton suet, rose water, glycerine, distilled water, olive oil, honey, syrup, and many other articles, all of which, under the statute, are defined as drugs and may be sold only by a licensed pharmacist. From the evidence it appears that the items referred to in the United States Pharmacopœia are those which are chemically pure, and it is argued that only the chemically pure articles are to be properly termed "drugs" and subject to the statute. It occurs to the writer that it would be an anomalous situation if a grocer could sell salt, honey, syrup, olive oil, and other items of like character, that were not chemically pure, with-

out being subject to the statute, but would be subject to it if he sold such articles when chemically pure.

The validity of that part of chapter 167, Laws 1927, making it a penal offense for any one, not a licensed pharmacist, to sell any of the articles listed in the United States Pharmacopœia or National Formulary, depends upon whether, in its enactment, there was a proper exercise of the police power of the state. If, in its enactment, the legislature kept within the legitimate exercise of that power, that part of the act may be valid. If it did not, then that part of the act is invalid.

A police power is a term of comprehensive meaning but incapable of exact definition or of precise limitation. The extent of the power has been the subject of thousands of judicial opinions, none of which, so far as we are aware, has ever attempted to fix any exact limitation of its exercise, but general principles to be applied in determining its proper exercise have been formulated. The courts generally agree that the police power is an attribute of state sovereignty, and, within the limits of the state and federal Constitutions, the state may, in its exercise, enact laws for the promotion of public safety, health, morals and generally for the public welfare.

We have no doubt of the power of the legislature to enact laws restricting to licensed pharmacists the sale of poisons, drugs, or medicines that are or may be harmful or deleterious, and that it may restrict to such persons the compounding of medicines and the filling of physicians' prescriptions. We think such power is generally recognized by the courts as a legitimate and proper exercise of the state's police power.

In *Chicago, B. & Q. R. Co. v. State*, 47 Neb. 549, it is held: "The essential quality of the police power as a governmental agency is that it imposes upon persons and property burdens designed to promote the safety and welfare of the public at large.

"The legislature cannot, under the guise of police regulations, arbitrarily invade personal rights or private property.

There must be some obvious and real connection between the actual provisions of such measures and their assumed purpose."

In *Smiley v. MacDonald,* 42 Neb. 5, it is said (page 13): "It may, however, with safety be asserted that the legislature cannot under the guise of police regulations arbitrarily invade personal rights and private property. On the other hand it should appear to the court, when such regulations are called in question, that they have, in fact, some relation to the public health or public welfare, and that such is the end sought to be attained thereby." To the same effect is *Iler v. Ross,* 64 Neb. 710.

In *Jay Burns Baking Co. v. Bryan,* 264 U. S. 504, it is held: "It is the duty of the court to determine whether a regulation challenged under the Constitution has a reasonable relation to, and a real tendency to accomplish, the purpose for which it was enacted."

In 19 C. J. 772, sec. 5, it is said: "The provisions of pharmacy acts which confer upon registered pharmacists the exclusive right to sell patent or proprietary medicines and domestic remedies not compounded by them, without requiring such pharmacists to make any examination or analysis thereof, are not within the scope of the police power but are invalid as conferring a special and exclusive privilege."

Pharmacy acts which confer upon registered pharmacists exclusive rights and privileges to vend proprietary medicines, without examination or analysis, or to give such pharmacists the exclusive sale of useful and harmless articles that may be sold and handled either in groceries or drug stores, have been held invalid in the following cases: *Noel v. People,* 187 Ill. 587; *State v. Wood,* 51 S. Dak. 485; *State v. Childs,* 257 Pac. (Ariz.) 366; *State v. Donaldson,* 41 Minn. 74.

We are not unmindful that the courts of New York, and, possibly, some other states, have apparently taken a different view; but it does not appear in the decisions of the reported cases that the statutes under consideration were

as broad and sweeping as the Nebraska statute. A number of pharmacy acts that have been held unconstitutional by the courts of other states are not nearly so broad as the Nebraska statute; yet they were deemed to be an attempt to extend the police power beyond its legitimate scope. We recognize that there was a laudable purpose on the part of the legislature in enacting the pharmacy act, and, were it restricted so as to permit none but licensed pharmacists to sell medicines and drugs that are poisonous, dangerous, or deleterious to the public safety or health, or to such medicines as are prescribed by physicians, or require the pharmacist to make an analysis or inspection of the drugs and medicines by him sold and to certify to the purity thereof, we would have a different situation from that presented.

The pharmacy act under consideration permits the sale of patent and proprietary medicines by other than licensed pharmacists, but it purports to restrict to such pharmacists the sale of medicines and drugs listed in the United States Pharmacopœia or National Formulary. There is no requirement that the pharmacist shall make an analysis or inspection of any of the drugs or medicines that he may dispense or sell. It is apparent that it does not tend to promote public safety or welfare to limit to registered pharmacists the sale of such articles as salt, soda, soap, distilled water, corn starch, lard, and many other useful and harmless articles that may as well be dispensed by a grocer as by a pharmacist. We do not wish to be understood as holding that asperin is a harmless drug, or that its sale should not be limited to registered pharmacists, but we are confronted with the proposition that the act limits the sale of all "drugs and medicines," not only those which are poisonous, harmful, or deleterious, but, as well, those which are useful but harmless. No distinction is made in the act between distilled water, salt, soda, and other articles equally useful and harmless, on the one hand, and strychnine, arsenic, and opium, on the other. The court may not make the distinction because that is a legislative function. The provision, conferring on licensed pharmacists the ex-

clusive right to sell any of the articles listed in the United States Pharmacopœia or National Formulary, must either stand or fall in its entirety.

It will not do to say that because the legislature intended to promote the public health, safety, and welfare by the legislation in question, and that the sale of poisonous, harmful, or deleterious drugs and medicines should be restricted to licensed pharmacists, we should therefore hold the act valid. To do so would be to put it within the power of the legislature to prohibit the sale of practically every article of merchandise except by licensed pharmacists. We think no one will contend that it would be within the scope of the police power if the act purported to restrict to licensed pharmacists the sale of sugar, coffee, tea, or dairy products. If the act were so framed that we could eliminate from its operation those articles that are useful and harmless, and leave it in force as to those articles, when the public safety or health would be promoted, or calculated to be promoted, by restricting their sale to registered pharmacists, we would gladly do so. As the act is framed, however, we cannot differentiate and separate one class from the other. That is a legislative and not a judicial function.

We are constrained to hold that, in so far as the act limits to licensed pharmacists the sale of all articles listed in the United States Pharmacopœia or National Formulary, it transcends the police power and is therefore invalid.

The judgment of the district court is

AFFIRMED.

Note—See Constitutional Law, 12 C. J. 909 n. 32, 932 n. 33; 6 R. C. L. 238; 54 A. L. R. 733.

IN RE ESTATE OF ROBERT E. MOORE.
BIANCY K. TUTTLE, ADMINISTRATRIX, APPELLANT, V. JOHN L. TEETERS, ADMINISTRATOR DE BONIS NON, ET AL., APPELLEES.

FILED JUNE 4, 1929. No. 26583.

1. **Attorney and Client: COMPENSATION.** In determining the reasonable value of an attorney's services, the court should take into

account the qualifications and standing of the attorney, his fitness for the particular task, the intricacy or novelty of the legal questions involved, the amount in controversy, the extent and duration of his services, and the burden by him carried, including the element of responsibility to the imposed trust.

2. **Executors and Administrators:** ATTORNEY'S FEES. When making such determination in the matter of the administration of an estate of one having died testate, as evidenced by this record, the estate should be given the benefit of any doubts, if such arise from the inquiry, thus safeguarding the property of the deceased to the extent that it may pass to the persons, and be devoted to the purposes, by the testator intended, unless prevented by law or by events beyond the court's control.

3. ———: FINAL REPORT: ATTORNEY'S FEES. The final report of the executor to the county court is the statutory manner of submitting his final account for the court's consideration, which report may properly include as an item of costs the fee paid, or agreed to be paid, to an attorney, the necessity for such employment, and the reasonableness of such fee, as a part of the accounting prayed.

4. ———: ———: ———: REVIEW. Such submission calls for the exercise by the county court of its sound discretion, and the application of equitable principles in its determination thereof, which falls within such county court's equitable jurisdiction; and on appeal from the judgment rendered to the district court the same should be tried as one in equity, and if from the judgment rendered in the district court an appeal is had to the supreme court, such action should be by it tried *de novo*.

APPEAL from the district court for Lancaster county: WILLARD E. STEWART, FREDERICK E. SHEPHERD, and MASON WHEELER, JUDGES. *Reversed, with directions.*

C. J. Campbell and *Don D. Elliott,* for appellant.

C. Petrus Peterson, Charles R. Wilke, R. A. Boehmer and *Sanden, Anderson, Laughlin & Gradwohl, contra.*

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

THOMPSON, J.

Appellant seeks reversal of a judgment disallowing a claim of Samuel J. Tuttle for attorney fees against the estate of Robert E. Moore, deceased. The latter died tes-

tate on the 6th day of December, 1921, a resident of Lancaster county, possessed of an estate of the value of from $2,500,000 to $2,800,000, about $500,000 thereof being real estate and the remainder largely consisting of what is known as "gilt-edge" bonds and securities. To the will, and forming a part thereof, there were four codicils, which, when considered in connection with the will and all as one instrument, rendered it somewhat difficult of construction. The entire estate was disposed of thereby in part to his wife, certain of his relatives and friends, by specific bequests, and the residue thereof to the Lincoln Hospital Association, one of the appellees herein. The properties comprising this estate were the fruits of long years of toil and business acumen, as well as close application on the part of the testator, and consisted mostly of loans and investments. At an early stage in the accumulation of this fortune, and as an aid, he had called to his assistance his brother, John Moore, an attorney at law, and a man of tastes similar to that of his employer brother. Recognizing these qualities, and the fitness of his brother John for the place, he was designated in the will as the one who should administer this important trust as executor. On the death of the testator, such named executor employed Samuel J. Tuttle, hereinafter called Tuttle or claimant, one of the leading members of the bar of this state, to aid him in the administration. These parties, not being able to agree upon the fee to be charged for such attorney's services, concluded that the reasonable value thereof should be left to the determination of the court. The will with the four annexed codicils were presented to the county court for probate, which, without objections, were admitted, and John Moore appointed executor, who qualified and served until this case was tried in the county court and was pending in the district court.

Upon the estate being administered, and prior to the filing of the final report by the executor, Tuttle having been theretofore paid, at different intervals, to be applied upon such services the sum of $20,000, filed his claim for

$40,000, noting the credit of the $20,000 previously paid, and further stating therein that claimant "seasonably and in due time will submit herewith an itemized statement of the services aforesaid by him rendered," which he did. In the aforementioned final report, the above situation as to attorney fees was reflected, and by the executor submitted for the county court's determination, without assent or objection thereto, as a part of the costs of his administration of the trust imposed and as one of the items of his accounting. After consideration, it was determined by the county court that the amount which had previously been paid was a fair and reasonable compensation for all services rendered by such attorney, and the claim was disallowed. To reverse this judgment an appeal was perfected to the district court by claimant, as is usual in such cases. In the meantime claimant died, and the appellant herein was appointed administratrix of his estate and the case revived in her name as such; also the appellee John L. Teeters was appointed as administrator *de bonis non* of the estate in question (the executor having died) and filed objections to the allowance of the claim, to which a reply was interposed. After the issues were thus joined, the case was heard by the district court before three of its members sitting in banc. A vast amount of testimony was taken pro and con, also evidence introduced consisting of the records and filings of the county court which reflected the things done therein, including the name of the attorney who was in a personal way connected immediately therewith. Later, judgment was entered disallowing such claim. The representative of claimant appeals.

There are numerous alleged reasons set forth by each of the parties as to why their respective contentions should be sustained. However, our first consideration shall be given to the following question: "Is this case, as it comes to this court, for trial *de novo*, or are the findings of fact by the trial court entitled to the same force and effect as the verdict of a jury in a law action?"

In *Williams v. Miles*, 63 Neb. 859, we held: "County

courts of the state, which are by the Constitution and laws given exclusive original jurisdiction in all matters of probate settlements of estates of deceased persons, etc., have the power and authority, with respect to the subjects mentioned, to try and determine actions of an equitable character, and grant equitable relief, when proper, to the same extent as a district court regarding other subjects in the exercise of its general equitable jurisdiction." The above cited case will be found instructive as to the equitable jurisdiction of our county courts.

In *Reischick v. Rieger*, 68 Neb. 348, 353, in citing *Williams v. Miles, supra*, with approval, we held: "Within its exclusive jurisdiction, its chancery powers are plenary." And again, citing the same case with approval, in *Youngson v. Bond*, 69 Neb. 356, 358, we stated: "It is well settled that the county court has full and complete equity powers as to all matters within its exclusive jurisdiction."

In the course of the opinion in *Hazlett v. Estate of Moore*, 89 Neb. 372, 375, we said: "The law is that the estate of decedent is chargeable with the expenses of its administration. * * * In his final account an executor should ordinarily be credited with reasonable attorney fees paid by him in proceedings to probate the will. * * * The estate itself is ultimately liable for compensation for such services, and the rule is applicable to executors. It is the policy of the law to protect attorneys in their right to reasonable compensation. * * * If an attorney employed by an executor can satisfy his lien out of money in his hands, but belonging to the estate, why should not the estate answer to him directly, where no money to which a lien can attach comes into his possession? Having, at the request of executors charged with the duty of executing a will, performed services on behalf of the estate, why, in recovering his fees, should he be driven to the circuitous course of first pursuing the executor personally and afterward the estate itself? Under the Constitution and statutes the county court in the settlement of estates of deceased persons has the powers of a court of chancery."

Thus again our holdings in *Williams v. Miles, supra,* were approved and followed.

The allowance of attorney fees by the court is considered in the nature of costs, and should be thus treated. This necessarily involves an accounting and the exercise of judicial discretion, each inherent in a court of chancery. Clearly the issues here involve a trust fund, the executor being the trustee, deriving his power from the statute, and the claimant desiring to have a lien impressed thereon to the extent of the fees found due him.

The attorney fee, being an item of cost of administration, was properly carried in the executor's final report, and submitted as a part of the expense incident to the successful handling of the trust and the accounting therein prayed. In such case it is for the court to decide whether a necessity for such employment existed, and to make inquiry as to the reasonableness of the fee charged under the facts reflected by the record and evidence adduced at the hearing. In other words, the court should so determine after taking into account the qualifications and standing of the attorney, his fitness for the particular task, the intricacy or novelty of the legal questions involved, the amount in controversy, the extent and duration of his services, and the burden by him carried, including the element of responsibility to the imposed trust. In such determination the estate should be given the benefit of any doubts, if such arise from the inquiry, thus safeguarding the property of the deceased to the extent that it may pass to the persons, and be devoted to the purposes, by the testator intended, unless prevented by law or by events beyond the court's control. Such report is the statutory manner of submitting the final account of the executor for the court's consideration, and calls for the exercise of its sound discretion, so that equity and justice may prevail; thus clearly an equitable proceeding.

We entertain no doubt that this is a case exclusively within the jurisdiction of the county court, one which called for the exercise of its equitable powers, and comes to this court for trial *de novo.*

Contrary to the above view, our attention has been called to the following cases: *McIntosh v. Brown,* 159 Ia. 41; *In re Mitchell's Estate,* 178 Mich. 493; *Dearing v. Coulson,* 48 Ind. App. 414; *Starrett v. Brosseau,* 208 Ill. 408. We find, however, upon an examination thereof, that each is based on a contract entered into by the deceased in his lifetime with the claimant—clearly not analogous to the case before us.

Also we find cited by appellees *MacDonald v. Tittmann,* 96 Mo. App. 536, and *Baker v. St. Louis Union Trust Co.,* 234 S. W. (Mo. App.) 858. As to these cases it is sufficient to say that the statutory law of Missouri does not vest its probate courts with equitable jurisdiction, as stated in *Matson & May v. Pearson,* 121 Mo. App. 120, which is cited in the above named *Baker* case: "The reason for the old English rule that courts of chancery possess jurisdiction of all matters respecting administration and estates of deceased persons, does not obtain in this state because the statutory provisions are so ample with respect to such matters that they amount to an exclusion of equity jurisdiction." Yet in this case it is stated: "A court of chancery will not assume jurisdiction of a matter involving a demand against an estate of a deceased person unless the facts are such that adequate relief at law cannot be had."

Further appellees cite *McNulty's Estate,* 230 Pa. St. 387, and *Tracy v. Spitzer-Rorick Trust & Savings Bank,* 12 Fed. (2d) 755. The decision in the Pennsylvania case is not impelling in this, there being involved in that case a contest between two claimants for compensation for selling a piece of property which belonged to the estate. The executor took no part in the controversy. One party recovered, from which recovery the other appealed, and the appellate court affirmed the judgment of the trial court, and held that as the defeated claimant was without interest in the estate he was not in position to challenge the recovery of the winning party; and further, as the executor had not challenged the successful claim, he could not be heard on appeal to urge objections to the allowance thereof.

As to the *Tracy* case, it is in no manner controlling as to the proper construction of the laws of Nebraska applicable to the present action.

Applying the rules heretofore announced to the record: Tuttle's qualifications were of such impelling force as to induce the testator to employ him as his adviser, draftsman, and advocate for many years antedating, and leading up to, the former's death. Thus Tuttle knew the constituent parts of the estate, their respective values, and their needs, as did also the brother John. Between the testator, the brother, and this attorney, there was a friendly understanding as well as an abiding faith in each other's ability and integrity. They naturally became possessed of a mutual desire that these accumulated properties be judiciously conserved. The testator, being fully cognizant of these facts, logically was led to name this brother as executor, and the latter to select as his aid and counselor the attorney Tuttle.

The evidence on the part of claimant was that of eminent attorneys, given by way of a hypothetical question propounded to each, together with those possessed of personal knowledge of the time and attention Tuttle had given to the matters involved. That on the part of the objector was largely based on services that the respective witnesses (men of equal standing at the bar) claimed to know that Tuttle had rendered to the estate. These respective estimates created a variance of opinion ranging from $15,000 to $20,000 as to what a reasonable fee would be. Further, three members of the district court heard all of the testimony that is now before us, and, so far as the consideration of the case here is concerned, must be concluded to have applied to the facts developed at the trial their individual experiences.

The consensus of opinion of claimant's witnesses is that the $20,000 paid to Tuttle lacks many thousands of dollars of being an adequate fee for the services rendered. The consensus of opinion of objector's witnesses is that the $20,000 was in excess of the fee that he should have received. The trial court found that the $20,000 paid was ample.

We have with much care observed each exhibit submitted, as well as considered all of the evidence, and this in the light of the able briefs that have been furnished on either side. As illustrative of the conclusion that we are about to reach, it might be well to suggest the following undisputed facts: The will, as well as each of the codicils connected therewith, were admitted to probate without contest; the executor was possessed of more than ordinary knowledge and equipped with unusual ability to handle the properties of the estate in every detail, aided by the advice of his attorney; the executor conducted the business after his appointment the same as it had been in the lifetime of the testator, so far as collecting and preserving the assets of the trust; that immediately on the will being admitted as above indicated, the widow (the testator having died without issue) rejected the provisions of the will and codicils, and elected to take her distributive share of the total property, as provided by statute, to wit, one-half of the entire estate; that in so doing she employed for herself an attorney, generally speaking of equal ability to that of Mr. Tuttle, and that he, without opposition on the part of Tuttle, associated himself with the latter in the further administration of the estate to the extent of looking after the interest of his client, the widow. While this action on the part of the widow's attorney would not of itself relieve Mr. Tuttle or the executor of the responsibility resting upon each thereof in the further administration of these properties, it was at least an aid to them in the performance of their respective duties. It should further be noted that, as to the federal inheritance taxes, special attorneys were employed at Washington, with the consent, if not under the direction of, Tuttle, which attorneys assumed and retained sole charge of that part of the estate's administration. The legal effect of the widow's election, and of the death of one of the legatees who died leaving heirs of his body prior to the death of the testator, were questions vital only to those possessed of a legal interest in the property or a part thereof, and entitled to share in its final distribution. This was

recognized by all of such parties in the proceedings instituted by certain heirs in the federal court, which will be found reported in *Moore v. Lincoln Hospital Ass'n,* 6 Fed. (2d) 986, in which case the executor, through Tuttle, filed simply an informatory answer and took no further part.

It might be well to also make mention of the fact that Tuttle was taken seriously ill the latter part of November, 1923, and was confined from that time until the first of February, 1924; that in the meantime the executor, at the instance of Tuttle, employed another attorney who took active charge of the legal matters involved, at all times recognizing Tuttle as his superior as to the legal burdens carried, and so continued to recognize Tuttle until the close of the trust. However, after his employment, he prepared certain papers and presented certain matters to the county court, Tuttle being frequently present at the hearings in an advisory capacity, but taking no part in the oral arguments. At the time the claim here in question was filed, September 25, 1925, this attorney lodged with the county court for allowance a claim for the services by him rendered for the sum of $17,135, to which no objections were interposed, which after hearing had was allowed in the sum of $16,000, and by the executor paid. The services liquidated by such allowance and payment were covered by the Tuttle contract of employment, and would have been by him performed but for his aforesaid sickness. It will be observed that we have not in any manner attempted, save in a very general way, to outline the services rendered by Tuttle, preferring to suggest some of the things he did not do, and not to burden this opinion with a detailed statement of the numerous things he did do; thus leaving for our determination what would be a reasonable fee for the entire burden carried and services rendered under Tuttle's contract with the executor, whether performed by him, or for him by his assistant. As such assistant was employed by the executor at the request of Tuttle, to do and perform that which Tuttle should have done, and would have been compelled to do, under such contract, there should be deducted from the

compensation found to be due to Tuttle the $16,000 allowed and paid such assistant, as Tuttle under this record cannot be heard to complain of the amount paid by the executor to such assistant. We find ourselves unable to agree with the claimant that he is entitled to an additional allowance of $20,000, or with the objector that Tuttle has been overpaid, or with the trial court that the $20,000 paid is a reasonable fee. Tuttle's contract was that he would carry the burden devolving upon him and perform all services necessary for him as such attorney to perform. With this contract he faithfully complied; to do that which he was unable to perform he supplied another equally competent. This was satisfactory to the court, the executor, and all concerned. The county court, as well as the trial court, must have been impressed with the belief that Tuttle was virtually out of the case from the time his assistant stepped in. We are strengthened in this conclusion by the testimony of the county judge then presiding, given at the trial in the district court. The evidence is clearly to the contrary. Tuttle never ceased to carry the burden, and his fee should be gaged accordingly. His efficiency and adaptability for the task imposed are unquestioned, as they well might be. Neither is there in this entire record that which would give rise to even a suspicion that the estate, and everyone connected with it, did not at all times receive the very utmost that this attorney was able to give of his attention, time, effort, and wisdom.

The evidence, considered as a whole, clearly warrants us in establishing the fair and reasonable fee due to Tuttle, under his contract with the executor, as we find, at $40,000. From this we deduct the $16,000 paid the assistant attorney, and the $20,000 heretofore paid for which credit is given on the claim filed, leaving a balance due from the estate of Robert E. Moore, deceased, to the appellant herein in the sum of $4,000, with interest thereon at 7 per cent. per annum from the date of the disallowance of the claim in the county court, together with all taxable costs in the three courts.

The judgment of the district court is reversed and the cause remanded to such court, with directions to enter judgment in conformity with this opinion, and to require such judgment to be certified to the county court.

REVERSED.

GOOD, J., dissents.

Note—See Attorney and Client, 6 C. J. 750 n. 21 to 27—Executors and Administrators, 24 C. J. 98 n. 18, 104 n. 96, 1051 n. 22; 25 L. R. A. n. s. 75, 76; 11 R. C. L. 234; 2 R. C. L. Supp. 1225.

E. J. DEMPSTER, RECEIVER OF THE BANK OF CASS COUNTY, APPELLANT, V. MYRTLE P. ATWOOD ET AL.: BYRON CLARK, APPELLEE.

FILED JUNE 4, 1929. No. 26590.

1. **Banks and Banking**: STOCKHOLDERS: LIABILITY: ESTOPPEL. A person who voluntarily assumes the status of a stockholder and director of a bank is estopped as against creditors to deny that he is a stockholder when it is sought to hold him liable for the superadded constitutional liability under section 7, art. XII of the Constitution.

2. ———: ———: ———: AGREEMENT WITH STATE BANKING DEPARTMENT. An alleged arrangement or agreement between a representative of the state banking department and a person to the effect that, if such person would permit stock of a bank to be put in his name to enable him to become a director in a bank so as to compose differences which had arisen between two factions of stockholders, said stock should not actually become his and that he would not be held liable thereon for the superadded stockholders' liability provided by section 7, art. XII of the Constitution, is void as against the provisions of the Constitution and a fraud on creditors.

3. ———: ———: ———: The stockholders made liable by section 7, art. XII of the Constitution, which provides that "Every stockholder in a banking corporation or institution shall be individually responsible and liable to its creditors over and above the amount of stock by him held to an amount equal to his respective stock or shares so held, for all its liabilities accruing while he remains such stockholder," are those who are such when the credit was extended to the bank or the liability incurred by the bank.

4. **Evidence** examined, and *held* that a *prima facie* case was made against defendant for the double stockholders' liability.

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

C. M. Skiles and *I. D. Beynon* for appellant.

Jesse L. Root, H. E. Kuppinger and *William A. Robertson, contra.*

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

LIGHTNER, District Judge.

Suit by the receiver of the failed Bank of Cass County, Plattsmouth, Nebraska, to recover the superadded or double stockholders' liability. The lower court found for the defendants and dismissed the action. The receiver appeals and the only matter presented by the appeal relates to the liability of the defendant Byron Clark.

The bank was suffering on account of dissention between two factions of stockholders and, on October 4, 1920, twenty-one shares of stock were issued to Mr. Clark and at about the same time he became a director of the bank. Mr. Clark claims, however, that he never actually became the owner of this stock and that the transfer was made to him at the request of one J. Hart, a representative of the state banking department, who induced Mr. Clark to accept a transfer of the stock and go on the board of directors for the purpose of composing the differences between the two factions and otherwise stabilizing the bank and giving the people of the community confidence in it. Mr. Clark continued to be the ostensible owner of the stock and remained on the board of directors until the final failure of the bank and the taking of it over by the department on December 13, 1921. During that time he attended the directors' meetings. There is no proof that he ever paid for or became the actual owner of the stock. The fact that Mr. Clark became a member of the board of directors was given wide publicity

and there is no doubt but that the general public believed him to be the actual owner of stock and a member of the board of directors of the bank. Plaintiff claims that defendant Clark is estopped by these facts from now claiming that he was not a stockholder.

In regard to Mr. Clark's defense that he never actually became the owner of the stock we think that the same is not available to him. In 6 Fletcher, Cyclopedia Corporations, sec. 4184, it is said:

"A person who voluntarily permits his name to stand on the corporate books as a stockholder is estopped as against creditors to deny that he is one, whether it is sought to hold him liable for a balance due on the stock or for an additional statutory liability. So a transferrer of stock remains liable as a stockholder if he continues to appear as a stockholder on the corporate books. Nor, as a rule, can a person who appears on the books as the absolute owner of stock escape liability on the ground that he holds it merely as a pledgee, or merely as trustee or agent for another."

This would seem to follow from the rule which prevents one who has been induced to purchase stock by fraud from rescinding after the insolvency of the bank as to creditors of the corporation. Numerous cases so hold, including the recent case of *Smith v. Bradshaw,* 222 N. W. (S. Dak.) 683. The reason for the rule is well stated in *Farmers State Bank v. Empey,* 35 S. Dak. 107, wherein it is said in the opinion:

"No doubt the general rule, under a law such as the one before us, is that, where one becomes a purchaser of bank stock in consequence of frauds practiced upon him by another, whether such other be an officer of the bank or a mere stockholder, such purchaser must look to the wrongdoer for redress, and is estopped, as against creditors, to deny that he is a shareholder, if at the time the rights of creditors accrued he occupied and was accorded the rights appertaining to his position as shareholder. Michie, Banks and Banking, 1882; *Scott v. Latimer,* 89 Fed. 843. Certainly a creditor of a corporation, when he becomes such, is under no obligation to ascertain what representations, if

any, may have been made to the stockholders to induce them to become such."

In *State Bank v. Gotshall,* 51 A. L. R. 1200 (121 Or. 92), it is held:

"Fraud inducing one to purchase bank stock cannot be urged as a defense in an action under a double liability statute against the stockholders by the state superintendent of banks, upon the insolvency of the bank, since the purpose of the statute is to protect depositors and creditors."

In *Commissioner of Banks v. Cosmopolitan Trust Co.,* 253 Mass. 205, 220, it is said in the opinion:

"Those who avowedly assume the relation of stockholders to such institutions in a sense stand sponsor for it. Public confidence in such institutions ought not to be shaken by relieving apparent stockholders from their ostensible liability, established by the law for the benefit of creditors, for any except the most potent and convincing reasons."

Many other cases to the same effect are cited in the opinion, and in the note at 41 A. L. R. 674. While these are nearly all cases of attempted rescission on account of fraud, the same reason holds good in the instant case. Mr. Clark was held out to the public as a stockholder and director. The creditors of the bank were under no obligation to ascertain the status of each stockholder. They could rely on those being stockholders who held themselves out or were held out to be such. Appellee's first contention must therefore be overruled.

Neither would the fact that there was an arrangement with Mr. Hart constitute a defense to this action. In *Markus v. Austin,* 284 S. W. (Tex. Civ. App.) 326, it is held:

"If the commissioners of banking and stockholder of bank entered into agreement that, on payment of assessment restoring impaired capital, stockholder would not be held liable for assessment provided by Rev. St. 1925, art. 535, such agreement was void as against provisions of law and fraud on creditors."

To the same effect see *Scovill v. Thayer,* 105 U. S. 143, and *Sanger v. Upton,* 91 U. S. 56. These cases hold in effect

that any such arrangement is void because it is against the provisions of the law and a fraud upon the creditors whose protection was provided in said law, that the law could not be rendered nugatory by an agreement or contract between the respective stockholders and the banking department, much less a single member of the banking department.

The principal reason, however, urged by appellee on oral argument in support of the judgment of the lower court was that there was no proof that any of the claims of creditors accrued during the some 14 months during which appellee remained an apparent stockholder of the bank. Section 7, art. XII of the Constitution, which makes stockholders liable for the superadded liability is as follows:

"Every stockholder in a banking corporation or institution shall be individually responsible and liable to its creditors over and above the amount of stock by him held to an amount equal to his respective stock or shares so held, for all its liabilities accruing while he remains such stockholder, and all banking corporations shall publish quarterly statements under oath of their assets and liabilities."

This constitutional provision limits the liability of the stockholder to those debts or obligations which arose or were incurred while he remained a stockholder. The meaning of the constitutional provision is that the persons who are stockholders of a bank when credit is extended to it, or a liability incurred by it, shall be liable to the creditors to an amount equal to their stock. *Golden v. Cervenka,* 278 Ill. 409. The above case construes a similar provision in the Constitution of the state of Illinois.

Appellant calls our attention to and asks us to follow the case of *Duke v. Johnson,* (123 Wash. 43), 211 Pac. 710, wherein it is held:

"Within Const. art. XII, sec. 11, and Rem. Comp. St., sec. 3242, making every stockholder of any banking corporation liable for its debts to the extent of the par value of his stock, the stockholders referred to are those who own stock in the bank at the time of its insolvency.

"Within Const. art. XII, sec. 11, and Rem. Comp. St., sec.

3242, making every stockholder of a bank liable to the extent of the par value of his stock for debts accruing while they remained such stockholders, the word 'accruing' is used in the sense of 'which have accrued.' "

Section 11, art. XII of the Constitution of Washington, is almost identical with section 7, art. XII of our own Constitution, and is as follows:

"Each stockholder of any bank or insurance corporation or joint-stock association shall be individually and personally liable equally and ratably, and not one for another, for all contracts, debts, and engagements of such corporation or association accruing while they remain such stockholders, to the extent of the amount of their stock therein at the par value thereof, in addition to the amount invested in such shares."

We have carefully read the opinion in *Duke v. Johnson, supra.* The construction given to the Washington Constitution in that case seems to us to be somewhat strained. It would prevent a stockholder who was such at the time of the insolvency from alleging and proving that the liabilities for which he was sought to be held accrued prior to the time he became a stockholder. Our Constitution makes him liable only "for all its liabilities accruing while he remains such stockholder." To make him liable for liabilities which accrued prior to the time he became a stockholder would be in plain violation of our constitutional provisions. The Washington court defines the word "accruing" to mean "which have accrued," and it holds that the liabilities referred to are those existing at the time of the insolvency; in other words, those liabilities that mature or become liabilities by reason of the insolvency. We do not think that such is the meaning of our constitutional provision. The stockholder is liable only for liabilities accruing or arising while he remains a stockholder. Our Constitution does not lay down any rule as to the burden of proof.

Appellant earnestly contends that the burden in these cases is not on the plaintiff to show that liabilities accrued

while defendant remained a stockholder, but that it was on the defendant to show that there are no creditors who became such while he remained a stockholder. Appellant cites a number of cases in support of this rule, including the recent case of *Smith v. Bradshaw,* 222 N. W. (S. Dak.) 683. To the same effect is *Farmers State Bank v. Empey,* 35 S. *Dak.* 107, and *Chapman v. Harris,* 275 S. W. (Tex. Civ. App.) 75. Appellee attempts to distinguish these cases on the ground that they were actions to rescind, but they were not. They were suits by creditors of the bank or by a commissioner or receiver to collect the superadded liability, in which the defense was either that defendant had rescinded the purchase on account of fraud or that he was entitled to rescind it on account of fraud. However, the constitutional and statutory provisions are different in the different states, and the provisions creating the liability in the cases above referred to and in other cases we have examined are so different from those of our Constitution as to be of little value in furnishing a guide to govern us in this case. Our Constitution makes the stockholder liable only "for all its liabilities accruing while he remains a stockholder" and it would seem necessary for the plaintiff to allege and prove that the liabilities or some of them accrued while the defendant remained a stockholder. The general rule is: "The facts without the existence of which the statute does not enforce liability on the stockholder in a bank for its debts must be affirmatively shown." Michie, Banks and Banking, 242. The appellant recognized this rule, for he alleges in the petition that the amount remaining unpaid "are liabilities accruing while the present stockholders of said bank remained stockholders thereof." It is not always necessary, however, for a party who has the burden of proving a fact to make direct proof thereof. Facts and circumstances may appear of record, or there may be presumptions, which aid a party and make a *prima facie* case in his favor. Thus the fact that defendant Clark was a stockholder at the time of the insolvency of the bank might alone be sufficient to make a *prima facie* case against

him. The legislature seems to have assumed that such is the meaning of the constitutional provision. Section 8015, Comp. St. 1922, provides as follows:

"Every stockholder in a banking corporation shall be individually liable to its creditors, over and above the amount of stock by him held, to an amount equal to his respective stock or shares so held, for all its liabilities accruing while he remains such stockholder. In case any stockholder shall sell, transfer or dispose of such stock, knowing that such bank is insolvent, he shall be deemed the owner of such stock, and liable thereon the same as if such stock had not been sold, transferred or disposed of; and such liability may be enforced whenever such banking corporation shall be adjudged insolvent without regard to the probability of the assets of such insolvent bank being sufficient to pay all of its liabilities."

While the last part of said section, reading "and such liability may be enforced whenever such banking corporation shall be adjudged insolvent without regard to the probability of the assets of such insolvent bank being sufficient to pay all of its liabilities," was declared unconstitutional in the cases of *Bodie v. Pollock,* 110 Neb. 844, and *State v. Farmers State Bank,* 113 Neb. 497, the remainder of it remains in force and would indicate that the legislature interpreted the constitutional provisions to mean that, if the sale is made without the seller knowing that the bank is insolvent or while the bank actually is solvent, the seller is relieved from the liability and the purchaser becomes liable. This indicates that the construction placed on the Constitution by the legislature was that the stockholders who were such at the time the bank failed would ordinarily be liable for the superadded liability. It is true that we have held that the constitutional provisions are self-executing and that the stockholder's liability thereby created is free from legislative interference. The latest statement of this rule is found in *State v. Citizens State Bank of Royal, ante,* p. 337. *Bodie v. Pollock,* 110 Neb. 844, and other cases are cited in the opinion. However, these cases do not

hold that the practical construction put upon the Constitution by the legislature is not entitled to some weight. As a rule, transfers made in good faith and in accordance with legal requirements are valid and release stockholders from subsequent liability, while new purchasers are liable on the bank's failure for its indebtedness without reference to the time it was incurred. 7 C. J. 504. A construction making those stockholders *prima facie* liable who were such at the time of the insolvency of the bank is well within the purview of the constitutional and statutory provisions. Section 7, art XII of the Constitution, and section 8015, Comp. St. 1922, indicate that both the framers of the Constitution and the legislature intended to make those stockholders *prima facie* liable who were such at the time of the insolvency of the bank. Those who administer the banking law, including, in so far as we know, the district courts, have construed the above constitutional and statutory provisions to refer to the stockholders who were such at the time of the insolvency of the bank. It is customary for the receiver in his report asking authority to bring the suit to refer only to the stockholders who were such at the time of the insolvency of the bank and the order of the court authorizing suit refers to such stockholders. We think that a fair and reasonable interpretation of the constitutional and statutory provisions and the meaning that has been generally given to them is that the stockholders referred to are *prima facie* those who were such at the time of the insolvency of the bank. However, the proof in this case goes much further in establishing a *prima facie* case against Mr. Clark than the mere showing that he was a stockholder at the time of the insolvency of the bank. It is established that Mr. Clark became an ostensible stockholder on October 4, 1920, and remained such until the bank was taken over by the department on December 13, 1921, a period of 14 months and 9 days; that during said time the bank was actually engaged in the banking business. A report of the condition of the bank on August 6, 1920, shows assets of $788,527.93, individual deposits subject to check, $280,237.94, time cer-

tificates of deposits, $324,547.01. A report on November 13, 1920, shows assets of $749,594.47, individual deposits, $258,824.72, time certificates of deposits, $304,015.70. A report dated February 16, 1921, shows total assets of $643,-055.74, individual deposits, $193,393.37, time certificates of deposits, $288,289.16. The report of May 23, 1921, shows total assets of $623,974.10, individual deposits, $153,726.25, certified checks, $262,403. The prior and subsequent reports would indicate that the item of certified checks was listed wrong through clerical error and that probably what was meant was time certificates of deposit. The last report in evidence is that dated August 6, 1921, and shows total assets, $658,054.93, individual deposits, $177,959.30, time certificates of deposits, $262,770.81. It is common knowledge that time certificates are usually issued for either six months or one year, and in *Fremont State Bank v. Vincent*, 112 Wash. 493, it was held that, when an original certificate of deposit was taken up by the issuing bank, interest paid thereon and new certificate issued, the liability accrued, not when the original certificate was issued, but when the new certificate was issued. The liability on an ordinary checking deposit accrues when the deposit is made. *Golden v. Cervenka*, 278 Ill. 409. It is also generally known that banking is an active business, representing, as it does, the liquid assets of the community. It is characterized by a rapid turnover and ordinarily the daily deposits in a bank average from 1½ to 2 per cent. of its total deposits. It further appears from the record in this case that the capital stock of the bank was $50,000 during the 14 months Mr. Clark was connected with it. The district court for Cass county on December 10, 1926, found that all the debts and liabilities of said bank were $470,-488.12, that all of the corporate property had been exhausted and $307,965.98 realized therefrom, that $13,500 had been realized from the double liability of stockholders, and that there remained unpaid at said time $149,022.14, and suit against the remaining stockholders, including Mr. Clark, was authorized. These findings, though not conclu-

sive, were sufficient *prima facie* evidence of the facts therein found so as to cast the burden of disproving them on Mr. Clark. *Miller v. Connor,* 177 Mo. App. 630. And we think that from these findings and from the facts above referred to it may be found that there are creditors of the bank whose claims arose during the time Mr. Clark remained a stockholder. In fact, a careful examination of the pleadings, evidence and briefs in this case convinces us that all parties assumed during the trial that the indebtedness arose while Mr. Clark remained a stockholder.

For the various reasons above set forth, the judgment in appellee's favor is reversed and the cause remanded to the district court, with instructions to enter a judgment against appellee for the sum of $2,100, together with interest at the rate of 7 per cent. per annum thereon from and after the 12th day of March, 1927.

REVERSED.

The following opinion on motion for rehearing was filed November 22, 1929. *Former judgment vacated, and judgment of district court reversed.*

1. **Paragraphs of Syllabus Approved.** Paragraphs 1, 2, and 3 of the syllabus of our former opinion in this case, *ante*, p. 579, found to be correct statements of the law applicable to the facts involved.
2. **Judgment Vacated.** Paragraph 4 of such syllabus is set aside, and the judgment heretofore entered in this court vacated.
3. ———. Record reexamined, judgment of the trial court set aside, and cause remanded for further proceedings.

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

PER CURIAM.

This is an action in equity brought by the receiver of an insolvent state bank to enforce the double stockholders' liability provided by section 7, art. XII of our Constitution, against Clark, appellee, and others, the names of whom it is not necessary to mention, in which judgment was entered dismissing the suit. The receiver appealed. After the case was by us heard and considered, an opinion was

submitted and adopted reversing the judgment of the trial court, and ordering it to enter judgment as follows: "For the various reasons above set forth, the judgment in appellee's favor is reversed and the cause remanded to the district court, with instructions to enter a judgment against appellee for the sum of $2,100, together with interest at the rate of 7 per cent. per annum thereon from and after the 12th day of March, 1927." The opinion is reported *ante,* p. 579. Thereafter Clark filed a motion for a rehearing which was set down for argument to the court. After such hearing was had, and reinvestigation made, it was by us determined that the rules announced in paragraphs 1, 2, and 3 of the syllabus of the original opinion are correct statements of the law applicable to the facts involved, but that further consideration should be given to paragraph 4 of the syllabus, which is: "Evidence examined, and *held* that a *prima facie* case was made against defendant for the double stockholders' liability."

We have, with much care, reread the bill of exceptions, and conclude that there is convincing evidence tending to prove that there are liabilities reflected which accrued while Clark remained a stockholder. However, the questions stressed in the trial court were those covered by our holdings in paragraphs 1, 2, and 3 of the syllabus hereinbefore referred to, and we are thus left without those necessary details which would enable us to intelligently compute the amount of the above indicated liabilities, and this without tangible fault chargeable distinctively to either party to the suit. Hence, to hold as we did in the original opinion that a mandatory judgment should be entered in favor of the plaintiff, or, as insisted upon by appellee Clark, that the judgment of the trial court should be affirmed, would be to deny to the litigants in this case that which they are each fundamentally entitled to, to wit, a fair trial.

As to paragraph 4 of the syllabus, for the reasons stated herein, the same is set aside, and the judgment heretofore entered in this court is vacated; and the judgment of the trial court is set aside and the cause remanded for further

proceedings in harmony with this opinion, with leave to the respective parties, if they so desire, to reform their pleadings to conform with the views expressed herein.

REVERSED.

MORRIS SWARTZ V. STATE OF NEBRASKA.

FILED JUNE 13, 1929. No. 26827.

1. **Criminal Law**: MISCONDUCT OF PROSECUTOR. Ordinarily, unless the fundamental rights of a defendant on trial in a criminal action are violated by the misconduct of a prosecutor in his language to the jury, the defendant must make timely objection thereto so that the trial judge may have an opportunity to rule thereon in the presence of the jury and to correct whatever prejudice might otherwise result.
2. **Homicide**. "Homicide committed in the perpetration of a robbery is murder in the first degree, and in such a case the turpitude of the act supplies the element of deliberate and premeditated malice." *Pumphrey v. State*, 84 Neb. 636.
3. ———: SENTENCE REDUCED. Evidence as to the guilt of defendant has been examined, and *held* sufficient to support the verdict, but the sentence is reduced from the death penalty to imprisonment during the term of his natural life.

ERROR to the district court for Douglas county: JAMES E. RAIT, JUDGE. *Affirmed as modified.*

C. E. Walsh and *Henry G. Meyer*, for plaintiff in error.

C. A. Sorensen, Attorney General, and *Irvin A. Stalmaster, contra.*

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

GOSS, C. J.

Morris Swartz was convicted of murder in the first degree while attempting to rob Roy L. Tinkham, the victim. The jury fixed the death penalty. Judgment was entered sentencing the defendant to death. Defendant brings the case here on error proceedings.

Plaintiff in error sets out many assignments of error. Some are argued but others are not. Such as appear to

be relied on or seem of sufficient importance to be discussed will be treated of as we proceed.

Misconduct of one of the prosecutors is urged in this, that in his address to the jury he said: "I declare Morris Swartz guilty of murder in the first degree and I will prove it to you, men of the jury, by Swartz' own attorneys. Let us see what they think of the innocence of Morris Swartz. At the opening of this case they offered to plead him guilty to second degree murder and to take life imprisonment in the state penitentiary but this offer was refused by the court. That is what his attorneys think of his innocence."

The trial began on October 1, 1928, and was concluded on the 4th day of that month. The bill of exceptions does not show that the final arguments were reported or that any objection was made during such argument. Indeed, it shows that one of the counsel for the defendant, by affidavit sworn to by him on November 2, 1928, and filed on that day, first brought this alleged language of the prosecutor to the notice of the court in its entirety. He had, however, on October 18, 1928, sworn to an affidavit, which the bill of exceptions shows was filed October 24, 1928, in which he attributed to the prosecutor this language in the final argument: "Gentlemen of the jury, let us see just how innocent the defendant Swartz is. Let us see how innocent his own attorneys think he is. At the opening of this trial they (meaning the attorneys for Swartz) offered to plead him guilty to second degree murder and to take life imprisonment. That's what they think of his innocence." On the hearing of the motion for a new trial, the bill of exceptions shows the prosecutor expressly denied that at any time during the argument he made the statement either in tenor or effect that "I declare the defendant guilty of murder in the first degree."

Had he made such a statement to the jury as to his belief in defendant's guilt, it would have been very reprehensible and prejudicial. That he made it has doubt cast upon it by the failure of defendant's attorney to include it in the first affidavit made on the subject. However, de-

fendant is concluded by the finding of the court overruling the motion for a new trial. The trial judge heard the arguments made to the jury and passed on this issue of fact presented on the motion for a new trial. The bill of exceptions shows that after the beginning of the trial, at least after Mrs. Tinkham, the first witness, was sworn, the very counsel who made the affidavits from which we have quoted, apparently in the hearing of the jury, made this record: "If the court please, I would like to offer this motion: 'Comes now the defendant and enters his offer of the defendant, Morris Swartz, to plead guilty to second degree murder and to accept a sentence of life imprisonment, and requests that the said plea and offer to plead be accepted and that he be given a life sentence under such plea.'" This motion was overruled by the court and the examination of the witness proceeded. It would thus seem as if the other words of the prosecutor (than those alleged as an expression of his belief) were based upon matters which the jury had heard in the trial. If there was anything prejudicial in the comment thereon, counsel for the defendant should have made objection at the time of the argument. Such action would have given the court an opportunity to pass upon the question and, even if erroneous but not prejudicial, to counteract its effect upon the jury. To hold otherwise, in the circumstances, would allow the defendant to sit quiet and speculate on a favorable verdict from the jury and, on failure of that, to demand a new trial before another jury. Ordinarily, unless the fundamental rights of a defendant on trial in a criminal action are violated by the misconduct of a prosecutor in his language to the jury, the defendant must make timely objection thereto so that the trial judge may have an opportunity to rule thereon in the presence of the jury and to correct whatever prejudice might otherwise result. *Catron v. State,* 52 Neb. 389; *Reed v. State,* 66 Neb. 184; *Clark v. State,* 79 Neb. 482.

Plaintiff in error complains because the court refused an instruction requested by him to the effect that the jury

might find the defendant guilty of murder in the second degree, or of manslaughter, and because the court refused another instruction relating to proof of premeditated malice before the jury could find the defendant guilty of first degree murder. These instructions were not applicable to the information under which the defendant was prosecuted. The information was laid under section 9544, Comp. St. 1922, and charged the defendant with homicide in the perpetration of a robbery. The same section provides, also, for ordinary first degree murder based on "deliberate and premeditated malice," in many instances of which offense it may be proper to submit second degree murder and manslaughter, but the offense with which the defendant was charged is another, comprehended in the same section but set off by the alternative "or." As we said in *Pumphrey v. State*, 84 Neb. 636: "Homicide committed in the perpetration of a robbery is murder in the first degree, and in such a case the turpitude of the act supplies the element of deliberate and premeditated malice."

Plaintiff in error in his brief makes rather casual references to section 9544 as "unconstitutional," but does not point out any legal reasons for the unconstitutionality. As no particular ground therefor is pointed out or obtrudes upon our consciousness, we do not find it necessary to pass on that question in this opinion.

In the last paragraph of their brief, counsel for plaintiff in error say:

"Personally the writers believe that society and the man himself would be better served and protected were this court to commute the sentence of defendant to life imprisonment, and so defendant respectfully moves the court for the reasons above set forth for an order commuting the sentence of defendant Morris Swartz from death to life imprisonment, or to grant him a new trial, as this court in its judgment deems best."

Roy L. Tinkham, the owner of a drug store on the northeast corner of Thirty-third and Cumings streets, in Omaha,

was killed therein on Sunday, August 19, 1928, shortly after 4 o'clock in the afternoon. The defendant and Dave Smith, who was jointly informed against but was not tried with defendant, drove, in a stolen car, one block north of the store and parked the car on the east side of Thirty-third street just north of Lincoln Boulevard. They left the engine running and walked back to the store. Entering, they saw Russell Salisbury, the clerk, who was behind the cigar counter, and Lee Foster, a 17 year old clerk and soda boy, who was standing near the door. This door is at the southwest corner of the store. No customers were present. Smith entered first and asked for a well-known drink and the boy went behind the soda counter on the east side and began to prepare to serve it. Defendant entered just behind Smith. Simultaneously Smith covered Foster and defendant covered Salisbury with revolvers and ordered them to the back of the store. The two pairs went beyond a partition, one pair on the east side and the other through an opening on the west. As the bandits reached the back part of the store behind the partition, they discovered Mr. Tinkham sitting at his desk near the northwest corner of the prescription room, reading, with his feet on the desk. One said: "Stick 'em up." Mr. Tinkham turned around, jumped up, reached for his gun that he kept in a case on his desk, and Swartz shot in his direction two or three times. One of the shots hit Mr. Tinkham and as a result thereof he soon died, without speaking. Defendant and Smith went out the front door and the clerks went down a stairway into the basement, their departure hastened by shots in their direction. Foster went out on Thirty-third street on his way to a so-called "pill-box" to get the officers and was shot at by defendant who was going north to the parked car. The police department maintains a place for two motorcycle officers in Bemis Park at a point just west of Thirty-third street on the north side of Cuming street. The officers had heard shots in the store and were ready for action. They overtook defendant and Smith at the car and took them into custody after one of

the officers shot Swartz, inflicting a superficial wound, as Swartz had his gun pointed at the officer. On examination it was found that the defendant had discharged all the shells in his revolver. The evidence shows beyond a reasonable doubt that Swartz and Smith went to the Tinkham store with the intent to secure drugs by robbery, and that Swartz fired the shot that killed Mr. Tinkham.

Upon the trial evidence was introduced by and on behalf of the defendant tending to prove that the condition of mind of the defendant was such at the time of the commission of the act that he was not of sufficient mental capacity to understand the difference between right and wrong as to the particular act charged and to know that the act was wrong. Upon this point the jury were appropriately instructed that the burden was therefore upon the state to prove the defendant's mental capacity beyond a reasonable doubt.

Defendant's plea for a commutation of his sentence, which we have quoted from his brief, is based on the power of judicial clemency conferred on this court by section 10186, Comp. St. 1922.

There is no doubt in our minds, after reading the entire record, that the defendant had long been a slave to the use of heroin, cocaine, and morphine. Much of the evidence produced before the jury was his own testimony on the subject. But he was so fully corroborated as to his habit by his physical condition that the fact seems clear to laymen as well as to experts.

Substantially this is his history, sketched from the hypothetical question put by the prosecutor to the state's expert, but based on the evidence. Born in July, 1898, in Paris, France, premature by two months, of a tubercular mother, who died shortly after his birth; within six months his father brought him to Philadelphia and within a year placed him in the care of his grandparents, remarried and has had nothing to do with him since; at a tender age he fell out of a second story window, injuring his head, but leaving no marks; his grandparents reminded him he was not wanted; at the age of seven he broke a leg, at eight some

ribs were crushed, and at nine a horse kicked and injured him; at eleven or twelve he ran away and went to North Carolina, remaining some months; returned to Philadelphia to his grandparents for a time, thence to New York for a year, thence to California for a year, thence to Philadelphia; when about eighteen years old he went to New York, where he worked and started to use drugs; used drugs for a period of about eight months before he knew he was an addict; thence he went to California, where he remained for a time, using drugs, begging money to procure them; in 1917 he went to Chicago and remained for a time in a tuberculosis sanitarium; attempted to enlist in our army but was rejected; went to Baltimore and signed up in the British Merchant Marine and remained in that service until a month before the armistice was signed; during his service he was on sick leave twice; after that service he was arrested in New York for having narcotic drugs in his possession and was confined four months (for a cure) before trial and then was convicted and detained for an additional time; from there his whereabouts became somewhat uncertain until the early part of 1927, when he was in California and in jail at various times for the possession of drugs; some time in 1927 he left California and went to Butte, Montana, thence to Sioux City, and traveled from there to different places until in August, 1928, when he met Dave Smith in Chicago; about August 5 he and Smith left Chicago, having in their possession an ounce of morphine and an ounce of cocaine, and went to Kansas City, Missouri; before they left Kansas City the morphine supply was exhausted and the cocaine supply almost exhausted; they left Kansas City August 15, 1928, going to St. Joseph, Missouri, and from there to Hamburg, Iowa; they obtained no more drugs until they arrived at Hamburg, where two grains of morphine were obtained and divided between the defendant and Smith; from Hamburg, Iowa, they went to Omaha on a freight train, arriving at Gibson, a suburb, Saturday, August 18, early in the morning; on the 18th of August they were unable to procure drugs in Omaha except a small

quantity of cocaine in solution and searched over town that day in an effort to procure drugs and found none; they obtained a room in the lower part of Omaha, where they spent the night; Swartz was very much in need of the drug and was raving and doing the various other things indicating his need; Sunday morning, August 19, they went out in search of drugs, taking a car which did not belong to them and which was driven by Smith to Gibson and into a pole, where the car was abandoned; they started back uptown and on the way entered a drug store with the purpose of getting drugs, but because of people in the store defendant lost his nerve and they left; they took a Ford sedan not belonging to them with the express purpose of leaving town in search of drugs and drove to Thirty-third and Cuming streets, defendant himself doing the driving and not knowing much about an automobile; the story of what took place in the drug store has already been narrated; after his arrest, defendant was taken to the hospital, where he was examined and an X-ray taken, but where he received no medicines; he was later taken to the police station and on the following day was given a small amount of drugs; when he first contracted the drug habit he used heroin and from that time used it constantly until he went to California and was told they did not know what it was, but that morphine could be obtained, and he then used morphine; some time after he started the use of drugs, and for the purpose of exciting sympathy and of being able to beg money on account thereof, he used concentrated lye and gasoline upon his left forearm to produce an appearance indicative of tuberculosis of the bone, and afterwards he used other means to make himself appear as a cripple, for the purpose of begging and obtaining money to buy drugs; this use of drugs continued throughout all the period from the time he contracted the habit until the 19th day of August, and prior to that time he was using about twenty grains of morphine a day and the same amount of cocaine.

On Saturday morning they tried unsuccessfully to purchase morphine and broke into the office of certain dentists,

finding no morphine but obtaining the cocaine solution heretofore referred to. Defendant testified that he had been vomiting and going through great tortures which only an addict could explain; the cocaine solution did not seem to relieve him and on Saturday evening he was sick and running around pulling his hair and begging Smith to go out and see if he could not buy some stuff for him, and he went out and came back reporting that he could not get any; he was not able to sleep much Saturday night, having a hemorrhage of blood, vomiting and with pains all over his body; they had a few dollars between them but were unable Sunday forenoon to purchase any drugs; after running into the pole at Gibson and injuring the first car they had taken, they took another car and Smith drove for a while, but got tired driving and a little before they reached the drug store at Thirty-third and Cuming defendant was driving but was "zig-zagging" all over the street, and after they passed the store he drove the car up beyond the Boulevard, where they stopped and went back into the drug store for morphine; they did not intend to rob of anything else, but knew that in such stores they have poison cases where they keep their morphine.

Expert testimony indicates that the drug addict, contrary to general belief of the laity, does not crave drugs to produce in himself agreeable feelings, pleasant dreams, and enjoyable illusions, but he takes the drug because he cannot exist normally without it; his body will not function right until he has taken his daily dose of the narcotic to which his body has become accustomed; the sudden cutting off of a drug like morphine produces, first, a condition of extreme restlessness, and later on that restlessness reaches the degree of delirium unless alleviated; the patient suffers extreme pain in the abdomen and in all his muscles, particularly of the side and arms; soon there is a condition of nausea and vomiting, the bowels become loose, and the patient has itching and intolerable irritation all over the surface of his body; the suffering is often intense; at times the patient will go into collapse, and in frequent instances,

where the drug is entirely cut off suddenly, instead of gradually, the patient dies within 48 hours after the drug is cut off.

The evidence indicates that the defendant weighed 116 pounds when he entered the county jail and in a period of about six weeks, up to the time of the trial, had gained so that he then weighed 140 pounds. He was given treatment by the jail physician and received drugs very sparingly and only when officially administered. He paid that jail this tribute in his evidence: It was the only jail he had ever been in where narcotics could not be secured by an inmate.

The killing of so estimable a citizen as Roy L. Tinkham was a despicable act, shocking to all law-abiding people of the community. Aided by his good wife, who had worked in the store with him for 23 years, he had built up a praiseworthy reputation as a fine business man and a good citizen and had accumulated a very comfortable fortune. While the circumstances did not prevent the defendant from having a fair and legal trial, which we think the record shows he had, yet the tendency of all things naturally concurred toward a finding by the jury of the death penalty against a defendant who held the gun and fired the fatal shot. Without in any way criticizing the jury, the case makes a somewhat different appeal to us, upon reading the record and after a longer lapse of time, than it made to the jury, and probably would have made to us, on a hearing so soon after the tragic event. We think this is an instance where the judgment may be modified without doing violence either to the intent of the legislature or to the ultimate interests of society.

Under the provisions of section 10186, Comp. St. 1922, the judgment of the district court is modified to the extent that the penalty imposed is changed from the death penalty to imprisonment for life. As thus modified the judgment is affirmed.

AFFIRMED AS MODIFIED.

Note—See Homicide, 29 C. J. 1106 n. 47, 1117 n. 68, 312 n. 42; 63 L. R. A. 354; 13 R. C. L. 776; 4 R. C. L. Supp. 832.

VILLAGE OF PETERSBURG, APPELLEE, V. JOHN J. CAREY, APPELLEE: CITIZENS STATE BANK, APPELLANT.

FILED JUNE 13, 1929. No. 26534.

Record examined and found to be without reversible error.

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

August Wagner and *C. M. Skiles,* for appellant.

Courtright, Sidner, Lee & Gunderson, and *W. J. Donahue, contra.*

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

THOMPSON, J.

This is an action brought by the village against appellant bank and Carey, appellee, praying for an accounting, and the cancelation of certain warrants claimed to have been wrongfully issued by Carey, who was at the time and had been for many years the treasurer of such village, and charging that many thousands of dollars of moneys belonging to the village and received by Carey, as such treasurer, had been by him and the said bank collusively and unlawfully converted to their respective uses without the knowledge or consent of the village. The funds so converted amounting to several thousand dollars, the village prayed that the exact amount be ascertained and that it have judgment against the respective defendants therefor as equity and justice might require, plaintiff being unaware of the specific amount each had received. Judgment was rendered against Carey and in favor of the village by the trial court in the sum of $9,789.02, and at the same time judgment was rendered against the bank for the sum of $3,573.72, with the provision that the bank "upon payment of this judgment against it shall have permission to apply to this court for a judgment against the defendant Carey for such amount as said bank may pay to the plaintiff." To reverse this judgment each defendant appealed separately.

The case as to Carey has been by us at this sitting determined, and will be found reported, p. 604, *post*. Appellant bank presents numerous reasons why the judgment against it should not be sustained, which will be considered as they are respectively reached.

A demurrer was interposed to the amended petition, in which it was alleged there was a misjoinder of causes of action, namely, cancelation of warrants and recovery of money alleged to have been converted. The petition specifically, as well as generaly, covered a vast number of dates on which specific amounts were claimed to have been received by Carey, and, through the collusion charged, converted to his own personal use, or to the use of the bank, and, as we find, it was deemed advisable in order that such respective conversions be not discovered that the village treasurer omit to make a record of the transaction. It was further found necessary that each transaction be noted in some way upon the books of the bank, but in a way not to disclose the source of the money or the rightful ownership thereof. Hence, it became necessary for the plaintiff to have, not only such records of the village treasurer as were available, but also the entire books of the bank covering these respective transactions, thus enabling plaintiff to trace a fund that it found had been paid to the treasurer from him into the bank, and into a certain account in such bank, as the bank had reported to the village authorities only such items as had been credited to the village, leaving the village officers uninformed as to the other items; thus, an accounting was necessary.

As to the warrants that the village prayed might be canceled: Without the books of the bank considered in connection with the books of the treasurer and the other records of the transactions in question, the village would have been hopelessly deficient in evidence. Hence, we conclude that, while the petition prayed for a personal judgment, it also indicated that before plaintiff could convince the court of its right to such accounting and judgment it must bring before the court the books and records of this

entire transaction for its consideration. It was not positively stated in the petition that the warrants were not held by the bank as its own property, but upon information and belief it is stated in the petition, as we infer, that the bank had parted with no consideration for the warrants, nor had there been a consideration given for the issuance of the warrants, but that the same had been issued by the village treasurer and delivered to the bank, as the bank well knew, for his own personal benefit, or without consideration. It will thus be seen that the equitable accounting preceded of necessity every step that was necessary to be taken by the trial court in reference to the granting to plaintiff of the relief that it prayed. Observing the facts heretofore mentioned with others of an equitable nature pleaded, it is concluded that the petition was not vulnerable to the challenge interposed, and that the demurrer was rightly overruled.

It is further contended that the court erred in not granting to defendant bank the right to a trial by jury. It will be plainly seen from the foregoing that this action was not one entitling the defendant to such a trial. Then, under the evidence, the conclusion of the trial court, as by it stated, is the only conclusion warranted; hence, no appreciable injury occurred.

This leaves the following questions remaining: Was the court warranted by the evidence introduced in rendering the personal judgment against this bank that it did, and charging it with interest at 7 per cent. on the respective items from the date of their found conversion to the date of the rendition of the judgment? When did the plaintiff's cause of action arise, at the time of the conversion or at the time of discovery thereof by the village? Further, had the statute of limitations run as to each or all of the items involved? These may, as we conclude, be determined under the same head, as the one logically follows and is controlled by the other. As to the respective items going to make up the amount of the judgment, there was ample evidence introduced to sustain the court's finding in reference to each. The computation of the interest also is found to be a

correct one. Each item represented an independent conversion and vested the village with authority to immediately proceed with the collection of the debt. This being true, it was entitled to interest thereon from the date that it could have initiated the action, and that at the rate of 7 per cent. per annum. This the court awarded, and no more.

As to the contention that action on these respective items had been barred by the statute of limitations, we must remember that it was by and through a collusive and intended fraud on the village perpetrated by Carey and the bank that these moneys were thus misappropriated, and that a part of the scheme was to prevent the village from becoming informed of such fraud, and in furtherance thereof the course was adopted of having the bank simply report to the village authorities only that part of the money which had actually come into the bank and had been deposited to the credit of the village. It is sufficient to say that the first knowledge the village had of these fraudulent transactions was obtained by it just shortly before instituting this action. It follows that the statute of limitations had not run. Hence, each of the afore-mentioned contentions are resolved in favor of the village and against the bank.

The other claimed errors presented have been examined, but are found not to give rise to reversible error.

The judgment of the trial court is

AFFIRMED.

VILLAGE OF PETERSBURG, APPELLEE, V. JOHN J. CAREY, APPELLANT.

FILED JUNE 13, 1929. No. 26615.

Record examined and judgment of trial court affirmed.

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

W. J. Donahue, for appellant.

Courtright, Sidney, Lee & Gunderson, contra.

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

THOMPSON, J.

This case was consolidated with *Village of Petersburg v. Carey, ante*, p. 601, for briefing and hearing. However, the briefs filed do not allege a single error which challenges the judgment against Carey. W. J. Donahue appeared for him in the trial court, and in this court only so far as to file the præcipe and to join in the consolidation. Notwithstanding the lack of compliance on the part of Carey with the rules of this court, as consolidation was permitted, without making this a precedent to justify such conduct in the future, we have considered the case to the extent of examining the record in its entirety, including the petition and the demurrer lodged thereto. It is our conclusion that the petition stated facts sufficient to resist the demurrer; that the district court's final determination is warranted by the record; and that the personal judgment rendered against John J. Carey, appellant, for the sum of $9,789.02, with interest thereon from January 1, 1928, together with costs of suit, is right, and it is in all things

AFFIRMED.

LEWIS LEONARD LEWIS, APPELLEE, V. ALLIED CONTRACTORS, INC., ET AL., APPELLANTS.

FILED JUNE 13, 1929. No. 26797.

1. **Master and Servant:** AWARD OF COMPENSATION: APPEAL. Under the employers' liability law, where either party appeals from the award of the compensation commissioner to the district court, the appeal is to be tried in that court *de novo*.
2. ———: ———: METHOD OF COMPUTATION. By subdivision 3, sec. 3044, Comp. St. 1922, for a permanent partial loss of the use or function of any one of the members mentioned in said subdivision 3, the method of computing the compensation is to apply the percentage of disability to the period of compensation, and not to the rate.

APPEAL from the district court for Douglas county: IRVIN A. STALMASTER, JUDGE. *Affirmed.*

Dressler & Neely and *H. J. Lutz*, for appellants.

Sullivan & Wilson, contra.

Heard before GOSS, C. J., ROSE, DEAN, GOOD, EBERLY and DAY, JJ., and RAPER, District Judge.

RAPER, District Judge.

Lewis Leonard Lewis, plaintiff, while working for the Allied Contractors, Inc., in September, 1926, came in contact with poison ivy, and as a result he became infected with blood-poisoning, which totally disabled him from September 13, 1926, to September 1, 1927. At the time of the accident he was receiving weekly wages in the sum of $24 and was therefore entitled to receive compensation at the rate of $15 a week during total disability, which compensation (together with medical and hospital expenses) was paid by the Southern Surety Company, insurance carrier for the Allied Contractors, Inc. These compensation payments aggregated $765. On September 1, 1927, plaintiff's temporary total disability ended, and on that date the extent of partial permanent disability of plaintiff's right lower limb was ascertained by the physicians for the insurance carrier. Thereafter the surety company paid compensation to plaintiff at the rate of $15 a week for 18 weeks, to apply on amount due for the partial permanent disability. The surety company then tendered compensation at rate of $15 a week for 3½ weeks, in full settlement for the partial permanent disability. The plaintiff refused to accept this tender, and filed an informal complaint with the compensation commissioner, asking additional compensation. A hearing was had on this complaint, and an award made by the commissioner finding a 10 per cent. permanent disability of the lower right limb, and that under subdivision 3, sec. 3044, Comp. St. 1922, plaintiff was entitled to receive compensation in the sum of $6 a week for 215 weeks. The defendants appealed from that award to the district court, but plaintiff

did not appeal. That court found the facts as above outlined, and further found that plaintiff has sustained a 20 per cent. permanent partial disability and is entitled to receive from his employer compensation at the rate of $15 a week for 40 weeks, and that the surety company is entitled to receive credit on said allowance for the period of 18 weeks, commencing on or about September 1, 1927, and that there is due plaintiff compensation at $15 a week for a period of 25 weeks, or an aggregate of $375 and judgment was entered for that amount on August 6, 1928. From that judgment both parties appealed.

The only error claimed by defendants is that the district court was without jurisdiction to increase the 10 per cent. partial permanent disability as found by the commissioner to 20 per cent. partial permanent disability. Plaintiff asserts his right to receive $6 a week for 215 weeks from September 1, 1927, the date the total temporary disability ended.

In their petition on appeal from the award of the commissioner to the district court the defendants alleged that they filed this appeal from the award of the compensation commissioner made in this case for the reason that the compensation commissioner has misconstrued the provisions of section 112 of the compensation law (Comp. St. 1922, sec. 3044), particularly subdivision 3 of said section 112 relating to allowances for disability resulting in permanent injury of the various members of the body; that the commissioner found that plaintiff had a 10 per cent. partial permanent loss of the right leg and awarded plaintiff the minimum compensation of $6 a week for 215 weeks, in addition to the amount already paid by the surety company; that the surety company has indicated its willingness to pay to plaintiff for the 10 per cent. permanent disability at the rate of $15 a week for 21½ weeks, or a total of $322.50, and has paid thereon $15 a week for 18 weeks, and has tendered $52.50 in full settlement of balance due for the 10 per cent. permanent disability. It will be seen that defendants' only claim in the petition on appeal was for the

purpose of correcting the award from $6 a week for 215 weeks to the sum of $15 a week for 21½ weeks. In his answer in district court plaintiff alleged that his total permanent disability was 75 per cent. instead of the 10 per cent. which had been awarded by the commissioner, and claimed additional hospital and medical expenses. At the trial in the district court testimony was received, over objection of the defendants, as to the extent of the partial permanent disability. The court increased the amount of such disability to 20 per cent., but refused to allow nurse hire.

Defendants contend in their appeal from the district court that, inasmuch as the plaintiff took no appeal from the award of 10 per cent. permanent partial disability, he is bound by that award, and the district court erred in receiving evidence and increasing such award to 20 per cent. The issue, then, is whether the district court is invested with the power to hear an appeal *de novo*, and increase or diminish the commissioner's awards in the same manner as if originally brought in that court. It has been the practice in at least some of the district courts to try the appeals from the commissioner's awards *de novo*, and receive evidence on all matters relevant to the injury and the amounts of compensation, although the precise question does not appear to have been definitely determined in this court. In *Selders v. Cornhusker Oil Co.*, 111 Neb. 300, it is held that the workmen's compensation law should be liberally construed with a view to giving effect to its provisions and purposes. The law requires a petition and answer containing certain averments to be filed by the parties with the commissioner. The trial by the commissioner is an informal hearing. The law (Comp. St. 1922, sec. 3062) concerning procedure on appeal provides that, in case either party refuses to accept the awards of the commissioner, either party may submit a verified petition to the district court, setting forth the names and residences of the parties and the facts relating to the employment at the time of the injury, the injury in its extent and character, the amount

of wages being received, the knowledge or notice to the employer of the occurrence of said injury, and such other facts as may be necessary for the information of the court, and also stating the matter or matters in dispute and the contention of the petition with reference thereto. The matters which the statute directs to be pleaded in the petition on appeal are substantially the same as are required in the petition to the commissioner. Likewise the answer on appeal is directed to plead practically the same things that are required in the answer before the commissioner. It is asserted by the defendants that the district court can only adjudicate matters in dispute as disclosed by the petition on appeal, and cannot go beyond that to hear and determine anything else except what the appellant has expressly raised in his petition on appeal, where the opposing party does not also appeal.

The practice in at least some of the judicial districts has been to hear the case *de novo* upon appeal, and hear and determine every issue, irrespective of which party took the appeal. This court in *United States Fidelity & Guaranty Co. v. Wickline*, 103 Neb. 681, held that on such appeal the district court has authority to hear the cause as a suit in equity and to enter final judgment. It also held that on such appeal the district court on proper application should allow such additional compensation and "waiting time" as the evidence shows the employee entitled to by reason of continuing disability subsequent to the award of the commissioner. See, also, *Updike Grain Co. v. Swanson*, 103 Neb. 872. If appellants' theory is to be followed, the district court on appeal could not take cognizance of anything happening after the commissioner's hearing. Suppose the injury to this workman was progressive, and after the initial award it became necessary to amputate the leg on account of the injury, or he had incurred other medical or hospital expenses, the law would be powerless to award additional compensation, unless the district court could make an additional award. It would destroy the effectiveness of the law, and prevent the carrying out of its beneficent purposes.

The law requires the pleadings on appeal to be substantially the same as in the proceedings before the commissioner. This is an indication that, when either party appeals, such appeal brings the whole case to the district court for trial on its merits, as a cause in equity, and the district court must hear and determine all the relevant matters, not only those that were determined by the commissioner, but any others, proper issues pleaded by either party. In this case the defendants appealed, they claim, only from that part of the commissioner's award which gave compensation for 215 weeks. If plaintiff took the appeal ostensibly to increase the weekly compensation and the defendants received information that plaintiff's award for medical and hospital expenses had been wrongfully allowed, it would be unjust to them if they were not permitted to prove such fact in the district court. The law was intended to give the district court jurisdiction on such appeals to try the case *de novo*, irrespective of which party brought the appeal, and the district court in this case had authority to increase the award, and there is evidence sufficient to support that finding.

The cross-appeal of plaintiff presents a question that has been already decided by this court. He claims that, where there is a partial disability of a leg, the plaintiff was entitled to compensation for 215 weeks. The defendants say that the compensation is to be computed on the percentage of the period and not percentage of wages. The district court gave judgment for $15 a week for 20 per cent. of 215 weeks, which was 43 weeks. This method is the correct one. *Western Newspaper Union v. Dee*, 108 Neb. 303; *Poast v. Omaha Merchants Express & Transfer Co.*, 107 Neb. 516; *Hall v. Germantown State Bank*, 105 Neb. 709; *Ulaski v. Morris & Co.*, 106 Neb. 782; *Updike Grain Co. v. Swanson*, 103 Neb. 872.

This is not inconsistent with the holdings in the cases of *Schlesselman v. Travelers Ins. Co.*, 112 Neb. 332, and *Johnson v. David Cole Creamery Co.*, 109 Neb. 707, as in each of those cases the employee had suffered partial permanent disability to two members, and compensation was accordingly

awarded under subdivision 1, sec. 3044, while the award in this case is under subdivision 3.

The judgment of the district court is affirmed at cost of Allied Contractors, Inc.

AFFIRMED.

GOOD, J., dissenting.

I am unable to concur in the rule announced in the second paragraph of the syllabus of the majority opinion.

Section 3044, Comp. St. 1922, fixes the schedule of compensation to injured employees. Subdivision 3 of that section provides: "For the loss of a leg sixty-six and two thirds per centum of daily wages during two hundred and fifteen weeks." Another provision of said subdivision 3 is as follows: "In all cases involving a permanent partial loss of the use or function of any of the members mentioned in subdivision 3 of section 3662 (3044) the compensation shall bear such relation to the amounts named in said subdivision 3 of section 3662 (3044) as the disabilities bear to those produced by the injuries named therein."

I am satisfied that the proper construction of that provision awards to the injured employee, who has suffered a permanent partial loss of the use or function of any of the members mentioned in subdivision 3, compensation for the full term allowed for the loss of such member, but that the amount of the compensation shall be such proportion of the amount awarded for the total loss of the member as the partial loss of the use or function bears to the entire use or function of the member. In other words, if an employee has suffered a 50 per cent. permanent partial loss of the use or function of any of the members mentioned in subdivision 3, he is entitled to 50 per cent. of the compensation that would be allowed for the loss of such member, and for the full term that compensation is allowed for the loss of such member. But the foregoing provisions are further qualified by another paragraph of said subdivision 3 in the following language: "Compensation under this subdivision shall not be more than fifteen dollars per week, nor less than six dollars per week: *Provided,*

that, if at the time of injury, the employee receives wages of less than six dollars per week, then he shall receive the full amount of such wages per week as compensation."

Applying the facts to the instant case, where the employee was receiving wages at $24 a week, the amount that he should receive for the permanent partial loss of the use of his leg could in no event be less than $6 a week for the period of 215 weeks, which would make the sum of $1,290, total compensation that he would receive. The language of the statute is so clear and plain that no other construction seems possible; yet, under the opinion adopted by the majority he is allowed $15 a week for 43 weeks, or, in the aggregate, $645, just one-half of what he is fairly entitled to by the statute.

It has always been the policy of this court to give a liberal construction to the workmen's compensation law and, wherever in doubt, to give the workman or employee the benefit of the doubt. Here, it seems to me, there is no doubt that the employee was clearly entitled to $1,290; instead he is given 50 per cent. of that amount.

FEDERAL TRUST COMPANY ET AL., APPELLANTS, V. WALTER SUNDEEN, APPELLEE.

FILED JUNE 13, 1929. No. 26465.

Evidence examined and opinion of the commission affirming the judgment of the district court readopted.

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

T. R. P. Stocker, Ralph W. Ford and *H. B. Muffly,* for appellants.

Clarence G. Miles, contra.

Heard before ROSE, DEAN, GOOD, EBERLY and DAY, JJ., and RAPER and REDICK, District Judges.

REDICK, District Judge.

Action in equity to cancel an assignment of a school land lease for 25 years, made by Julia Walsh, plaintiff's ancestor, to Walter Sundeen, defendant. The plaintiffs are Federal Trust Company, administrator of the estate of Julia Walsh, and John Walsh, devisee. The latter will hereafter be referred to as plaintiff. The lease in question was for 160 acres of land in Lancaster county about 10 or 12 miles from the city of Lincoln. The rent payable to the state was $432 per annum, subject to revision by the state authorities. The land had been occupied for many years by Julia Walsh, her husband, and family, until the husband's death a number of years prior to the transaction complained of, after which event Julia's son John, the plaintiff, ran the farm for a number of years, his mother and younger members of the family living with him. Some five or six years prior to the assignment in question, John married and moved to a place in western Nebraska. The place was then leased by Julia Walsh to the defendant, Walter Sundeen, for one year from March, 1923, at a rental of two-fifths of the small grains and a cash rent of $4 an acre for pasture and $5 an acre for hay land. July 12 another lease was executed for the term of five years from March 1, 1924, and on April 16, 1925, a third lease was executed to Sundeen for a period of twelve years from March 1, 1926. All of these leases were upon the same terms and contained a provision that the lessor shall furnish necessary materials for the repair of buildings and fences as may be required from time to time and mutually agreed upon as necessary. The average gross rental value of this lease to the lessor was about $940 a year, out of which she was required to pay the rent to the state, $432, and about $30 a year taxes on the improvements, and an indefinite amount for repairs, estimated by one witness at about $100, though this seems somewhat excessive. The net returns on the leased property being from $400 to $700 per annum. The improvements upon the premises were of the value of from $800 to $1,600, though some witnesses testified that they were worth from $600 to $700 to wreck

or move off. The lessor was an old lady about 80 years of age at the time of the assignment in question; had always been of a strong, determined and independent character with reference to the conduct of her affairs, asking no advice, but depending almost exclusively upon her own judgment. Her relations with her tenant were most friendly, there having been no disputes or trouble of any kind between them during the five years preceding her death. She kept no accounts and relied upon her tenant to sell her share of the crops and account to her for the rent under the lease each year. It is fair at this point to observe that there is no evidence in the record indicating that the tenant did not fairly account to the lessor for her share of the crops. Mrs. Walsh and the Sundeens, as above stated, were very friendly, to such an extent that she oftentimes referred to them as her children, and the Sundeens at various times would perform little acts of courtesy for the old lady, such as bringing her feed for her chickens and other products of the farm as gifts. The evidence does not suggest that these acts were based upon any ulterior purpose, but were simply friendly gestures growing out of the relations, business and social, of the parties.

Sometime prior to October or November, 1926, there was some discussion between Julia Walsh and Sundeen regarding a sale of the school lease to the latter. Whether these negotiations were initiated by Mrs. Walsh or Sundeen is in dispute, but the weight of the evidence indicates that the subject was first proposed by Mrs. Walsh, and in October or November, 1926, Sundeen went to the department at Lincoln to inquire as to the legal situation, whether Mrs. Walsh could sell the lease, and the proceedings necessary to be taken, and procured a blank assignment. About that time Mrs. Walsh went to her banker, Biddlecom, at Havelock, and told him she was thinking of selling the lease to Sundeen, and asked him whether it would be necessary in such event to change her will, which the banker had drawn for her in 1925 and by which she had willed the lease in question to her son John, the residue of her property to be

divided amongst her children, including John, and he advised her it would not be necessary unless she desired to set aside the proceeds of the sale for John's benefit, which she said she did not. Biddlecom was also the banker of Walter Sundeen, and held his note for the sum of $800; he also advanced Sundeen upon his note, signed by a brother as surety, the sum of $500, being the cash payment upon the purchase of the lease, as hereafter detailed.

Thereafter some discussions took place between the parties as to the price to be paid for the lease, which was finally fixed at $1,000, $500 cash and the unsecured note of Sundeen for a like amount, payable in two years at 5 per cent.

On the evening of January 7, 1927, Mrs. Walsh called up the Sundeens and asked them to come in to her house at Havelock and talk over the sale of the lease. Mr. and Mrs. Sundeen did so, and some discussion of the matter was had, with the result that they were asked to come back the next day and close the transaction. They returned about noon on the 8th and found that Mrs. Walsh had been taken ill, had called a doctor, and arrangements made to take her to a hospital. Upon finding this situation, defendant drove to the bank to get Biddlecom to come to the house to act as a notary in the execution of the assignment, but when he returned Mrs. Walsh was being taken out of the house on a stretcher to the ambulance for removal to the hospital. He testifies that Mrs. Walsh told him to come to the hospital that evening, which he did, accompanied by Biddlecom; but, when they arrived and asked Mrs. Walsh if she wanted to execute the assignment then, she said, no, she was too tired. She asked Biddlecom to advise her about selling the lease, but he refused, telling her she should consult her children. At this time Mrs. Walsh was suffering severely from pain in her back, the doctor diagnosing her difficulty as gall-bladder trouble or a serious disturbance of the liver calling for an operation, but it was considered by the doctor inadvisable to operate, owing to the advanced age and weakness of the patient, and over the objections

of the relatives present. At the hospital Biddlecom suggested to Mrs. Walsh that the rental due the state on the school lease in question and another was delinquent, and suggested that it be paid. Thereupon Biddlecom drew a check on his bank for $440.82, Mrs. Walsh was propped up in bed and signed the check, which was thereafter sent to the county treasurer and paid.

Mrs Walsh remained at the hospital until Monday, the 10th, when she was removed to her home, where she was put to bed under the care of her housekeeper, Mrs. Boos, who had been living with her for some time in that capacity. A daughter of Mrs. Walsh, Mrs. O'Halloran, who lived in Omaha, had been visiting her for about a week, was present at the hospital, and remained with her mother until Saturday, the 15th of January. During this period Mrs. Walsh suffered considerably and was in bed most of the time, attended by Mrs. Boos. During this week the Sundeens had inquired by telephone as to Mrs. Walsh's condition, and on Monday, the 17th, after Mrs. O'Halloran's departure, came to the house with Biddlecom, who wrote out the assignment on the blank furnished by defendant, and the same was signed by Mrs. Walsh while sitting up in bed, acknowledged before Biddlecom as notary, and a check for $500 and a note for the same amount delivered to Mrs. Walsh in the presence of Mrs. Boos. There is some dispute as to whether or not Mrs. Walsh was sitting up in a chair at the time she executed the assignment, but the evidence clearly supports the above statement in that regard.

From that time forward until January 30 no physician was called to attend Mrs. Walsh, and the evidence is in dispute as to whether or not she remained in bed or was up and around sometimes during that interval, but the preponderance thereof, as stated by a disinterested witness, a neighbor who saw her practically every day, indicates that she was only up occasionally, and, as the witness says, sitting in a chair while her bed was being changed. For the last three weeks before her death she was in bed. After her return from the hospital she became weaker and weaker

as time passed, and lingered in that condition until February 17, 1927, when she died.

The learned district judge in a memorandum opinion stated that he considered the case extremely close, and that the rules of law and principles of equity which he deemed applicable conflicted with his personal conception of justice, but that his duty required him to follow the former. He therefore entered a decree for defendant, the costs to be divided. Plaintiffs appeal.

There are four grounds urged by the plaintiffs as reasons for canceling the assignment, as follows: (1) Misrepresentations as to the value of the school land lease; (2) abuse of the alleged confidential relations existing between Mrs. Walsh and her tenant; (3) that the consideration for the assignment was grossly inadequate, giving rise to an inference of fraud; and (4) that Julia Walsh was incompetent to make the assignment at the date thereof. We have arranged these propositions in the order in which we desire to discuss them.

(1) The misrepresentation claimed is that defendant told Mrs. Walsh that the lease in question was only worth about $500, but that he was willing to give her $1,000 for it. The evidence as to the representation made was that it was to the effect that Sundeen had heard that school leases were selling for $500 or $600. Sundeen denied this, but the evidence supports the inference that some such statement was made. However, it is extremely doubtful that such statement had any influence upon Mrs. Walsh. No facts were given nor any circumstances tending in any way to show that the conditions of those sales were at all similar to the one in question, nor, in fact, that any such transactions had actually taken place, and we think, taken alone, that such a representation to a woman of Mrs. Walsh's positiveness of mind would not be sufficient as a basis for rescission of the contract. In this connection it should be stated, however, that Sundeen testified that in his opinion the lease was worth $1,500, and that he thought he was getting a good bargain, which statement will be

considered later on in connection with another question presented.

(2) There existed between the parties no confidential relations as ordinarily spoken of in the cases, such as man and wife, parent and child, etc., but it is contended that by reason of the continued pleasant and friendly relations of the parties during the period of five years that Sundeen was tenant, coupled with the fact that she frequently referred to them as her children and they to her as "Ma," the little kindnesses performed for her by the Sundeens, and the confidence reposed by her in permitting Sundeen to divide the crops and sell her share without question or investigation on her part, the latter had acquired an undue influence over the old lady which had some substantial part in the procurement of the assignment in question. How much these matters may have influenced Mrs. Walsh is a very difficult question to determine from the evidence. There is no doubt that she had a very friendly feeling, if not affection, for the Sundeens, and trusted them implicitly regarding the management of the farm and payment to her of the rentals. She permitted Sundeen to ascertain and sell her share of the crops, never questioning his honesty, and on one or two occasions, in bad years, released him from payment of a portion of the cash rental. The evidence furnishes no inference of any direct effort of Sundeen to capitalize the friendly relations and use them as a lever with which to force her consent to the transaction. It does appear, however, that Sundeen was rather unduly precipitate in his efforts to procure the assignment to be executed at a time when Mrs. Walsh was suffering considerable pain, one of the witnesses testifying that he asked them to delay her removal to the hospital long enough that he might procure the services of Biddlecom, which was refused, and he wanted to talk to her while she was on the stretcher being taken to the ambulance, and thereafter, though as he says at her suggestion, followed her with his notary to the hospital and again tried to procure her signature, at which time the daughter, Mrs. O'Halloran, testi-

fied that she objected to her mother signing away the state lease for such a "paltry sum," that she ought to get $2,500, and that after Sundeen and Biddlecom had gone her mother said to her, "This is a shame for Walter to bother me on my death-bed." During the week after the return from the hospital and while Mrs. O'Halloran was with her mother, the defendant did not come to the house and made no effort to secure the assignment, but did secure it the Monday following the departure of the daughter for Omaha. Mrs. O'Halloran testified that during that week Sundeen called by telephone and Mrs. Boos answered, saying, "She is here yet," referring to the witness; that this occurred twice. This was not denied by Mrs. Boos, but Sundeen denied ever inquiring if Mrs. O'Halloran was there. We seriously doubt the existence of such undue influence as, of itself, would justify a reversal.

(3) The next question for consideration is the alleged inadequacy of the consideration. It is practically conceded that the 25-year lease was worth from $2,000 to $2,500. Sundeen said he thought at the time it was worth $1,500, but admitted that later he discovered it was worth considerably more. The improvements on the place, belonging to Mrs. Walsh, as they stood, were worth from $1,200 to $1,600, their removable value in the neighborhood of $700 or $800. These improvements were not sold with the lease, so it may be said that the right to remove them at the expiration of the lease would be of little if any value. They were not removable in any event until the expiration of the 12 year lease already held by Sundeen, expiring in 1938. The price to be paid for the lease, $1,000, was agreed upon a week or more prior to the trip to the hospital. However, Sundeen testified that the original price asked by Mrs. Walsh in November was $800 or $1,000, and that the night before the trip to the hospital it was agreed that she should pay the rental in advance for the renewal of the lease, and that Biddlecom called her attention to such payment at the time the assignment was executed; that such payment was the reason for increasing the price from $800 to $1,000.

While at the hospital Mrs. Walsh gave a check for $440.82, which included payment to the state of the rental of these lands to July 1, 1927, in the sum of $216. It therefore appears that in fact all that Mrs. Walsh received for the assignment was $284 in cash and Sundeen's unsecured note for $500. Assuming that the note would be paid eventually, Mrs. Walsh received not more than one-third of the conceded value of the lease, without taking into consideration the value of the improvements. There was also a small balance due Mrs. Walsh, 60 bushels of corn and a small amount of oats, which she forgave the defendant, and three or four days after the execution of the assignment she executed to him a receipt in full to date, without further payment. The district court found and there is no question but that the consideration was inadequate, and the dispute between the parties is whether or not it is so grossly inadequate as to afford of itself an inference of fraud, the plaintiffs contending for the affirmative and the defendant the negative of that proposition. The question is not free from difficulty. If the values involved were much greater, as for example, a consideration of $35,000 for property fairly worth $100,000 we would have little difficulty in concluding that the difference was so wide as to afford a legal inference of fraud. Here, the difference is only about $1,500 or $1,800, and, standing alone, we have serious doubt whether it would be sufficient to stamp the transaction as fraudulent.

The plaintiffs, however, cite a number of cases of similar character to this where the disparity between consideration and value was much less. In *Rarick v. Womer,* 184 Ia. 1016, the amount agreed to be paid was about two-thirds the value, and the contract of sale by a woman 72 years of age, inexperienced in business and unacquainted with land values, and susceptible to the influence and advice of her tenant, to such tenant was set aside as being for a grossly inadequate price. In *Shevlin v. Shevlin,* 96 Minn. 398, a consideration of $70,000 for property found to be worth $95,000 was held to be so grossly inadequate as to entitle

the vendor to relief. So it appears that the determination of the question cannot be based absolutely upon the rule of percentage, but the fact is one to be taken into consideration under all the circumstances surrounding the transaction, and even though the consideration be not so grossly inadequate of itself as to shock the conscience of the chancelor, it may be the controlling factor, when considered with other inequitable circumstances, in determining the rights of the parties. See *Shevlin v. Shevlin,* 96 Minn. 398, and *German Corporation v. Negaunee German Aid Society,* 172 Mich. 650.

(4) Was Mrs. Walsh of sufficient mental capacity to enter into the assignment in question? Upon this question the plaintiffs called three of Mrs. Walsh's children and their wives, also some neighbors, and Mr. Mitchell, the grocerman where she dealt, all of whom gave it as their opinion that she was not competent to transact business at the date of the assignment. On the other hand, Mrs. Boos, the housekeeper of Mrs. Walsh, Mr. Hall, a lumberman of Havelock, and two others stated that they considered her competent. Defendant also called Dr. Miller, who had attended Mrs. Walsh for a great many years, but had not seen her for some time, and who was called on the 30th of January, 1927, and attended her during her last illness, seeing her three or four times. He testified that he talked with Mrs. Walsh, asking her about her physical condition, and that she was possessed of her mental faculties and knew what she was doing at that time; that she would be of sufficient mental capacity to transact business if it went her way, meaning by that "she was a woman that had a mind of her own, when things didn't go her way she would shut up and say nothing to you, sometimes she would tell you things you didn't want to know." He saw her about a week later, and again before her death, but did not notice anything wrong with her mental condition. Defendant also called Dr. McKinnon, who attended her at the time she was taken to the hospital, until which time he had not seen her for some years, who testified that in his opinion

she was apparently normal mentally and perfectly competent to transact business. On cross-examination he declined to give an opinion as to her competency a week later, when the assignment was made, for want of sufficient facts from which to judge. In answer to a question by the court, he said that he had known Mrs. Walsh for 20 odd years and that her mental faculties were not perceptibly impaired when he saw her in January, 1927.

The opinions of plaintiffs' witnesses as to Mrs. Walsh's mental capacity were based largely upon her condition of weakness, lack of memory, and forgetfulness. Very little evidence was produced of any acts or conduct of Mrs. Walsh indicative of mental weakness. One instance was introduced of conduct upon her part as indicating failing mentality consisting of a mistake in the identity of Mrs. Phillip's sister, a larger woman weighing about 200 pounds, for her daughter weighing about half that much and very slight of figure, but the circumstances surrounding this instance are not given in sufficient detail to give it much value from which to draw a conclusion; another where she stated the age of her youngest daughter as 26, when as a matter of fact she had been married for 28 years, indicating to the witness that she was "unable to calculate." So far as the opinion of the witnesses are concerned on this question, we think the evidence is so nearly balanced that the plaintiffs have failed to sustain a preponderance thereof; the medical testimony appears the more satisfactory. It is fairly to be inferred, however, that Mrs. Walsh was a very sick woman and was gradually getting worse from day to day after the visit to the hospital, except at one time, about a week before her death, when she rallied for a short time.

In addition to the above, the evidence fairly discloses the following facts and circumstances having a bearing upon the question before us: At the time the son John went west he and his mother had some business difficulties in settling up their affairs, and John did not come to see his mother for over three years, and Mrs. Walsh did not

like John's wife, all of which tended to create an estrangement between them. Notwithstanding this fact, in October, 1925, the mother willed to John the lease in question. For two years prior to the assignment the farmers in the vicinity had had a hard time, crops had been poor and returns to the landlords correspondingly reduced. The rentals received by Mrs. Walsh for 1925 were about $700, and for 1926 $500. She had expressed her dissatisfaction with the returns from the lease and a desire to get rid of it. At the date of the assignment she had from $1,500 to $1,700 in the bank, but some $1,300 was due for taxes on land in Minnesota, besides about $440 due on the lease in question and another school lease. The improvements on the farm were badly in need of repairs, which would call for a considerable expenditure on the part of the lessor. Mrs. Walsh suffered from rheumatism in her hips, making it difficult for her to get around, and after her return from the hospital expressed the opinion that she was going to die.

There are many other matters revealed by the evidence having some weight on one side or the other in determining the question before us, but not of sufficient importance to be mentioned here. The evidence was very conflicting, and it may be said that the direct testimony of the interested witnesses on both sides was considerably weakened by very able and searching cross-examination. It is impossible in many instances to reconcile the testimony of several of these witnesses with their statements made at a prior time in depositions taken in the case. In such situation the rule is well established that the finding of the trial court upon the facts is entitled to consideration upon the trial *de novo* in this court.

We are, then, to determine from all this evidence and the surrounding circumstances of the execution of the assignment in question, whether or not that document really represents a voluntary act upon the part of Mrs. Walsh, binding between herself and the assignee, and therefore binding upon her devisee, John Walsh, or whether her consent thereto was obtained under such circumstances of undue

influence, pressure, and physical or mental weakness that in equity and good conscience it should be set aside.

After a most careful consideration of the problem of which we are capable, from every angle, we have concluded that the plaintiffs have failed to establish by a preponderance of the evidence, with that reasonable certainty required in this class of cases, that the assignment was procured by undue influence, that the assignor was mentally incompetent to make it, or that the inadequacy of consideration under all the circumstances was such as to afford a presumption or inference of fraud sufficient to set aside the transaction. Whatever we may think of the soundness of judgment exercised by the assignor, we are unable to say that she was incapable of exercising that judgment, but on the contrary it appears to us that she was dissatisfied with the situation and preferred to avoid the trouble, contingencies and probable expenditures incident to the continued ownership of the lease, and to accept in lieu thereof a present consideration considerably less than the probable value of the lease to one in a different situation than herself as regards the management of the business, the contingencies affecting a profitable return upon the investment and their own financial situation. Upon these considerations we cannot hold that the transaction was either unreasonable or inequitable. We conclude that the case was properly disposed of by the opinion of the learned commission, and the same is again approved, and rehearing denied.

AFFIRMED.

UNITED STATES NATIONAL BANK OF OMAHA, APPELLANT, V. DUNBAR STATE BANK ET AL., APPELLEES.

FILED JUNE 17, 1929. No. 26686.

1. **Banks and Banking: NOTES: FORGERY: RELIEF IN EQUITY.** The principle that "One whose name nowhere appears on a negotiable promissory note is not generally chargeable as an indorser" will not defeat a suit in equity based on the plea that defendant knowingly and fraudulently uttered and negotiated a forged

note and thus procured from plaintiff the proceeds without consideration.

2. ———: ———: ———: NOTICE. The knowledge of a bank president and managing officer who knowingly and fraudulently uttered and negotiated a forged note in the name of and for the bank and thus procured for it the proceeds of the felonious transaction may be the knowledge of the bank in a suit to recover such proceeds as a deposit.

3. ———: ———: ———: RELIEF IN EQUITY. Proceeds of a forged note indorsed by the payee to a state bank and by the latter knowingly and fraudulently uttered and negotiated at its face value may be traced into such bank, identified as a deposit therein, and so treated in a suit in equity by the party defrauded.

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

Morsman & Maxwell and *Paul Jessen,* for appellant.

C. M. Skiles, I. D. Beynon and *Edwin Moran, contra.*

Heard before ROSE, DEAN, GOOD, EBERLY and DAY, JJ., and RAPER, District Judge.

ROSE, J.

As this cause was presented to the trial court it was a suit in equity by the United States National Bank of Omaha, plaintiff, against the Dunbar State Bank, and its receiver, defendants, to establish a claim for a deposit. The claim was contested by defendants. Upon a trial of the issues raised by the pleadings the suit was dismissed. Plaintiff appealed.

The controversy grew out of transactions involving a forged note for $5,000, dated at Dunbar, November 20, 1926, payable to Thomas Murray at the Dunbar State Bank May 20, 1927, with interest at 7 per cent. per annum, and bearing the name "Henry Kasbohm" as maker. The note was indorsed on the back as follows: "Pay to the order of United States Natl. Bank. Thomas Murray." The signature of the indorser was genuine and he was then president and managing officer of the Dunbar State Bank, a corporation engaged in general banking at the time. As admitted in the answer of defendants and as shown by undisputed evidence the note was a forgery. For six years or longer the United

States National Bank, plaintiff, was a correspondent of the Dunbar State Bank and carried for the latter a deposit account against which drafts and checks were drawn.

November 19, 1926, the Dunbar State Bank, under its own name, using what is called a "remittance letter," addressed plaintiff and to it mailed the forged Kasbohm note for $5,000 with the written request: "For discount." The same day the Dunbar State Bank also mailed to plaintiff for discount the genuine note of H. S. Baker for $3,000. These notes were discounted by plaintiff and in its bank books the deposit account of the Dunbar State Bank was credited with $5,018.90 for the forged note and with $3,011.33 for the Baker note or with $8,030.23 in all. Though each of the notes bore interest at 7 per cent. per annum, they were discounted at the rate of 6 per cent. The Dunbar State Bank's profit on the discounting transaction, based on the difference in the rates of interest, was $18.90 on the forged note. The deposits for the proceeds of the two notes were entered on plaintiff's books November 20, 1926. On that date plaintiff wrote and the Dunbar State Bank subsequently received a letter containing the following statement:

"We credit your account with $8,030.23 covering notes of Henry Kasbohm and H. S. Baker, as per the following statement:

Note—Henry Kasbohm due 5-20-27	$5,000.00	
Int. 6 mos. at 7%	175.00	
	$5,175.00	
Disc. 181 days at 6%	156.10	
		$5,018.90
Note—H. S. Baker due 5-20-27	$3,000.00	
Int. 6 mos. at 7%	105.00	
	$3,105.00	
Disc. 181 days at 6%	93.67	
		$3,011.33
We credit		$8,030.23"

The Dunbar State Bank accepted these credits as shown by an entry on its journal, disclosing an item of $8,030.23—the sum of the proceeds of the two notes including the profit arising from the discounting of the forged note. It procured these proceeds by means of drafts on the deposit account described and never restored to plaintiff the money it feloniously procured by uttering and negotiating the forged note. After the present suit was brought a receiver was appointed to wind up the affairs of the Dunbar State Bank on the ground of insolvency. Among the papers that fell into his hands was a deposit slip of the Dunbar State Bank, noting a deposit therein in favor of "Thomas Murray, Special," for $5,000 November 19, 1926, the date of the remittance letter inclosing the forged note received by plaintiff November 20, 1926. In addition to this deposit slip, the depositors' ledger of the Dunbar State Bank contained the entry of a deposit for $5,000 November 22, 1926, as the "Thomas Murray, Special," after it had received notice that it had been credited by plaintiff with the proceeds of the forged note. Another entry included $18.90, the amount of the profit arising from the difference between the rate of interest on the forged note and the rate at which it was discounted.

Plaintiff insists that it traced the proceeds of the forged note into the Dunbar State Bank as a deposit recoverable as such in the present suit.

Since the name of Dunbar State Bank does not appear on the forged instrument, the receiver invokes the principle that "One whose name nowhere appears on a negotiable promissory note is not generally chargeable as an indorser," citing *Norfolk Nat. Bank v. First Nat. Bank of Bristow*, 114 Neb. 560. The present suit is not an action to enforce a liability on the forged note. It was tendered back. The principle quoted does not defeat the cause of action based on the plea that the Dunbar State Bank uttered and knowingly used the forged note to deceive plaintiff into parting with $5,000 without any consideration whatever.

The receiver contends further that Murray individually

caused the discounting of the forged note and dissipated the proceeds thereof by means of drafts and checks and that the Dunbar State Bank was without notice of, or responsibility for, such acts. The evidence shows conclusively that the transactions resulting in the discounting of the forged note were conducted in the name of the Dunbar State Bank and that it received the proceeds in the regular course of business between the two banks.

The receiver also challenged the sufficiency of the evidence to establish the claim that the forged note and the proceeds thereof created the fund comprising the deposit in controversy. The Dunbar State Bank was wrecked while under the management of Murray who acted for it in its name in uttering the forged note; in disposing of it as genuine; in having it discounted; in procuring credit in the bank of plaintiff for the proceeds in the form of a deposit; in withdrawing the money; in taking credit for the discounting profit of $18.90; in making the books of the Dunbar State Bank show a credit in favor of "Thomas Murray, Special," for $5,000, an amount equal to the face of the forged note.

No banker would forge or accept and knowingly utter a forged note without attempting to devise some means of concealing his crime and preventing detection. The searcher for the lost fund, after learning that he had been deliberately swindled, would not expect to find in the account books of the swindler an honest entry disclosing the truth in direct terms. The devious trail of iniquity must be traced through circumstances. The business under consideration was obviously a transaction for "collection and credit." As already stated, Murray was the president and managing officer. As such he knew the established course of business between the two banks. The deposit slip indicated the deposit of $5,000 under the heading: "Deposited with the Dunbar State Bank, Dunbar, Nebraska, by Thomas Murray, Special." This did not make the forged note an asset of the Dunbar State Bank. That note did not appear in the note-case. Neither Murray nor the Dunbar

State Bank paid anything for it. There was nothing to show an investment in the forged note. With guilty knowledge that it was a forgery the Dunbar State Bank formally took it "for collection and credit," presented it to plaintiff as genuine and thus deceitfully and fraudulently negotiated it at its face value and collected the proceeds which in the equivalent of gold went into the till of the Dunbar State Bank. The entry on the depositors' ledger November 22, 1926, crediting "Thomas Murray, Special," with $5,000, in connection with all the circumstances, so shows. The Dunbar State Bank already had the proceeds with Murray in control. Without changing the actual possession of the proceeds they were a general deposit falsely entered as the "Thomas Murray, Special." This entry on the deposit ledger was not an honest entry for a "special deposit"—property to be returned in the exact form received. The real deposit of the $5,000 was subject to check as shown by the general deposit ledger. To Murray and the Dunbar State Bank the ledger entry not only identified the proceeds of the forged note but it was well calculated to mislead a searcher for the fund. These proceeds had not been checked out when the receiver took charge and they still belong to plaintiff. The receiver and the bank guaranty fund have no better defense than the Dunbar State Bank.

It is the proper inference from the books and memoranda of both banks, from the dates and items, from the correspondence, and from all the circumstances that the deposit entered on the deposit ledger November 22, 1926, had its source in the proceeds of the forged note. When all the details are impartially considered they identify the deposit credited to "Thomas Murray, Special" as plaintiff's fund. No other item was so identified. By means of expert testimony, however, an attempt was made to show that the special deposit might have been the proceeds of another 5,000-dollar note, but that view of the evidence is not substantiated by the record. The note in that instance was genuine and the circumstances preclude such an inference.

The conclusion is that this deposit of $5,000 November

22, 1926, was the fund feloniously procured from plaintiff by means of the forged note, and that it was never checked out of the Dunbar State Bank or legally withdrawn, though the receiver in good faith attempted to apply it on outstanding obligations of Murray. Judgment should have been entered against the receiver for plaintiff's claim, making it a charge against the bank guaranty fund. For the purposes of such a decree the judgment of the district court is reversed and the cause remanded.

REVERSED.

Note—See Banks and Banking, 7 C. J. 530 n. 71, 663 n. 56—Bills and Notes, 8 C. J. 61 n. 60.

FIRST STATE BANK OF NORTH BEND, APPELLANT, V. THOMAS J. KASTLE ET AL., APPELLEES.

FILED JUNE 17, 1929. No. 26718.

1. **Pleading**: DEMURRER. Where a plaintiff has failed to plead actionable facts, it follows that his petition is vulnerable to a general demurrer.
2. **Creditors' Suit**: INJUNCTION. "A creditor whose claim has not been reduced to judgment, and who has neither a general nor specific lien on his debtor's property, is not entitled to have such property impounded as security for the claim, nor is such creditor entitled to an injunction restraining his debtor from disposing of some or all of his property." *Brumbaugh v. Jones*, 70 Neb. 786.

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

Crossman, Munger & Barton, for appellant.

Dolezal, Mapes & Johnson and *Abbott, Dunlap & Corbett, contra.*

Heard before ROSE, DEAN, GOOD, EBERLY and DAY, JJ., and RAPER and REDICK, District Judges.

DEAN, J.

This suit is from Dodge county and was begun by the

First State Bank of North Bend, to enjoin Thomas J. Kastle, Anna M. Kastle, Thomas J. Kastle, Jr., a minor, Alice Kastle, Marion K. Milliken, nee Kastle, and James D. Milliken, her husband, defendants, from transferring, conveying, leasing, or in any way incumbering the title to certain described real property, "pending final determination of the rights of plaintiff and its successors in interest, and the liabilities of the defendants." The following statement appears in the plaintiff bank's brief: "The defendants, Thomas J. Kastle, Anna M. Kastle, Alice Kastle, and Thomas J. Kastle, Jr., filed separate demurrers. The defendants Milliken first filed a joint demurrer and later filed separate demurrers. The several grounds of demurrer urged by the defendants include practically all of the statutory grounds (Comp. St. 1922, sec. 8610) and others." The trial court sustained all demurrers so filed by the defendants. Thereupon the plaintiff bank, hereinafter called plaintiff, appealed from the judgment to this court to have the record reviewed.

The bank was organized on or about September 23, 1914, and has ever since, pursuant to law, maintained its corporate capacity. It appears that Thomas J. Kastle has been a stockholder and director of the bank from its organization, and from 1915 to 1922 he was its vice-president, and ever since 1922 he has been its president, and for practically all of the time mentioned herein he has been the "sole managing officer and executive" in the control and operation of the bank.

January 10, 1928, the state department of trade and commerce took possession of the assets and the business of the bank and thereafter it came under the management of the guaranty fund commission, hereinafter called the commission. The commission has continued to manage the bank as a going concern, without regard to its solvency, retaining possession of all of its money, rights, credits, and assets of every description, "in order to make an examination of its affairs and dispose thereof as provided by law." Plaintiff pleads that at the time the department took it over the bank

surrendered and turned over to the commission "all of the outstanding capital stock as evidenced by the certificates therefor * * * and said guaranty fund commission is in sole possession, control and operation of said plaintiff bank by reason thereof."

The plaintiff charges violation of the banking laws on the part of the defendant in that, when the bank's affairs were taken over by the commission, its capital and surplus each approximated $25,000, and investigation disclosed that many loans were made to individuals and corporations and also to some of the corporations' shareholders for more than 20 per cent. of the paid-up capital and surplus of the bank, all in alleged violation of law, and that such excess loans then aggregated $100,000, or thereabouts. It is also pleaded that such excess loans were knowingly and unlawfully assented to by Thomas J. Kastle, as director of the bank, and that he is therefore liable in his personal and individual capacity for the damages which the plaintiff, and its shareholders, and all other interested persons sustained in consequence thereof. And it is pleaded that the amount of the above named funds cannot be determined by plaintiff from the fact that the loans have not yet matured.

Plaintiff also pleads that a deed of conveyance was filed wherein defendant Thomas J. Kastle conveyed to his wife on September 26, 1927, in consideration of $1 and love and affection, certain real estate in Dodge county, and that, on the same day, another instrument was filed wherein Kastle and his wife conveyed to their son certain land subject to a rental of $2 an acre, and also other land for a consideration of $1 and love and affection. It is also alleged that the grantors conveyed certain lands in Dodge county to their daughter, Alice Kastle, for a consideration of $1 and love and affection, and also other land for a consideration of $2 an acre rental each year, and that, on the same day, and for the same consideration, a deed of conveyance of other lands was made to another daughter, Marion K. Kastle.

It is plaintiff's contention that the above conveyances were executed by Kastle and wife at a time when the bank

was under the supervision of the commission and that such conveyances were for the purpose of removing the title in the property beyond the reach of the department of trade and commerce or its successors.

The defendants rely on section 4, ch. 30, Laws 1925, which, *inter alia,* so far as applicable here, contains this provision:

"If the guarantee fund commission shall determine that it is impossible to preserve such (banking) institution as a going concern, then the commission shall proceed to liquidate such bank as by law provided: Provided, the district court of the district in which such bank is located may, upon application of any judgment creditor after a period of three months from the taking over of said bank by the guarantee fund commission, order the commission to close said bank, and liquidate the same, as provided by law."

Defendants here point out that plaintiff is without legal capacity to sue or to maintain this suit from the fact that the bank was taken over by the department January 10, 1928, and the suit was begun January 27, 1928, or only 17 days thereafter, instead of "a period of three months from the taking over of said bank" by the commission, as the above cited section provides, and that the commission had not at any time determined whether the bank could be continued as a going concern.

The plaintiff bank was given 30 days in which to amend its petition, but did not avail itself of this opportunity and, no amendment having been made, the court sustained defendants' demurrers.

It does not appear that plaintiff has pleaded actionable facts. It is well settled in this jurisdiction that a mere general creditor, who has not reduced his claim to judgment, cannot maintain an action to enjoin a debtor from transferring his property. *Crowell v. Horacek,* 12 Neb. 622; *Missouri, Kansas & Texas Trust Co. v. Richardson,* 57 Neb. 617; *Merchants Nat. Bank v. McDonald,* 63 Neb. 363. And in *Brumbaugh v. Jones,* 70 Neb. 786, the above rule, in language that was specifically plain, was announced:

"A creditor whose claim has not been reduced to judgment, and who has neither a general nor specific lien on his debtor's property, is not entitled to have such property impounded as security for the claim, nor is such creditor entitled to an injunction restraining his debtor from disposing of some or all of his property."

Reversible error has not been pointed out. It follows that the judgment must be and it hereby is

AFFIRMED.

IN RE ESTATE OF JOHN H. CHARLES.
W. A. C. JOHNSON, APPELLANT, V. GEORGE HOGG ET AL., APPELLEES.

FILED JUNE 17, 1929. No. 26367.

1. Wills: VALIDITY: WITNESSES. C. died leaving four heirs. Some years prior to his death he made a will by which he left all of his estate to J., a stranger, except a small bequest to a brother, disinheriting three of his heirs. Shortly before death he made a will revoking all prior wills, but not purporting to make any other disposition of his property. The last will was attested by one of the three disinherited heirs; there being but two subscribing witnesses thereto. *Held*, that under sections 1248-1250, Comp. St. 1922, the last or revocatory will was not invalidated because one of the subscribing witnesses thereto was an heir who had been disinherited by the first will.
2. Evidence: OPINION OF NONEXPERT. "Nonexpert witnesses can be permitted to express opinions as to the sanity or insanity of a person only when they have shown other sufficient qualifications, and have stated the facts and circumstances upon which their opinion of mental condition is based." *Bothwell v. State*, 71 Neb. 747.
3. Trial: INSTRUCTIONS. Where a party was of the opinion that the instructions given by the court were not explicit enough upon certain points, other and more explicit instructions should have been tendered by the complaining party. *Cornforth v. Graham Ice Cream Co.*, 109 Neb. 426.
4. ———: WITHDRAWAL OF ISSUE. Where, as in this case, evidence as to any material issue is conflicting and such that different conclusions might reasonably be drawn therefrom, the trial court properly refused to withdraw such issue from the jury.

APPEAL from the district court for Howard county: EDWIN P. CLEMENTS, JUDGE. *Affirmed.*

Taylor & Spikes, J. J. Ledwith, Hall, Cline & Williams, Charles Dobry and *H. H. Foster,* for appellant.

T. T. Bell and *Prince & Prince, contra.*

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

ELDRED, District Judge.

This is a will contest. The proponent, W. A. C. Johnson, filed for probate in the county court of Howard county an instrument purporting to be the last will and testament of one John H. Charles, deceased, referred to in the proceedings as the Johnson will. This will appears to have been executed May 10, 1924. John H. Charles died September 23, 1926. Deceased left surviving him no widow nor children. Many years ago he changed his name from John Charles Hogg to John H. Charles. Objections to the probate of the will were filed by contestant George Hogg, a brother of John H. Charles, and Elizabeth Kemp Edington, a niece, Charles Hogg Edington and James A. Edington, nephews. The Johnson will having been denied probate by the county court, the proponent appealed to the district court. A petition for the probate of the Johnson will having been filed in the district court, the contestants again filed objections thereto, alleging that the Johnson will was executed by virtue of undue influence of said Johnson and others; that it was not the free and voluntary act of the deceased; and further alleging that the Johnson will had been revoked by an instrument purporting to have been executed September 17, 1926, which is as follows:

"I, John Charles, of the County of Howard in the State of Nebraska, being of sound and disposing mind and memory, do hereby revoke all former wills by me made, for the purpose and to the end that my property and estate shall descend to my heirs as provided by the laws of the state of Nebraska.

"In witness whereof I have hereunto subscribed my name this 17th day of September, 1926.

"John H. (X) Charles.

"We whose names are hereunto subscribed hereby certify the above John Charles signed his name to the foregoing instrument in our presence and in the presence of each of us, and declared at the same time in our presence and hearing that this instrument is his revocation of all former wills by him made, and we at his request sign our names hereto in his presence and in the presence of each other as attesting witnesses.

"James A. Edington, of Howard County, Nebraska,

"Nels Christensen, of Howard County, Nebraska."

James A. Edington, who witnessed the foregoing revocation, is a nephew of John H. Charles and one of the contestants in these proceedings.

The proponent in his reply alleges that the purported revocation was not executed as required by law, and was not properly and legally attested; that the deceased at the time of the execution of said revocation was not possessed of sufficient mental and testamentary capacity to make the same; and further, if John H. Charles executed said instrument, the same was executed as the result of fraud and undue influence practiced upon him by James A. Edington and Nels Christensen.

The trial court peremptorily instructed the jury that when the Johnson will was made it was the valid last will and testament of John H. Charles, and submitted to the jury only the question as to the validity of the revocation. On this question the court submitted three issues, which were stated in the instructions as follows: (1) Did the testator, John H. Charles, execute the alleged revocation in the manner and form as provided by law? (2) Was the testator, John H. Charles, at the time of the execution of the alleged instrument of revocation, of sound mind and memory and competent, as defined in these instructions, to execute said revocation? (3) Was said instrument the free and voluntary act of the said John H. Charles, or was said

instrument procured to be executed by him by fraud, undue influence and misrepresentation of James A. Edington and Nels Christensen?

The jury returned a verdict in favor of the contestants, finding that the Johnson will had been revoked by the revocation will, and that it should be denied probate. Judgment was entered on verdict denying probate of the Johnson will. Motion for new trial having been overruled, proponent appeals. No cross-appeal has been filed.

While appellant's brief contains eleven assignments of error, only four propositions are really presented: (1) Error in the admission in evidence of the alleged revocation; (2) error in ruling on evidence proffered; (3) error in giving instruction No. 29; and (4) insufficiency of evidence to sustain verdict.

1. It is urged that the revocation will was not executed according to law, in that its execution was not attested by two competent witnesses. In connection with this specification of error two propositions of law are presented: (1) The alleged revocation is void if not attested by two competent witnesses; and (2) an interested heir is not a competent witness to the revocation of a will.

With the first proposition no issue is taken by contestants. As to the second proposition contestants urge that, though the witness James A. Edington might be an heir of deceased, that did not disqualify him as a witness to the revocation. This is really the crucial point in this case. James A. Edington was not given any property by the Johnson will. He was not given any property by the instrument referred to as the revocation; but as an heir, if there was no will, he might be entitled to share in the estate of the deceased.

The execution of wills and revocations is governed in this state by the statutory provisions which follow:

"No will made within this state, except such nuncupative wills as are mentioned in the following section, shall be effectual to pass any estate, whether real or personal, nor to change, or in any way affect the same, unless it be in

writing, and signed by the testator, or by some person in his presence, and by his express direction, and attested and subscribed in the presence of the testator by two or more competent witnesses; and if the witnesses are competent at the time of attesting the execution of the will, their subsequent incompetency, from whatever cause it may arise, shall not prevent the probate and allowance of the will, if it be otherwise satisfactorily proved." Comp St. 1922, sec. 1245.

"All beneficial devises, legacies, and gifts whatsoever, made or given in any will, to a subscribing witness thereto, shall be wholly void, unless there be two other competent subscribing witnesses to the same; but a new charge on the lands of the devisor for the payment of debts shall not prevent his creditors from being competent witnesses to his will." Comp. St. 1922, sec. 1248.

"But if such witness, to whom any beneficial devise may have been made or given, would have been entitled to any share of the estate of the testator, in case the will was not established, then so much of the share that would have descended or have been distributed to such witness, as will not exceed the devise or bequest made to him in the will, shall be saved to him, and he may recover the same of the devisees or legatees named in the will, in proportion to and out of the parts devised or bequeathed to them." Comp. St. 1922, sec. 1249.

"No will, nor any part thereof, shall be revoked, unless by burning, tearing, canceling, or obliterating the same, with the intention of revoking it, by the testator, or by some person in his presence and by his direction; or by some other will or codicil in writing, executed as prescribed in this article; or by some other writing signed, attested and subscribed in the manner provided in this article, for the execution of a will; excepting only, that nothing contained in this section shall prevent the revocation implied by law from subsequent changes in the conditions or circumstances of the testator." Comp. St. 1922, sec. 1250.

The revocatory instrument in this case falls within the

provisions of the last section, that a will may be revoked "by some other writing signed, attested and subscribed in the manner provided in this article, for the execution of a will." The will must be signed by the testator, or by some one in his presence, and by his express direction, and attested and subscribed in the presence of the testator by two or more competent witnesses.

Section 1248, Comp. St. 1922, in treating the subject of the competency of a witness who may be a devisee or legatee under a will does not provide that a will shall be void which may have been witnessed by such devisee or legatee. It merely provides: "All beneficial devises, legacies, and gifts whatsoever, made or given in any will, to a subscribing witness thereto, shall be wholly void, unless there be two other competent subscribing witnesses to the same," while section 1249, Comp. St. 1922, provides under what circumstances an interest in an estate as an heir may be saved to such subscribing witness.

Appellant suggests in his brief that, as one of the heirs of testator, James A. Edington would reap a direct, substantial and pecuniary advantage by the establishing of the revocation, and urges that a person with such an interest is not a competent witness.

We have no statutory provision disqualifying any person as a witness on account of interest.

"Every human being of sufficient capacity to understand the obligations of an oath, is a competent witness in all cases, civil and criminal, except as otherwise herein declared." Comp. St. 1922, sec. 8835. Neither an interested person nor witnesses to wills are included within the exceptions to the provision quoted.

Counsel for appellant suggests that the section quoted is procedural as distinguished from substantive law, and that the requirement for two competent witnesses is a part of the substantive law of wills. But, the provision for the attestation of wills does not disqualify an interested witness; the only effect being that as to such witness all devises, legacies or gifts of such subscribing witness shall be void in

excess of the share of the estate of the deceased that would have descended or been distributed to such witness in case the will was not established. The will is valid in other particulars. Sections 1248, 1249, *supra*. The meaning of the provision referred to is plain. Nobody but an heir would be entitled by descent to any share of the estate of the testator in the event a will was not established. This statute must be held to contemplate that an heir may become a competent witness to a will, but that he forfeits any right thereunder.

Appellant cites a line of decisions beginning with *Child v. Baker*, 24 Neb. 188, defining who are competent witnesses to deeds and some other transactions, in support of his contention that an interested witness is not a competent witness. These cases are readily distinguishable from the instant case in that we are here considering a statute embodying a legislative determination as to just what effect the attesting of a will by an interested witness should have upon the validity of such instrument.

"The term 'competent witness,' as used in the statute relating to the execution of wills, means a person who, at the time of making the attestation, could legally testify in court to the facts which he attests by subscribing his name to the will." *In re Estate of Wiese*, 98 Neb. 463; *Hayden v. Hayden*, 107 Neb. 806. The first cited case lays down the rule that a devisee may be a competent subscribing witness to a will. In the opinion in *Hayden v. Hayden, supra*, the following language is aptly used: "The statute defining the competency of witnesses has, and was obviously intended to have, a far-reaching application. It has been in force since 1866, and has been the source of frequent application, directly and indirectly. In *Sorensen v. Sorensen*, 56 Neb. 729, this court announced that, 'under our system of jurisprudence every person is *prima facie* a competent witness in all cases, both civil and criminal,' and it was therein further held that the incompetency of one as a witness, or the incompetency of his evidence, must be found in express law, and not based on strict or technical construction, and it was stated in the opinion: 'To disqualify a person from testify-

ing by reason of incompetency, he must fall within some one or more of the exceptions expressly provided by statute.'" Further, it is well said in the opinion just referred to: "The language 'two other competent' witnesses implies that a devisee or one receiving a beneficial gift is competent; and the section does not say or imply that the will is void, for the reason that one of the witnesses is a devisee or interested. The plain purport of the section is that a will so witnessed is valid."

Appellant urges that the authorities cited above are not in harmony with many authorities from this and other jurisdictions cited in the brief of his counsel. Much research is indicated in the collation and review of authorities. These largely treat of the subject either in the absence of statutory provisions, or arise under statutory provisions entirely unlike those of our state.

The case of *Pfaffenberger v. Pfaffenberger,* 189 Ind. 507, is cited by appellant, and it is stated in his brief: "This case on its facts is the one case in all the reports that is closest to the case before us. It squarely and directly decides that an heir is an incompetent attesting witness to a revocation."

That case having thus been particularly emphasized by appellant, it is specially reviewed here. In that case the court did not hold the will so attested to be void, but void only as to the interested witness; the court further holding that beneficiaries who did not attest a will may compel an interested attesting witness to prove the will, that it may not fail as to them, and for such purposes the interested witness was competent. In that case there was no person interested in or benefited by the revocatory will, other than the defendant, who was an attesting witness; while in the case at bar there are a number of other heirs who are interested in the will in question and who are parties to this suit. In that case the deceased left only two heirs, the plaintiff, a sister, and the defendant, a half brother. In 1907 the testator made a will whereby she devised all her property to her sister, the plaintiff. In 1913 she executed

another will revoking the prior will, and further by that instrument giving the half brother, the defendant, an equal share in her property. The last will was attested by the defendant as one of the two witnesses. The requirement of the Indiana statute as to the execution and attestation of wills and revocations is practically the same as Nebraska; while in some other particulars it is so materially different that the case is not of much value as an authority in the instant case. It turns largely upon the interpretation of the statutory provisions of that state. The reasoning in that case is not inconsistent with the conclusions reached by this court in the cases heretofore cited.

Page on Wills (2d ed.) is also cited by appellant in support of his contention that an interested witness is not a competent witness, and the text of section 305 of that work appears to support such theory; but, by reference to the footnote under that section, it will be seen that the only authority cited by the author for the text of that section is the case of *Pfaffenberger v. Pfaffenberger, supra,* which, as has been pointed out, is not inconsistant with previous holdings of this court.

We have considered the other authorities cited, but an extended review of them could serve no useful purpose. We are satisfied with the conclusions reached by this court in the cases heretofore cited, and adhere to the holdings therein announced, believing, as we do, that they are in harmony with the intention of the legislature, and that substantial justice is attained thereby.

It seems to us that the material issue here involved is settled by the statutes of this state, as well as by the decisions of this court, and is no longer an open question. We conclude that the revocation will was properly received in evidence. What effect the witnessing of the revocation by one of the heirs of the deceased may have in determining who are entitled to share in the distribution of the estate of the deceased is not now before this court, and no opinion is expressed thereon.

2. The trial court refused to allow Nelson Scott and

Mrs. Alfred Reimers, nonexpert witnesses, to state their opinions as to the mental capacity of the deceased. Objections were sustained for want of foundation, due to the witnesses not having detailed in court the facts and circumstances on which the opinions were based. The reason for the ruling was called to the attention of the parties at the time. We have examined all the testimony of these witnesses and conclude that the rulings of the court complained of were clearly correct. "Nonexpert witnesses can be permitted to express opinions as to the sanity or insanity of a person only when they have shown other sufficient qualifications, and have stated the facts and circumstances upon which their opinion of mental condition is based." *Bothwell v. State,* 71 Neb. 747.

3. Appellant contends that by instruction No. 29 the jury were told that, if the revocation was executed because of undue influence, or fraud, the Johnson will was not good. We do not so interpret the instruction. Instruction No. 28 sets forth the issues essential to proponent's recovery; while instruction No. 29 sets forth issues essential to contestants' recovery, as follows:

"You are instructed that if you find from a preponderance of the evidence that the testator executed the revocation of his will which has been introduced in evidence in manner and form as required by law, and that at the time he so executed it he had testamentary capacity and a revoking mind, as explained in these instructions, and if you also fail to find from a preponderance of the evidence that at the time he signed said revocation he was not acting freely and voluntarily, but signed said instrument because of the undue influence or fraud of said James A. Edington and Nels Christensen, then your verdict should be for the contestants and said will will not be admitted to probate."

It will be seen that the first part of this instruction embodies the matters as to which the burden of proof was on the contestants; while the latter part of the instruction relates to matters as to which the burden of proof was on

proponent; and the jury are advised that they must find the establishment of the matters set forth in the first part of the instruction, in conjunction with a failure to establish the matters set forth in the latter part thereof, before contestants could recover. We fail to see how a jury could be misled by the language used. Its meaning seems clear, and particularly so when read in connection with the preceding instruction. If the appellant was of the opinion that the instruction was not explicit enough, another and further instruction thereon should have been tendered. *Cornforth v. Graham Ice Cream Co.*, 109 Neb. 426.

4. Finally, it is urged that the evidence is insufficient to sustain the verdict of the jury. The testimony taken on the trial is voluminous and space will not permit a review of it here. On examination we conclude that there is such a conflict in the evidence on the questions submitted that different minds might reasonably draw different conclusions therefrom. The issues of fact under the conditions of the evidence were peculiarly questions for the jury's determination. The trial court would not have been justified in withdrawing those issues from the jury. The issues were fairly submitted by the instructions of the court, and with the conclusion reached this court should not interfere.

AFFIRMED.

Note—See Evidence, 22 C. J. 606 n. 17, 607 n. 28—Trial, 38 Cyc. 1537 n. 45, 1694 n. 57—Wills, 40 Cyc. 1111 n. 55; 28 R. C. L. 133; 5 R. C. L. Supp. 1515; 11 R. C. L. 620; 2 R. C. L. Supp. 1282.

GEORGE BAMRICK, APPELLANT, V. VILLAGE OF MINATARE ET AL., APPELLEES.

FILED JUNE 17, 1929. No. 26595.

1. **Municipal Corporations: ASSESSMENTS: COLLATERAL ATTACK.** "Where, in the making of assessments for local improvements and the levy therefor, property owners have opportunity to present their objections to the municipal body and to there have a hearing and pursue proceedings for review of the final decision

of that body whether by error or appeal, they cannot fail to do so and then, in the absence of a substantial jurisdictional defect in the proceedings, question the proceedings collaterally by an independent suit to restrain the making of the levy." *Weilage v. City of Crete*, 110 Neb. 544.

2. ———: ———: VALIDITY. Evidence examined, and *held* that proceedings before the village board purport to make appellant's property liable in proportion to benefits received.
3. ———: ———: LACHES. Appellant owned thirty acres of real estate, part of it unplatted. He believed that the unplatted part was outside the village limits, although it was actually within the village limits. He paid no attention to the proceedings for the construction of a sanitary sewer because of his belief that his real estate was outside the village limits and could not be assessed for the cost thereof. Five years after the assessment had been made he brought this proceeding to enjoin the collection of the special assessment. *Held*, notwithstanding lack of actual knowledge that his real estate was assessed until just prior to bringing the suit, he was guilty of laches, which prevents the court from granting him relief.

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

Morrow & Morrow, for appellant.

Oscar E. Nelson and *Mothersead & York, contra.*

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

LIGHTNER, District Judge.

This is a suit to enjoin the collection of a special assessment against plaintiff's real estate to pay for a sanitary sewer. The lower court found against plaintiff's contentions and dismissed his action.

The plaintiff, hereinafter referred to as appellant, contends that the special assessments in question were void and therefore subject to this collateral attack, first, because he had no actual knowledge that a levy was made or to be made against his property; second, because his property received no actual benefit from the improvement; and, third, because the ordinance and other proceedings did not purport to make the assessment in proportion to benefits.

Appellant admits that he knew of the construction of the improvements at the time. He offers as an excuse for not knowing of the contemplated levy against his acre property that he understood it had been disconnected from the village prior to the time of his purchase. He therefore paid no attention to any of the proceedings, thinking they did not affect him. And as to both the acre and platted property, he alleges the closest thereof was at least two blocks away from the mains and would not be benefited by it, and he thought therefore that no attempt would be made to levy assessments against it.

The village of Minatare is located mostly in the northeast quarter of the section. Appellant's land lies directly east, 145 acres, 30 acres of which is within the boundaries of the village, and east 15 acres thereof adjoining the village platted, the other 15 acres not platted. It was stated on oral argument that the land which appellant purchased was included at one time within the boundaries of the village, but in the year 1918 proceedings were instituted by a former owner to disconnect it therefrom, and appellant understood when he purchased the property in March, 1920, and was advised by persons of whom he inquired, that all of it had been disconnected from the village. However, he does not claim that any such representation was made by any one having authority to bind the village in an official way. In any event appellant was under the impression that none of his property was included within the boundaries of the village. As a matter of fact, 30 acres of the 145 acres covered by his purchase had not been disconnected by the proceedings above referred to and were still within the boundaries of the village. The sewer in question was finished on or about July 28, 1921. Prior to that time, in the summer of 1920, appellant platted the west 15 acres of the 30 acres, and he was of the impression that by the mere act of platting it became part of the village. The special assessments about which appellant complains was levied on the 13th day of September, 1921, and it must be conceded that they place an enormous burden upon appellant's real

estate, $2,108 having been levied against the platted portion and $2,074 against the acre property. No complaint is made that the proceedings for the creation of the sewer district and the levying of the special assessments were not in due form, and a careful examination of these proceedings indicates that the statute was carefully followed, and that every necessary step was taken by the board of trustees. However, we will go over these proceedings a little more carefully in connection with appellant's claim that the assessments do not purport to be in accordance with benefits.

Appellant's first contention is that he had no actual knowledge that a special assessment was to be levied against the property to pay for the improvement in question. Plaintiff is not entitled to relief in a collateral proceeding on the ground that he did not have actual notice, provided the statutory notice was given. It is so held in the analogous case of substituted personal service where the summons does not get into the hands of the defendant and he receives no actual notice of the suit. 33 C. J. 1083; 32 Cyc. 462; *State v. Trimble,* 309 Mo. 415; *Wells v. Wells,* 279 Mo. 57; *Carroll v. Muller,* 31 Ga. App. 209; *Getchell v. Great Northern R. Co.,* 24 N. Dak. 487. Plaintiff in this case had the notice which the law provides; he had constructive if not actual notice. "Constructive notice," it is said, "is the knowledge which the courts impute to a person upon a presumption so strong of the existence of the knowledge that it cannot be allowed to be rebutted, either from a duty to know imposed by the law, or from his knowing something which ought to have put him upon further inquiry, or from his wilfully abstaining from inquiry to avoid notice." *State v. Omaha Nat. Bank,* 66 Neb. 857, 891. Our judgment is that appellant either knew that his property was inclosed within the sewage district, or was guilty of gross negligence and laches in not knowing it. Minatare is a village of from 500 to 600 population. It has a local newspaper, and at least four notices pertaining to the project were published therein, two weekly publications giving notice of establishment of the district and the boundaries

thereof, two weekly publications of the notice to contractors, two weekly publications giving notice of proposed assessments and of the fact that a schedule was on file showing "the amount proposed to be assessed against each separate piece of property in said district," and one publication of the ordinance confirming the creation and establishment of said district, approving the schedule to be assessed against each separate piece of property in said district and levying said assessments, describing the manner for collection of said assessments, and authorizing the issuance of sewer district bonds and warrants in payment of said improvement. Improvements of this kind in a town of that size could not fail to have the widest publicity, and naturally everyone in the village would know that the work was going on and would have some idea of its cost and would know that the cost would be assessed against the property of the village. Plaintiff admits that he knew that the work was going on. It seems clear that he also knew that there was an intention to assess his property for part of the cost. A witness, Mr. Harshman, testifies that about the time the work was completed he had a talk with appellant in regard to a sewer lateral which he was contemplating, and that during the course of the conversation he said to appellant, referring to his platted 15 acres, "It is all under the main sewer and you will have to pay that anyway." Plaintiff filed the suit to enjoin these assessments in September, 1926, five years after the work was completed and the special assessment levied. During that time assessments were paid on 560 of the 800 tracts in the district in whole or in part. Where the notice required by law has been given and the special taxes duly levied against the property of a litigant and he waits for five years before beginning his action, during which time assessments have been paid on 560 tracts of the possibly 800 tracts comprising the district, the litigant is guilty of laches which will prevent the court from giving him relief except under very extraordinary circumstances.

The second proposition contended by appellant is that his

property received no actual benefits from the improvements, and in connection with this he cites *Hurd v. Sanitary Sewer District,* 109 Neb. 384, wherein it is held: "Special assessments for construction of sewers should be confined to abutting property." It is conceded that appellant's property did not abut upon the sewer, in fact that the closest portion of the same was two blocks away from the line of the sewer. However, the situation was not materially different from that disclosed by the record in the case of *Frohnen v. Sanitary Sewer District,* 115 Neb. 84. In that case "the entire city was included in the sanitary district and the real estate therein generally was charged with special benefits." In the *Frohnen* case, "plaintiffs aver that the main and the laterals are not available to them, that their assessed property is not benefited by the sewage system." We held, however, that these were all matters which should have been presented to the mayor and council, that such questions are not open upon collateral attack. The same propositions were before us also in the case of *Weilage v. City of Crete,* 110 Neb. 544, and we there held:

"Where, in the making of assessments for local improvements and the levy therefor, property owners have opportunity to present their objections to the municipal body and to there have a hearing and pursue proceedings for review of the final decision of that body whether by error or appeal, they cannot fail to do so and then, in the absence of a substantial jurisdictional defect in the proceedings, question the proceedings collaterally by an independent suit to restrain the making of the levy."

Neither do we believe that the record shows, at least except by inference, that appellant's property did not receive actual benefits from the construction of the sewer equal to the assessments. The only proof tending to support his contention that his property did not receive actual benefits is the conceded fact that the closest of it is two blocks away from the main line of the sewer. It is shown that appellant paid $135 an acre for this real estate in March, 1920. He was asked if he knew the value of this land in 1921, about

the time the sewer was built, and he said, "Why, things were pretty high then. Well, after the deflation took place you couldn't get rid of anything and I couldn't say then, but things dropped, a half anyway." Question: "The deflation took place during 1920?" Answer: "Yes." This is the only evidence bearing on the question of value, the only evidence that tends to prove in any way that appellant's property was not benefited by the improvement.

We think that it is impossible to find from this evidence that appellant's property was not benefited to the full extent of the assessments against him. Presumably the construction of the main sewer benefited all of the real estate in the village, since that was the first step in a system which later by use of laterals would eliminate the objectionable conditions which exist in villages which do not have sanitary sewage connections. In view of these holdings and facts appellant's second contention should also be overruled.

The third contention is that the ordinances and other proceedings did not purport to make the assessment against the property in proportion to the benefits. In the original resolution establishing the district it is said: "The costs of said main and outlet sewer shall be assessed on the property therein benefited to pay therefor." In the published notice fixing September 13, 1921, at 8 p. m., as the time when the board of trustees would meet as a board of equalization and adjustment, it is said: "The proposed assessment shall be adjusted and equalized with reference to benefits resulting from the improvements constructed in main sewer district and such assessment shall not exceed such benefits." In the final resolution making the assessment it was found: "That said proposed assessment heretofore filed with the village clerk to cover the entire costs of the improvements * * * in said main sewer district, upon each and every of said lots, blocks, and parcels of land in said district is just and equal with reference to the benefits resulting from said improvements and should be and hereby is made in accordance with said proposed schedule."

We think that these proceedings sufficiently show that

the board of equalization and adjustment purported to assess appellant's property only to the extent that it was benefited by the improvements.

Appellant further contends that the notice above referred to was in effect an invitation to appellant to remain away from the meeting since his property could not possibly be benefited. The fact that his property was included within the district was notice to him that special assessments might be levied against it. He remained away at his peril.

In view of these considerations, the judgment of the lower court is right, and it is hereby

AFFIRMED.

Note—See Municipal Corporations, 44 C. J. 631 n. 16, 654 n. 90, 754 n. 82, 759 n. 83, 768 n. 56; 9 A. L. R. 634; 25 R. C. L. 180, *et seq.*; 3 R. C. L. Supp. 1410; 5 R. C. L. Supp. 1313; 6 R. C. L. Supp. 1458.

DAVID Z. MUMMERT, APPELLEE, v. FRANK GRANT ET AL.: UNITED STATES OF AMERICA, INTERVENER, APPELLANT.

FILED JUNE 17, 1929. No. 26207.

Taxation: FORECLOSURE OF LIEN: APPEAL: REDEMPTION. Where an appeal has been brought to this court from an order confirming a sale under a tax lien foreclosure, the owner may redeem from such sale before a final order has been entered in this court; the amounts to be paid for such redemption shall be the same as fixed by law for redemption from sales under foreclosures of mortgages.

APPEAL from the district court for Thurston county: MARK J. RYAN, JUDGE. *Motion to redeem sustained and cause remanded with directions.*

James C. Kinsler and *A. C. Epperson*, for appellant.

A. M. Smith, contra.

Heard before ROSE, DEAN, GOOD, EBERLY and DAY, JJ., and RAPER and REDICK, District Judges.

RAPER, District Judge.

In an action to foreclose a tax lien, David Z. Mummert, plaintiff, on November 25, 1925, recovered a decree of foreclosure for the sum of $757.20, with interest at 15 per cent. per annum from that date, and attorney's fee, taxed as costs, of $75.72, which was decreed to be a first lien on the west half of the northeast quarter of section 9, township 24 north, range 10 east, in Thurston county, Nebraska. The United States, because of a claim that the land was not taxable (alleging it to be Indian land) defended. By agreement of all parties, the sale under the decree was delayed until the question of the right of the state to tax the land was passed upon by the United States court of appeals. After that court decided the contention of the United States, holding that the land was taxable, an order of sale was issued on the decree and the land sold thereunder to W. T. Truesdale for the sum of $1,079.63, and on June 9, 1927, said sale was confirmed and the sheriff was directed to execute and deliver deed to purchaser.

From said order of confirmation, the United States, on behalf of Fred A. Baxter, appealed to this court, and gave supersedeas bond to David Z. Mummert, plaintiff, and W. T. Truesdale, purchaser, which bond was duly approved. The defendant Fred A. Baxter, owner of the land, has applied to this court for leave to redeem. The right to redeem is not questioned by appellees. The motion of the defendant Baxter to redeem is sustained. The only contest is the amount to be paid for such redemption.

Concerning the status of the parties under such appeal, it was said by Judge Harrison in *Philadelphia Mortgage & Trust Co. v. Gustus*, 55 Neb. 435: "The appeal and bond, if they did not vacate the order of the district court, superseded, suspended, or rendered it inoperative. The purchaser acquired no rights and the applicant was not divested of his title to, and rights in, the land. (Citing cases.) All things remained as before the sale and subsequent order of the district court, and will so remain and exist until a decision in and by this court of the matter appealed."

The statutes controlling the foreclosure of tax liens gives no specific directions as to amount necessary to redeem in cases in this present situation. Section 6088, Comp. St. 1922, concerning tax lien foreclosures, provides that the tax sale purchaser may proceed to foreclose his lien "in all respects as far as practicable in the same manner and with like effect as is provided for the foreclosure of real estate mortgages." Section 6095, Comp. St. 1922, gives right of such redemption after the sale and before confirmation by paying "the sum for which the land was sold, with interest and costs to date of confirmation." This language is not clear. If it is redeemed before confirmation, there can be no confirmation. Perhaps the law was intended to mean the date of redemption, and not date of confirmation. That is its effect.

This provision, without doubt, presupposes that on the sale and confirmation the holder of the tax lien will be paid the proceeds of the sale, or enough to satisfy his decree, interest, and the costs, and such payment would have been made if the supersedeas bond had not been given. This bond prevented the plaintiff from receiving his money, and took from the purchaser the right to the title and possession of the land, and the owner retained the use and possession of his land during the appeal.

It is wholly unfair and inequitable to permit the owner to enjoy the possession of the land and withhold the rights of the plaintiff and purchaser, and to now redeem by paying only the amount of plaintiff's decree, with interest to date of confirmation, and costs, which the owner now contends is all that he should be required to pay.

A reasonable construction of section 6088, Comp. St. 1922, giving a like effect to tax sale foreclosures as the law provides for mortgage foreclosures, where no other specific statute intervenes, makes it apply to redemption after confirmation and appeal to this court, with the same effect as redemption in this court from mortgage foreclosures. That requires the payment of the decree with interest, as found by the trial court, to the date of redemption, and

costs, and 12 per cent. on the money actually paid by the purchaser on his bid, and which has been held by the sheriff, pending the appeal, from the time of such payment to date of redemption. This is in accord with the holding in the case of *Lincoln Savings & Loan Ass'n v. Anderson,* 115 Neb. 199, and *Trompen v. Hammond,* 61 Neb. 446.

The cause is remanded to the district court, with directions to determine the amount paid by the purchaser to the sheriff on his bid, and which has been held by said sheriff, and, if Fred A. Baxter, within 30 days after the court has determined said amount so paid by the bidder to, and held by, said sheriff, shall pay to the clerk of the district court the amount of plaintiff's decree, with interest at 15 per cent. from date of decree to date of redemption, and all costs in the district and supreme court, including attorney's fee, and also pay to the clerk of the district court, for the use of the bidder, 12 per cent. interest on the amount so paid by the bidder, from the time of such payment to the date of redemption, the redemption will be permitted. In case of such redemption, the sheriff shall return to the bidder the amount so held by the sheriff. If such payments are so made within the time hereinabove directed, the redemption will be effective, but, unless the payments are so made, the decree of the district court, confirming the sale and ordering deed made to the purchaser for the land described in the seventh cause of action in plaintiff's petition, will stand affirmed.

JUDGMENT ACCORDINGLY.

EBERLY, J., dissenting.

In this case I find myself unable to assent to the disposition made by this court of the matters involved in this case. I have no quarrel with the principle announced in the syllabus, but my sense of public duty impels me to protest against the exactions imposed upon the redemptors in this case as wholly unauthorized by law.

As preliminary to the discussion, it is suggested that, in addition to the facts recited in the opinion, it is undisputed that Truesdale, the purchaser at the foreclosure sale, was

not a party plaintiff, nor had he any interest in the decree of foreclosure under which the sale was had, and that the amount of his accepted bid was less than the amount due on the decree of foreclosure at the time of the sale.

I also agree with the majority opinion that the sole question presented by the application to redeem is the amount to be paid for such redemption. It is, however, to be remembered that at this stage of the proceedings (after sale and before final confirmation) the right of redemption is wholly statutory and the amount required for that purpose must be consistent with the express terms of the controlling statute. *Swearingen v. Roberts,* 12 Neb. 333.

Assuming the conclusion stated in the majority opinion that "the amounts to be paid for such redemption shall be the same as fixed by law for redemption from sales under foreclosures of mortgages," then it must be admitted that the provisions of section 9012, Comp. St. 1922, are controlling. This statute, which was originally enacted in 1875 under the title, "An act providing for the redemption of real estate from decree and judgment liens," and which has never been amended, contains the following provisions:

"The owners of any real estate against which a decree of foreclosure has been rendered in any court of record, or any real estate levied upon to satisfy any judgment or decree of any kind, may redeem the same from the lien of such decree or levy at any time before the sale of the same shall be confirmed by a court of competent jurisdiction by paying into court the amount of such decree or judgment, together with all interests and costs; and in case the said real estate has been sold to any person not a party plaintiff to the suit, the person so redeeming the same shall pay to said purchaser twelve per cent. interest on the amount of the purchase price from the date of the sale to the date of redemption, or deposit the same with the clerk of the court where the decree or judgment was rendered."

The words of this statute are applied to the subject-matter before us by the majority opinion with the following result:

"That requires the payment of the decree with interest (at 15 per cent.), as found by the trial court, to the date of redemption, and costs, and 12 per cent. on the money actually paid by the purchaser on his bid, and which has been held by the sheriff, pending the appeal, from the time of such payment to date of redemption."

In support of this conclusion the majority opinion cites *Trompen v. Hammond,* 61 Neb. 446. In that case there was no application for redemption and the amount necessary for redemption is not in any manner considered by the court either in the opinion or in the syllabus. It also cites *Lincoln Savings & Loan Ass'n v. Anderson,* 115 Neb. 199. In the case last cited it is to be noted that redemption was allowed against a purchaser who was a party plaintiff, and the parties redeeming were required to pay, it is true, the amount of the decree, interest, and costs to time of redemption, and it is also to be noted that the exaction of 12 per cent. under the second clause of section 9012, Comp. St. 1922, was not only not permitted as a fact, but was expressly denied as a part of the opinion.

Then, too, the majority opinion in the instant case ignores the fact that in *Swearingen v. Roberts,* 12 Neb. 333, this court was early committed to the doctrine in absolute variance with the result directed by the majority opinion. In the case last cited the question presented for decision is the same as in the instant case. It was stated by Maxwell, J., as follows:

"The question to be determined in this case is, whether or not the owner of real estate, which has been sold to one not the plaintiff in the action under a decree of foreclosure, must, in order to redeem the same, pay or tender the entire amount of the decree, with interest and costs, with 12 per cent. additional interest on the purchase money, or only the amount paid by the purchaser, with 12 per cent. interest thereon."

The answer to this question by this court was:

"Where real estate has been sold under a decree of foreclosure, to any person not a party plaintiff to the action,

the owner of the equity of redemption may redeem the same at any time before the confirmation of the sale by paying to the purchaser the purchase money, together with twelve per cent. interest thereon, from date of sale to the date of redemption."

And in this connection it should be noted that the exact position taken by the present majority opinion was before the court in that case, as may be seen from the following language employed by Maxwell, J.:

"It is very strenuously insisted that in any case a party redeeming must pay the amount of the decree, interest, and costs; and if the premises are sold to any person not the plaintiff in the action he must, in addition, pay the purchaser 12 per cent. interest on the purchase money."

But that contention was refuted by the majority opinion in *Swearingen v. Roberts*, 12 Neb. 333, after full consideration of all the equities involved. Indeed, the statement for the fundamental reason for the existence of the legislation construed cannot be better stated than in the language of Judge Maxwell in that case:

"The object of the statute is to grant relief to the debtor, and the legislature certainly did not intend to place hindrances in the way of redemption by imposing upon the debtor the payment of 12 per cent. to the purchaser in addition to the interest on the decree."

This determination has received the unquestioned adherence of this court. Indeed, until the instant case that doctrine thus expressed had long since passed beyond the realm of discussion and was accepted as a matter of course. See opinion of Barnes, J., in *Citizens Bank of Stanton v. Young*, 78 Neb. 312. And it is also to be noted that a careful reading of the opinion in *Lincoln Savings & Loan Ass'n v. Anderson*, 115 Neb. 199, cited by plaintiff, discloses the fact that this court in that opinion is committed to the doctrine that the two clauses of section 9012, Comp. St. 1922, are applicable to different states of fact, viz., the first clause solely to redemption made as against the purchaser who is a party plaintiff, and the second clause as to redemption

made solely against the party who is not a party plaintiff, and as to the latter situation that case last referred to expressly reiterated the rule first adopted in *Swearingen v. Roberts,* 12 Neb. 333, as is shown by the sixth paragraph of the syllabus.

Not only is this conclusion established by a fair construction of the language employed in the decisions referred to, but it is unquestionably supported when we consider what has been actually done and required by this court pursuant to the declarations made, in its allowance of redemptions heretofore on and after appeal taken from the district court. For this purpose let us examine the case of *Thesing v. Westergren,* 75 Neb. 387, which appears to be the first case in which the doctrine was announced by this court that "During the pendency of an appeal from a judgment of the district court confirming a judicial sale, the supreme court is vested with jurisdiction to entertain an application to redeem and to determine the amount of redemption money required for that purpose." Condensing the facts gleaned from records on file here, it may be said that Thesing was the owner of certain real estate in York county, an undivided tract, which was mortgaged in three separate parcels, one to Bothwell, one to Thompson, and one to Stockman. These mortgages were foreclosed in a single action and decree of foreclosure entered in favor of Bothwell for $2,591.92, also in favor of Thompson for $2,224.06, and in favor of Stockman for $2,250. Pursuant to decree the premises were sold on the 15th day of May, 1899, as follows: One tract to Bertha L. Richardson, *"not a party plaintiff,"* for $1,800, which was less than the amount of the decree. The second tract sold to Bothwell, *"a party plaintiff,"* for the sum of $1,350, materially less than his decree. The third tract was sold to Andrew Westergren, *"not a party plaintiff,"* for the sum of $2,205, which was less than the amount of the decree. The sale thus made was confirmed in district court, appeal taken to the supreme court, and about the 11th day of December, 1901, some two years after confirmation, application to redeem was made

here and by this court allowed under the statute referred to. It will be noted that the redemption was from the purchasers, one of whom was "a party plaintiff," and also some purchasers who were "not parties plaintiff." This court at that time unhesitatingly followed the principles announced in *Swearingen v. Roberts,* 12 Neb. 333. The redemptor was by this court required to pay Bothwell, "a party plaintiff" who had purchased his lands for $1,350, the sum of $2,591.92 (the amount of his decree) with 7 per cent. interest from the date of the decree and all costs. This was under the first clause of section 9012, Comp. St. 1922. The redemptor was required to pay to Bertha L. Richardson, who was *"not a party plaintiff,"* her purchase money only with interest at the rate of 12 per cent. on the same money. He was required to pay Westergren, not a party plaintiff, likewise the purchase money and 12 per cent. per annum thereon from the date of sale to the date of redemption. He was required to pay no part of the unsatisfied decrees in favor of mortgagees Thompson and Stockman which remained after confirmation of the mortgage sale. And this record further discloses that, when it appeared to this court that "all the sums required by the order of the court to be paid as a condition precedent to the redemption were fully paid, thereafter the orders of confirmation entered by the district court were vacated by this court and the appeal dismissed by final order of the date of December 17, 1901."

The writer has searched in vain for a single instance in the history of this court since the case of *Swearingen v. Roberts,* 12 Neb. 333, was determined, wherein this court has departed from the principles announced in that case, or has materially varied from the manner in which they were applied in the case of *Thesing v. Westergren,* 75 Neb. 387. In the present case, without discussion of *Swearingen v. Roberts, supra,* by its order it in effect has nullified the principles announced therein and departed from that which by long acquiesence has become a rule of property in this state. We have not overlooked the fact that by appeal in the instant case the redemptor prolonged the time of the

pendency of this case to the damage of the parties plaintiff, and it is said should therefore be required to pay therefor.

It is respectfully suggested that redemption after foreclosure sale is wholly statutory; that the rights of the parties are measured in the terms of the statute, and it is not the province of the court either of equity or law to nullify the valid enactments of our legislature by conveniently ignoring their express terms. The applicable maxims are that *"Equity follows the law"* and that *"Equality is equity."* Besides, in the York county case referred to, the same considerations were before the court that appear in this case, and the court is to be read in the figures of their decree.

In conclusion, the writer respectfully and earnestly protests that exaction of 27 per cent. from the redemptor in the present case, as a condition of redemption, is unauthorized by statute, and violative of the uniform precedents of half a century.

STATE, EX REL. O. S. SPILLMAN, ATTORNEY GENERAL, V. NEBRASKA STATE BANK OF HARVARD: VAN E. PETERSON, RECEIVER, APPELLANT: J. H. YOST LUMBER COMPANY, INTERVENER, APPELLEE: SECURITY STATE BANK OF LAWRENCE, INTERVENER, CROSS-APPELLANT.

FILED JUNE 17, 1929. No. 26863.

1. **Banks and Banking**: GUARANTY FUND: DEPOSIT. An arrangement between a state bank and its correspondent bank whereby checks upon the former are paid at par by the latter is not such a consideration of value or rendering of a service to a depositor in the state bank as will deprive the deposit of the protection of the depositors' guaranty fund, although, as an incidental result of the transactions thereunder, the depositor may receive the benefit of interest on the float of such checks in addition to the rate allowed by law upon the deposit, where there was no corrupt intention by either party to circumvent the banking law regarding the rate of interest on deposits.
2. ———: ———: INTEREST. The record in this case fails to show any excess interest paid or credited on the deposit.

3. ———: ———: DEPOSIT. Deposits in a bank, subject to check and made in the ordinary course of business by a corporation, will not be held loans to the bank merely because the depositor knew that the bank was in need of funds, where there was no agreement that the deposit should be made or remain in the bank for the purpose of bolstering up its reserve or other unlawful purpose.
4. ———: ———: ———. The fact that the president and principal stockholder of a corporation is also a stockholder (though not a director) in the bank will not of itself constitute the making of deposits by the corporation in the ordinary course of business an obtaining of money for the purpose of effecting a loan to the bank.
5. ———: ———: INTEREST. Interest on daily balances, lawfully contracted for by a depositor in a bank, may be within the protection of the depositors' guaranty fund.
6. ———: ———: ———. Interest accruing upon a bank deposit is a mere incident to the principal sum and a part of it, within the meaning of the bank guaranty act.
7. ———: ———: ———. A valid police regulation providing for the safety of bank deposits includes interest thereon lawfully contracted for.
8. ———: INSOLVENCY: INTEREST. A claim against a failed state bank allowed against the depositors' guaranty fund draws interest after date of allowance at 7 per cent. per annum.

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

Butler & James and *C. M. Skiles,* for appellant.

Stiner & Boslaugh, for J. H. Yost Lumber Company.

Perry, Van Pelt & Martin, for Security State Bank.

Heard before DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ., and LIGHTNER and REDICK, District Judges.

REDICK, District Judge.

Appeal by the receiver and cross-appeal by Security State Bank of Lawrence from an allowance of a claim in favor of the J. H. Yost Lumber Company against the depositors' guaranty fund in the receivership proceedings of Nebraska State Bank of Harvard. The claim was scheduled by the receiver as one not payable out of the fund,

whereupon claimant filed his petition in the district court. Answers were filed by the receiver and the Security State Bank of Lawrence, intervener. The issues will appear from the discussion in the opinion. By the judgment of the district court the claim was allowed against the fund in the sum of $19,185.43, with interest at 7 per cent. per annum from the date of the judgment.

From the pleadings and evidence the following situation appears. On or about May 1, 1926, the Union State Bank of Harvard was in the hands of a receiver for the purpose of liquidation, and a proposal was made by the Nebraska State Bank of Harvard to take over the assets and assume certain of the liabilities of the Union State Bank. This proposal was approved by the receiver and the court, and resulted in a contract to that effect on May 10, 1926, and the Nebraska State Bank continued in business until May 4, 1927, when it was taken over by the guaranty fund commission, and on May 9, 1927, a receiver appointed to wind up its affairs.

At the time of the purchase by the Nebraska State Bank, the claimant, J. H. Yost Lumber Company, was a depositor in the Union State Bank, having to its credit, subject to check, the sum of $15,595.41, which was one of the deposits assumed by the purchasing bank. At the time of the closing of the Nebraska State Bank, claimant had on deposit the sum of $19,185.43, subject to check.

Claimant had an agreement with the Union State Bank that it would pay 4 per cent. interest on daily balances, and this arrangement was continued with the Nebraska State Bank. This was the highest rate of interest permitted by the statutes of this state to be paid by state banks.

There was an arrangement between the Nebraska State Bank of Harvard and the Omaha National Bank of Omaha, its correspondent, whereby checks drawn by its customers upon the Nebraska State Bank would be paid by the Omaha bank without any charge for exchange, and charged to the account of the Nebraska State Bank; and the Nebraska State Bank furnished claimant with a stamp to be imprinted upon its checks containing the following words:

"Payable, if desired, at par through Omaha National Bank, Omaha, Nebraska." It does not appear whether or not these stamps were furnished to other customers. A number of objections, of a novel and interesting character, are presented by the receiver and intervener to the allowance of the claim against the depositors' guaranty fund, and we will now consider them in the order in which they are presented by the brief of appellant.

1. It is urged that the arrangement by which claimant's checks were to be paid at par by the Omaha National Bank resulted in the payment of interest in excess of 4 per cent. allowed by law; or, that thereby the bank gave a consideration or rendered a service to the depositor as an inducement, in addition to the legal interest, for making or retaining a deposit in the bank, and had the result to withdraw the deposit from the protection of the guaranty fund. The law under which this claim is made is section 1, ch. 28, Laws 1925, which, as far as applicable, reads as follows:

"No banking corporation transacting a banking business under this article shall pay interest on deposits, directly or indirectly, at a greater rate than * * * four per cent. per annum. * * * Any officer, director, stockholder or employee of a bank or any other person who shall, directly or indirectly, either personally, or for the bank, pay any money or give any consideration of value, or render any service for, or at the request of, a depositor or any other person as an inducement, in addition to the legal rate of interest, for making or retaining a deposit in the bank, or any depositor who shall accept any such inducement shall be deemed guilty of a felony." And the act provides for a fine or imprisonment in the penitentiary. Also, "Deposits made in violation of this section shall not be entitled to priority of payment from the assets of the bank, nor be protected by the guaranty fund."

It is not claimed that this arrangement was entered into between claimant and the bank with the unlawful purpose to increase the rate of interest upon the deposit beyond that permitted by law, but it is argued that such is its effect, the

ratiocination being that, when the check is charged to the account of the Nebraska State Bank by the Omaha National Bank, one or more days elapse before it is returned to the Nebraska State Bank, during which period 4 per cent. interest is accruing upon the deposit; or, that the interest allowed the Nebraska State Bank by its correspondent ceases a day or two earlier than it would have done if the check had been sent for collection. In other words, the depositor gets the benefit of interest on the float.

The arrangement for parring checks through the Omaha National Bank was one between the two banks, and, for aught that appears in the record, was available to all depositors of the Harvard bank. Neither the claimant nor its president was a party to the arrangement, and the record fails to show that any checks of the claimant were cashed at par by the Omaha bank. The furnishing of the stamp to claimant was not in consequence of any special contract or arrangement between claimant and the Harvard bank, but it was mailed to claimant by the bank after it had succeeded the Union State Bank. It amounted, so far as the record shows, merely to a notice to plaintiff of an existing arrangement between the two banks of which claimant might have the benefit. It seems altogether probable that it never entered the mind of either party that the accommodation thus granted would result in an allowance of interest on claimant's account slightly in excess of 4 per cent. In fact, it seems that such result, if in fact it existed, was apparent only after the bank had failed and the transaction submitted to the scrutiny of ingenious counsel and officers of the guaranty fund commission. It is suggested by counsel for receiver that the burden of proof is upon the claimant to establish that no specific limitation of the guaranty fund act has been transgressed (*State v. Security State Bank*, 116 Neb. 223), and it may be that some of the matters above referred to as not appearing of record might have been brought into it by the claimant; but, if the evidence in the record is sufficient to bring the deposit within the protection of the fund, the fact that claimant did not produce all the

evidence within reach favorable to his contention will not be held to affect the result.

The principal office of the Yost Lumber Company is at Lincoln, Nebraska, to which city it had been removed from Harvard some time prior to the transaction involved herein. It operated no yard at Lincoln, but at several towns surrounding Harvard. It had transacted its banking business with the Union State Bank and continued with the Nebraska State Bank of Harvard. After removal to Lincoln the company continued to keep its principal banking account at Harvard, the reason for which being stated by Mr. Yost as follows:

"The matter of fact is that the Harvard bank, me being interested in it in previous years and it being in my home town, when we moved to another town we kept the bulk of our deposits there, because they gave us the privilege that we could stamp the checks payable at par at the Omaha National from all that time on, and of course our checks going at par was better than we could do at the—better than we could do out of Lincoln, you know, and even when living at Lincoln we never kept more than a checking account locally, for some accounts around there, and the balance was always kept at Harvard, and we never borrowed any money to keep up the deposit. We just kept our natural run of balances from year to year in the bank and no more."

With reference to the stamp, he testifies: "Every check is stamped that way, you know, so our collections or our customers can get away from paying collections on checks." It seems, therefore, that one of the considerations leading to the maintaining of the deposit in the Harvard bank was the fact that claimant's checks could be parred through the Omaha National Bank. It does not appear, however, that this had any connection with the agreement for the payment of interest upon daily balances. The account of claimant was by far the largest in the bank and its daily balances were such that the agreement for interest does not appear unreasonable.

Under these circumstances the question for determina-

tion is whether or not the deposit of claimant transgressed the limitations of the guaranty fund act. The statute is highly penal and should be strictly construed. The remark of the court in *Kelley v. Gage County*, 67 Neb. 6, that, "in the exposition of statutes, the reason and intention of the lawgiver will control the strict letter of the law when the latter would lead to palpable injustice or absurdity," is applicable.

The purpose of the statute is to penalize corrupt agreements entered into with the intention of evading the law as to allowable interest, and while contracts which plainly and inevitably result in an infraction are within the spirit of the prohibition, we do not think that the legislature intended to anathematize transactions not tainted with an evil purpose, and which merely may or may not result, and that only incidentally, in an unimportant advantage, and which can only be brought under the condemnation of the statute by an attenuated process of reasoning. We disclaim any intention to criticize the learned counsel for the receiver. Their argument is most ingenious and of considerable force. But, for the reasons stated, we are of the opinion that the arrangements for parring checks did not transgress the limitations of the guaranty act, and that the construction of the statute contended for by the receiver is not justified by its words or purpose, and would, in the language of claimant's counsel, "draw within its sweeping terms multitudes which the legislature clearly did not intend to include."

2. The next objection to the allowance of the deposit as a claim against the guaranty fund is based upon a claim that interest was paid thereon in excess of 4 per cent. allowed by law. This claim is based upon the fact that the sum of $17.64, being the interest on the daily balances from May 1 to May 10, a period prior to the purchase by the Nebraska State Bank, was credited to the claimant, and was interest due from the Union State Bank. By the contract of purchase the Nebraska State Bank did not agree to pay any accrued interest on deposits subject to check, and, therefore,

would have been justified in starting its credits for interest May 10. Technically this might be considered a payment of excess interest, but, so far as claimant is concerned, was not contracted for, nor does it appear that he had any knowledge of this particular credit. Under these circumstances we think it would not be just to withdraw the deposit from the protection of the fund. The Nebraska State Bank was the successor to the Union State Bank, and the item in question may be properly disposed of as a matter of bookkeeping in the final adjustment of the account. However, as a matter of fact, the total amount of interest on daily balances credited by the bank was $720.78, whereas the correct amount should have been (exclusive of the first ten days in May) $777.78. It therefore appears that there was no excess interest paid. True, on May 4, 1927, the day the bank was taken over by the guaranty fund commission, a deposit slip for $122.76, representing interest on April daily balances, was issued to claimant and is included in his claim herein, but the same was never entered upon the books of the bank and was apparently issued after the bank had been taken over. We are of the opinion that this did not constitute a payment of excess interest. Claim for these amounts was withdrawn at the trial, and while such withdrawal would be ineffectual to cure a prior excess interest payment, it should be permitted under the circumstances.

3. It is next claimed that the deposit in question was in violation of section 12, ch. 30, Laws 1925, reading 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."

J. H. Yost was a stockholder, but not a director, in the Nebraska State Bank to the extent of $500. He and his family were the owners of 95 per cent. of the stock of the

lumber company. The statute required the bank to keep a reserve of at least 15 per cent. of its deposits. From October 1, 1926, until the bank was taken over, the reserve was depleted, varying all the way from 5 per cent. to 12 per cent. It does not appear that Yost or the lumber company had any knowledge of the condition of the reserve, although Yost had been requested in the latter part of 1926 to leave as large a balance as possible in the bank for the balance of the year, and on December 20, 1926, wrote the bank: "We have been keeping this in mind and are holding off everything we possibly can. However, we have bought quite a bit of lumber to assort up our stocks after invoicing and some of that is shipped and, of course, in order to get our discount, we must pay when due. But we will try to check out as much as we can from the yards until after the first of the year to give you a chance to show as good a statement as possible." And on March 9, 1927, he wrote: "I don't like the idea of leaving too much cash in the bank and would like to swing some of the money now on deposit into well-secured notes. I would buy them outright and this would give you the cash and I would feel safer by doing so."

It is argued that the language of these letters can mean only that the Nebraska State Bank was pressed for funds, and that Yost was keeping as large a balance there as possible to help them. This might be true, and still not be an infraction of the law. It appears beyond question that the deposits of claimant were such as accumulated in the ordinary course of claimant's business, the balances varying from $4,000 to $40,000, and the evidence does not establish that any sum at any particular time was deposited or maintained for the unlawful purpose of bolstering up the reserve fund of the bank. In *State v. Farmers State Bank*, 113 Neb. 348, under a statute denying to a stockholder the right of priority if he borrows money for the bank or bases his claim to priority on an evidence of indebtedness representing money obtained by him for the purpose of effecting a loan of funds to the bank, it was held that such statute does not prevent a stockholder from individually depositing his

own money in the bank in good faith for his own benefit, nor from participating individually in the bank guaranty fund, where he does nothing to forfeit that right. In that case the deposits were made in the ordinary course of business and did not constitute loans to the bank. So here, as above suggested, there is no evidence tending to show that the deposits in question evidenced loans to the bank, but, on the contrary, were made in the usual course of business. There is nothing inconsistent with this holding in the cases cited by the attorney general (*State v. Farmers State Bank*, 117 Neb. 448; *State v. Security State Bank*, 116 Neb. 521; *State v. Atlas Bank*, 114 Neb. 646), nor with any other of our decisions we have been able to find. Furthermore, the Yost Lumber Company was not an officer or employee or stockholder of the bank, and the deposits had always been carried in the company's name. It would therefore appear that the claimant is not one of the persons referred to in the statute. Paraphrasing what was said in *State v. Exchange Bank*, 114 Neb. 664, at page 672: "In fact, the J. H. Yost Lumber Company could make a deposit at any time notwithstanding it might have knowledge that the bank was 'in need of money,' and such deposit would be within the protection of the guaranty law." The deposit was not money obtained from a corporation for the purpose of effecting a loan of funds to the bank, but was the act of the corporation, a separate entity, in the ordinary course of business.

4. The next contention of the receiver is in the following language: "That the depositors' guaranty fund does not expressly or by necessary implication contemplate that interest upon open accounts subject to check shall be protected by the depositors' guaranty fund, and, the fund being a creation of the statute, no liability can be imposed thereon by a bank officer that is not expressly or by necessary implication contemplated by the statute."

It is said that "interest upon open checking accounts is not ordinarily paid in Nebraska, and the legislature must be taken to intend that interest should not be protected by the depositors' guaranty fund on open checking accounts."

Nowhere are banks prohibited by statute from paying interest on open accounts, and, while not a common practice, it is a matter of common knowledge that in some instances such interest is paid. In fact, as to public moneys, the statute requires payment of such interest, and in the case of county funds fixes the rate at 2 per cent. There is, therefore, nothing illegal in the practice, and with the question of business policy involved therein we are not concerned. It is true that the fund is not liable beyond the terms of the statute (*State v. Security State Bank,* 116 Neb. 521; *Rogers v. National Surety Co.,* 116 Neb. 170), but the protection is extended to the deposit, and interest is a mere incident. If interest is lawfully contracted for, paid and deposited in the bank, we perceive no reason for distinguishing it from the main body of the deposit. It is argued that, because the statute provides that "holders of certificates of deposit shall not be entitled to payment until their maturity," this amounted to a legislative direction that interest should be paid on certificates (*State v. Farmers State Bank,* 113 Neb. 679), and that the rule *"expressio unius est exclusio alterius"* applies. We think not. The prohibition is against payment before maturity, and while this affords an implication of liability for interest during the waiting time, it in no way excludes such liability in other cases.

In *Central State Bank v. Farmers State Bank,* 101 Neb. 210, a separate claim for interest on a deposit subject to check, in accordance with the agreement of the bank, was allowed as a claim against the fund. In *State v. Nebraska State Bank,* 111 Neb. 360, involving the allowance of interest upon a certificate of deposit, it was said:

"While it is true that the assessment of state banks for the creation of the guaranty fund is made upon a percentage of the actual deposits in such banks, there is no specific provision in the statute restricting the payment to depositors from that fund to the exact amount of money deposited. Under section 8033, Comp. St. 1922, it is the *claims* of depositors for deposits and the claims of holders of exchange which are accorded priority, and are a first lien on all the

assets of the corporation. * * * Money on deposit in the state banks of Nebraska is largely upon time deposit and is evidenced by the issuance of interest bearing certificates of deposits. The guaranty fund law expressly provides that interest may be paid by a state bank not in excess of 5 per cent. per annum. The fair implication is, when this provision is found in the law creating the fund, that the intention was to make the fund liable for the payment of such interest."

It was further suggested in that case that the same arguments against the allowance of interest on a certificate of deposit would apply to interest paid to depositors by savings banks, in connection with which the court said: "Could it ever have been the intention of the legislature to deprive the small depositor in such a bank of the protection afforded by the guaranty fund to the interest earned by the use of his money? Unless the statute is clear that this was its intention we cannot so hold."

Counsel for the receiver refers to *State v. Farmers & Merchants Bank,* 114 Neb. 82, as holding: "Where bank deposit was misappropriated, and depositor protested, asking that it be converted into time deposit, drawing interest, but no rate was agreed on, and deposit was never changed to time certificate," interest would not be allowed. This quotation was probably taken from the syllabus from that case as reported in 206 N. W. 158. That syllabus, however, was not carried forward in the regular report of the case, in which the court used the following language: "The district court allowed Ossenkop interest from the date the money was wrongfully withdrawn from his account by the bank's cashier. We think this was error. The deposit never was changed to a time certificate, *or to an interest-bearing deposit*"—thus impliedly recognizing the existence of an interest-bearing deposit not evidenced by a certificate. Interest was disallowed because no rate had been agreed upon, not because the deposit had not taken the form of a time certificate. The implication from the fact that the guaranty fund law expressly provides that a state bank may pay in-

terest, that it intended to make the fund liable therefor (*State v. Nebraska State Bank*, 111 Neb. 360), is as forceful as to interest on daily balances as on time certificates.

We think by these cases we are committed to the rule that interest upon deposits subject to check, when contracted for, may be a proper charge against the guaranty fund.

5. It is, however, earnestly contended by counsel for the receiver that the payment of interest out of the depositors' guaranty fund is beyond the power of the legislature to prescribe; that no consideration of public health, morals, safety, or general welfare is advanced by such legislation, and, therefore, the exercise of the police power in that direction is illegal and contrary to the provisions of the Constitution of the United States against the taking of private property for a private use and without due process of law. These same arguments were presented to the supreme court of the United States as exhibiting the unconstitutionality of the bank guaranty act, and were held untenable in the cases of *Noble State Bank v. Haskell*, 219 U. S. 104, *Shallenberger v. First State Bank*, 219 U. S. 114, and *Assaria State Bank v. Dolley*, 219 U. S. 121. These decisions are conceded by counsel to be conclusive upon the validity of the act with reference to the deposit itself, but it is strongly insisted that to extend the protection to interest on the deposit is not necesary for the accomplishment of the purposes for which the act was sustained as to the principal of the deposit, nor within any of the reasons adduced by the supreme court in support of their holding. The following is quoted from the opinion in the *Noble State Bank* case, as furnishing the only basis upon which the legislation was sustained:

"It may be said in a general way that the police power extends to all the great public needs. *Camfield v. United States*, 167 U. S. 518. 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. Among matters of that sort probably few would doubt that both usage and

preponderant opinion give their sanction to enforcing the primary conditions of successful commerce. One of those conditions at the present time is the possibility of payment by checks drawn against bank deposits, to such an extent do checks replace currency in daily business. If then the legislature of the state thinks that the public welfare requires the measure under consideration, analogy and principle are in favor of the power to enact it. Even the primary object of the required assessment is not a private benefit as it was in the cases above cited of a ditch for irrigation or a railway to a mine, but it is to make the currency of checks secure, and by the same stroke to make safe the almost compulsory resort of depositors to banks as the only available means for keeping money on hand. The priority of claim given to depositors is incidental to the same object and is justified in the same way."

The holding in that case meets the contention of counsel for receiver, that the money of intervener, Security State Bank of Lawrence, is taken to pay interest on claims against the Nebraska State Bank, a private purpose, by the following language of the syllabus: "Where the mutual advantage is a sufficient compensation, an ulterior public advantage may justify a comparatively insignificant taking of private property for what in its immediate purpose is a private use." The mutual advantage is the protection each state bank receives from every other state bank, and the public advantage is the safety of the deposits.

It is argued that the "currency of checks is made just as secure whether interest be paid on deposits or not. Likewise, paying interest on deposits out of the guaranty fund does not in any manner tend to make safe compulsory resort of depositors to banks as the only available means for keeping money on hand. The protection of their money is not increased one bit by according priority of payment to interest." And it is suggested that the protection of interest is entirely unnecessary for the public welfare or the carrying on of successful commerce. The argument assumes that the reasons given by Justice Holmes in the above case are

the only ones which may be adduced in support of the legislation. Whether or not this is correct we need not at this time determine, for we are of the opinion that they are broad enough to cover the present situation. Counsel quotes from 12 C. J. 929, sec. 441, as follows:

"In order that a statute or ordinance may be sustained as an exercise of the police power, the courts must be able to see that the enactment has for its object the prevention of some offense or manifest evil or the preservation of the public health, safety, morals, or general welfare, that there is some clear, real and substantial connection between the assumed purpose of the enactment and the actual provisions thereof, and that the latter do in some plain, appreciable, and appropriate manner tend toward the accomplishment of the object for which the power is exercised."

This is without doubt a correct statement of the general principles governing the question of the validity of an attempted exercise of the police power; but it must be borne in mind that such power resides in the legislature, and that their determination of the necessity for its exercise is entitled to great weight, and that all presumptions are in favor of the law's validity. The police power is construed liberally in favor of the general public, and not strictly in favor of individual interests. If there is any reasonable doubt as to whether a police regulation is invalid, such doubt should be resolved in favor of its validity. *Cream City Bill Posting Co. v. Milwaukee,* 158 Wis. 86. It would seem, therefore, that the validity of the enactment is dependent, not so much upon the question as to whether or not the court is able to point out some particular public purpose intended to be subserved or accomplished, but whether or not, upon a comprehensive view of the situation, the legislature had reasonable ground for concluding that the enactment of the law was demanded by the public necessity or public welfare.

It is said that a police regulation may be valid up to a certain point, and invalid beyond. *Burns Baking Co. v. Bryan,* 264 U. S. 504. This presents no difficulty, neither a

solution of the present problem. If the protection of interest is without the police power, it may be so declared without disturbing the holding as to the corpus of the deposit.

At the time of the enactment of the law in question, the general nature of the business of banking was well understood. The fact that it received deposits, upon some of which it paid interest and others not, must have been in contemplation of the lawmakers, and yet they made no distinction between deposits of one kind or the other. It would seem to follow that in their judgment the legislature considered that the public welfare demanded the safety of all classes of deposits. In fact, an interest-bearing deposit is just as much a deposit within the banking law as one without interest, and the act itself recognizes this fact by its limitation of interest to a certain rate if the deposit is to be within the protection of the guaranty fund.

Now, interest is a mere incident to the deposit. It is just as much a part of it as a man's arm is a part of his body. It has no separate existence. It lives or dies with the thing upon which it depends for existence. The deposit is the amount due from the bank to the depositor, and includes interest when lawfully contracted for. Such is the thing which the legislature has determined should be protected in the interest of public welfare. To dismember it and invalidate the law because, considered separately, some particular reasons for sustaining it are of more force when applied to one part than to another, in our judgment, would be subjecting the broad legislative discretion to unwarranted dissection. We are unable to perceive that the extension of protection to interest is any less reasonable than the deposit itself from which it is inseparable. We conclude that the allowance by the district court of interest at 4 per cent. to the date of the closing of the bank was correct.

6. One further question remains to be considered, viz.: Is the depositors' guaranty fund chargeable with interest on the claim at 7 per cent. from the date of its allowance by the district court? In several cases we have held that

the allowance of the claim amounted to a judgment and came under the general provision of the statute that judgments shall draw interest at 7 per cent. It is contended by counsel for receiver that these decisions were rendered at a time when the guaranty fund was solvent and able to pay all claims certified to it under the law, but that at the time of the trial there were approximately $7,000,000 in claims certified for payment and unpaid because there were no funds in the depositors' guaranty fund to pay the same; and, further, that the maximum assessment authorized by law at that time in any one year was $1,650,000. Evidence of these facts appears of record. Attention is also called to the fact that by section 8028, Comp. St. 1922, as amended by section 26, ch. 191, Laws 1923, the maximum assessment for replenishing the fund is one-half of 1 per cent. of the average daily deposits of banks, whereas prior thereto the assessment permitted was 1 per cent. of the average daily deposits. It is therefrom argued that, inasmuch as the delay in payment of the deposits is attributable to the law itself, no interest should be allowed.

The argument *ab inconvenienti* is of considerable force and its rejection results in leaving the guaranty fund charged with a burden of staggering weight, but we would not be justified in relieving it unless in accordance with legal principles applicable to the facts of the case. As above noted, we have held in a number of cases that upon the allowance of the claim it draws interest at 7 per cent. per annum until paid. Among these cases may be cited: *State v. Farmers State Bank,* 113 Neb. 679, *State v. Octavia State Bank,* 116 Neb. 825, and three cases of *State v. Security State Bank,* 116 Neb. 521, 526, and 530, in which claims were allowed "with interest as provided by law." The question now presented was not discussed in any of those cases, but the principle upon which the holdings are based is that the allowance of the claim is in the nature of a judgment and is therefore within the operation of section 2836, Comp. St. 1922, providing that judgments shall bear interest at 7 per cent. unless a greater rate is provided for

in the contract upon which it is based. *State v. Farmers State Bank*, 113 Neb. 679.

But it is argued that it was also held in the case last cited that no interest should be allowed upon the certificate after maturity and until the allowance of the claim in the receivership proceedings, for the reason that "the delay in payment may be said to be the delay of the law," and that the same reason is applicable to the present case. The situations are not analogous. Here failure of payment is not due to the processes of the law, but the failure of the law itself to make adequate provision for payment. Certificates of deposit generally provide that interest stops at maturity. From that time the deposit falls into the class of general deposits not drawing interest, and it seems just that no interest should be allowed upon it against an insolvent bank until judgment. The present case is in closer analogy to that of a debtor who by lack of foresight or other cause is unable to pay his debt when due. We know of no principle which would justify a refusal of interest in such case on those grounds.

It is still further contended that the claim is in the nature of one against the state, and therefore interest is not allowable. The proceedings we are examining are specifically provided for by the guaranty fund act for the purpose of determining the claims against the bank. Such claims are not against the state in any sense and the state is not liable therefor. It is therefore difficult to discover the basis for the contention that the allowance of interest against the state is involved. *Lankford v. Platte Iron Works Co.*, 235 U. S. 461, is cited as holding that the title to the guaranty fund is in the state. That case involved a statute of Oklahoma and merely followed the decision of the state court in *State v. Cockrell*, 27 Okla. 630, four justices dissenting. It was an action in equity to compel the state banking board to pay plaintiff's claims out of the state guaranty fund, and the court held: "The state courts of Oklahoma having held that the statute creating the state banking board intended to give the state a definite title to the depositors'

guaranty fund, the fact that the fund is to be used to satisfy claims of beneficiaries does not take its administration from the officers of the state or subject them to judicial control."

The present action does not seek in any manner to control the administration of the fund, but merely to establish a claim against it in the manner pointed out by the act. And if it be considered in any sense an action against the department of trade and commerce or the guaranty fund commission, it is one provided for by the act itself. There is nothing that we said in the case of *Svoboda v. Snyder State Bank*, 117 Neb. 431, contrary to the views herein expressed.

The provisions of the Oklahoma statute with reference to the relation of the state to the guaranty fund differ from those of this state and the *Lankford* case is therefore not controlling. We do not deem it necessary in the disposition of this case to determine where the title to the guaranty fund is vested.

We conclude that the judgment of the district court is right and should be affirmed.

AFFIRMED.

COMMERCIAL INVESTMENT CORPORATION, APPELLEE, V. FARMERS STATE BANK OF BRUNSWICK, APPELLANT.

FILED JUNE 17, 1929. No. 26639.

1. **Bills and Notes: INDORSEMENT: PROOF.** In order that an offer of a note or certificate of deposit may carry with it an offer of its indorsement, it is necessary that said offer specify the inclusion of the latter.
2. **———: ESTOPPEL.** On the question of an estoppel, the party asserting the same is required to show, in order to prevail on that ground, that he has altered his position for the worse in reliance upon his adversary's conduct and in ignorance of his rights.

APPEAL from the district court for Antelope county: DEWITT C. CHASE, JUDGE. *Reversed.*

C. M. Skiles, I. D. Beynon, Boyd & Harris and *Lyle E. Jackson,* for appellant.

Williams & Kryger and *Burgess & Gill, contra.*

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

SHEPHERD, District Judge.

The Farmers State Bank of Brunswick, appellant, bought a $7,000 mortgage upon the representation that the property covered by the same consisted of nearly 300 acres of good tillable land, when, as a matter of fact, the Missouri river had swallowed all but about 10 acres of it. The bank gave in exchange $1,000 in cash, some uncollectible paper which it had, and the $3,000 certificate of deposit sued upon in this case.

Suit was brought by the Commercial Investment Corporation, appellee, which claimed to own said certificate by purchase from the payee, an automobile concern styled the King of Trails Garage. The bank answered alleging the fraud described. Trial was to the court without jury, and from a finding and judgment in favor of the plaintiff the defendant appeals.

One of appellant's assignments of error is that plaintiff failed to prove the indorsement on the certificate of deposit. The following excerpt from the bill of exceptions comprises the whole of plaintiff's proof: "The plaintiff offered in evidence the instrument identified by the reporter as 'Ex. 1,' which was received. Whereupon the plaintiff rests." Then follows the certificate pasted to the record page and bearing indorsement on its back, "King of Trails Garage, Inc., C. J. Boltze, Pres."

Since indorsement was denied in the answer, it was necessary to *prima facie* proof of plaintiff's case that it be shown in the evidence. *Shawnee State Bank v. Lydick,* 109 Neb. 76; *Shawnee State Bank v. Vansyckle,* 109 Neb. 86; *Capitol Hill State Bank v. Rawlins Nat. Bank,* 24 Wyo. 423.

Yet no attempt was made to show that such indorsement was authorized, nor was it even offered in evidence.

It is true, as contended by the appellee, that in making its offer the term "instrument" was used. But the instrument identified was the certificate. "Ex. 1" appears on the face of the paper and the face is the certificate. The offer was an offer of the certificate alone.

Appellee concedes in its brief that a mere offer of the certificate would not have been an offer of the indorsement also, but contends that its offer of the instrument identified as "Ex. 1" was of broader scope and included the offer of the indorsement on the instrument's back. With this the court is not able to agree. *Certificate* and *instrument* must be considered as interchangeable terms in connection with an offer of this kind. Such is the plain and common inference from the words employed.

It is to be observed, too, that what the reporter identified as "Ex. 1" was the face of the paper, not the writing on its back. In order that an offer of an instrument of this character—note or certificate—may carry with it an offer of its indorsement, it is necessary that said offer specify the inclusion of the latter. *Shawnee State Bank v. Lydick*, 109 Neb. 76.

We entertain no doubt that the plaintiff's evidence was insufficient to establish its title to the said certificate.

Other assignments of error are based upon the exclusion of the depositions which were offered to prove the fraud. The plaintiff objected as incompetent, irrelevant, immaterial, without foundation, and because the defendant was estopped. The court ruled: "Overruled as to everything except question of estoppel, and sustained upon the objection of estoppel."

Shortly after the certificate of deposit had been issued, the defendant bank had received a telegram from the plaintiff asking if it would be honored, and had answered: "Certificate will be paid when due. Is guaranteed by state." The court evidently considered that the defendant was thereby concluded on the ground of estoppel.

For all the record shows, however, the plaintiff may have bought the certificate before the date of the telegram referred to. And though it might be surmised that the transfer followed such telegram and was in consequence thereof, the fact could not be taken for granted in the absence of proof. There is nothing in the evidence to show either that the plaintiff altered its position for the worse in consequence of the information so received by wire. There is nothing to show that the defendant was at that time advised of the fraud that had been practiced upon it, and nothing to show that the plaintiff did not itself have knowledge of such fraud. Each of these essentials is made the subject of particular assignment of error. To have the benefit of estoppel it was incumbent upon the plaintiff to show facts justifying the application of the same; and having in mind the paucity of plaintiff's proof, it is obvious that the court erred in its ruling. The following from *Union State Bank v. Hutton*, 62 Neb. 664, supports the conclusion arrived at: "On the question of estoppel the defendant had the burden of proof. It was required to show, among other things, that it altered its position—that it lost some advantage, incurred expense, paid out money, parted with property, assumed an obligation or did, or failed to do, some other act or thing by which it was prejudiced—in reliance upon plaintiff's conduct and in ignorance of his rights. *Burke v. Utah Nat. Bank*, 47 Neb. 247; *State v. Bank of Commerce*, 61 Neb. 22; *Lingonner v. Ambler*, 44 Neb. 316."

It is contended in the able brief of the appellee that defendant's plea of fraud was bad in form and insufficient in substance, and it must be conceded that defendant's pleading was far from perfect in these respects. But it is apparent that the plaintiff took the fraud as well pleaded. It made specific answer thereto, thus joining issue thereon. The following is from the plaintiff's reply: "Plaintiff denies that the land described in the mortgage * * * had no existence, or that said mortgaged premises were covered by the waters of the Missouri river, and denies that any

fraud or misrepresentation was practiced on the defendant as to the character and extent of said mortgaged premises to induce the defendant to issue said certificate for said note and mortgage, or that said note and mortgage were worthless, and denies that there was any want or failure of consideration for said certificate, in whole or in part; but, to the contrary, the plaintiff alleges that said certificate was issued for full value received." And, following this in said reply, the plaintiff pleads the facts in regard to the described telegram of inquiry, and alleges that estoppel resulted. Plainly, therefore, the plaintiff regarded the pleading of the petition to be a pleading of fraud, and so treated it. And when it is considered that the court's ruling was also upon this theory, it is plain that both the parties and the court proceeded in the case and throughout the trial upon the theory that fraud was an issue and that the same was well pleaded. Where the parties by their acts and proceedings upon trial of a cause adopt a common theory as to the issue joined, and where the case is determined by the court in accordance with that theory upon that issue, the appellant will not be heard to deny that such issue was raised by the pleadings.

For the reasons stated, the judgment of the district court must be reversed, and it is so ordered.

REVERSED.

ROBERT CUNNINGHAM ET AL., APPELLANTS, V. HERMAN ILG ET AL., APPELLEES.

FILED JULY 2, 1929. No. 26580.

1. **Schools and School Districts: CHANGE OF SCHOOLHOUSE SITE: VOTERS.** Parents whose children have been transferred as pupils to an adjoining rural school district under the provisions of section 6524, Comp. St. 1922, as amended by chapter 176, Laws 1925 (and by chapter 81, Laws 1927), are not entitled to vote on a change of schoolhouse site in the rural school district in which they reside.
2. ———: ———: **COUNT OF VOTE.** One who was actually present at an annual meeting of a rural school district and entitled

to vote on a change of schoolhouse site but who did not vote must, under section 6275, Comp. St. 1922, be counted as present in order to compute the requisite majority on that matter.

3. ———: ———: VOTERS. Under section 6271, Comp. St. 1922, an unmarried woman, of legal age and a citizen, though residing in the school district, but having no children and no property, is not entitled to vote at the annual meeting of a rural school district.

4. ———: ———: REVERSAL. The record and evidence, being examined, shows that 35 electors were present and qualified to vote at the annual meeting in a rural school district on the matter of a change of site requiring at least a two-thirds vote of those present, and that only 23 voted for the change. *Held*, that a judgment and decree ordering the change of site was erroneous.

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

Coufal & Shaw, for appellants.

F. H. Mizera and *August Wagner, contra.*

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

GOSS, C. J.

Plaintiffs appealed from a final decree of the district court denying them an injunction against the defendants to prevent a change of a schoolhouse site in a rural district.

The plaintiffs were electors qualified to vote in rural school district number 55 in Butler county. The defendants were members of the school board of the district. The controversy arose out of the proceedings at the annual meeting of the school district June 13, 1927, on a vote to change the school site to another location in the district. There were 38 individuals present, 24 voted to change the site, 11 voted against it and 3 did not vote on this proposition.

Under section 6275, Comp. St. 1922, at any annual meeting the "qualified voters in the school district" may effect a change of site when designated "by a vote of two-thirds of those present," with the proviso that where the schoolhouse

is located three-fourths of a mile or more from the center of the district it may be changed to a point nearer the center of the district "by a majority vote of those present." Plaintiffs made *prima facie* proof that the proposed change was less than three-fourths of a mile. Nothing in the evidence or arguments seriously challenges this proof. So the change of site involved here required a two-thirds vote rather than a majority vote.

The three individuals present at the meeting who did not vote were John M. Stoupa, his wife, Mary Stoupa, and Jerry Kubik. The evidence shows that Mr. Stoupa owned land in the school district where he and his wife resided with their children of school age; but that, on his application, a transfer had been granted and was in force admitting his children to attend school in an adjoining district. Under section 6524, Comp. St. 1922, as amended by chapter 176, Laws 1925 (and, effective after the election under consideration, by chapter 81, Laws 1927), there had been carried, unchanged, in the original section and in the amendments, a provision that "the parents or guardians of the pupils so transferred shall have the right to vote in the district to which such pupils are transferred on all school matters except that of issuing bonds." Under this provision the Stoupas were not entitled to vote on this question of change of schoolhouse site in their home district and the district court properly excluded them from consideration as voters present and entitled to vote. See, also, *State v. Matson*, 97 Neb. 746.

The district court found as a fact that Jerry Kubik was physically present at the election and was qualified to vote, but held as a matter of law that he was not "present" within the contemplation of section 6275, because he did not offer to vote and was not prevented from voting. The record of the school meeting shows that prior to voting on any propositions they adopted a set of rules to govern the election. One of these rules required each qualified elector desiring to vote at the election to secure a ballot from one of the judges. After marking and folding it he was to return

it and have it deposited forthwith in the closed receptacle. Kubik did not obtain a ballot and did not vote either way on the proposition. Appellees argue that, as Kubik did not appear and obtain a ballot and did not vote, to hold that he was present is to allow extraneous evidence to supersede the record of the meeting. The record of the meeting, kept and certified by the director, states that it "clearly and completely reflects the action of such meeting and contains all of the motions, resolutions, proceedings and acts of said meeting." Nowhere in the record made at the meeting does it appear that Kubik was present and they strenuously urge that such record should be controlling. It was proved on the trial that he was at the meeting during all of the proceedings on the matter of change of site and was in fact qualified to vote thereon. That finding of fact by the trial court was correct. We are bound by the statute rather than by the records of the school meeting in a determination of the question as a matter of law whether he was "present." It was decided by the court that he was not "present" as contemplated by the language of the statute.

The general meaning of the adjective "present," as supplied by the definition in the dictionary, may be said to be given as "being in a certain place and not elsewhere; opposed to absent." There do not appear to be many judicial definitions of the word in cases similar to the one under consideration.

McLain v. Maricle, 60 Neb. 353, involved the change of a schoolhouse site to a point nearer the geographical center of the district. There it was "held, that of those present at such meeting at least a majority thereof must cast their votes in favor of the proposition to legally adopt it." In the opinion, after quoting the statute, it was said: "This, we think, is capable of but one construction, and that is, of those present entitled to vote upon the question, at least a majority thereof must cast their votes in favor of the proposition."

In *State v. Vanosdal,* 131 Ind. 388, three out of the six township trustees refused to vote on the election of a county

superintendent. They were present, refused to vote and merely stepped aside among the bystanders in the same room. The court held that "they must be treated as present and failing or refusing to vote."

An act provided for an election of a county superintendent "by a majority of the whole number of directors present." At a county convention for purposes of electing a superintendent, 112 directors were present, 56 voted for relator, 55 voted for another and one member refused to vote. The court held that the director who was present and refused to vote should have been counted, that "the legal intendment was that he voted for neither or for the minority candidate," and that a commission could not issue to relator. *Commonwealth v. Wickersham,* 66 Pa. St. 134.

Appellees cite *Smith v. Proctor,* 130 N. Y. 319, which they think controlling. It holds that a majority of those who vote, though less than a majority of those actually present at the meeting, is sufficient. But the New York statute is different from ours in that it provides that said majority is "to be ascertained by taking and recording the ayes and noes."

The fact that the meeting adopted rules requiring those desiring to vote to secure ballots and to vote, and thus excluded Kubik from the count of those present because he did not follow the rule, cannot control. However desirable the rules might be in making a record of the school election, they cannot supersede the plain words of the statute. Kubik was present and must be so counted.

The vote of Mary Dolezal, who voted with the majority, is challenged. She had no children and no property. Section 6271, Comp. St. 1922, prescribing the qualifications of school district electors, is as follows:

"Every citizen of the United States, male or female, who has resided in the district forty days and is twenty-one years old and who owns real property or personal property that was assessed in the district in his or her name at the last annual assessment, or who has children of school age residing in the district, shall be entitled to

vote at any district meeting or school election held in any district, village or city."

If the plain terms of this section are controlling, then she had no right to vote and was not present in contemplation of law. But appellees, and the trial court, concluded that she was eligible to vote on the question under the general election laws. A section thereof, after its amendments in 1917 and in 1921, reads as follows:

"Every person of the age of twenty-one years or upwards shall be an elector, and shall have the right to vote for all officers to be elected to public office, and upon all questions and propositions submitted to the voters, at any and all elections, authorized or provided for by the Constitution or laws of Nebraska.

"No person shall be qualified to vote at any election unless such person shall have resided in the state six months, in the county forty days and in the precinct, township, or ward ten days, and shall be a citizen of the United States." Comp. St. 1922, sec. 1893.

The decree of the district court on this point said:

"That as a matter of law section 1893, as amended in 1917 and 1921, is to be construed in connection with section 6271 (1922 Statutes) so that following said amendments every citizen, over 21, having resided in the state for 6 months and in the district for 40 days is an elector, qualified to vote at a school meeting upon all questions, except the election of district officers, although such citizen may not own real property or personal property that was assessed in the district in his or her name and may not have children of school age."

One qualification for voters at school meetings and another for voters at general elections has been consistently prescribed by the legislatures of this state. In 1884 it was held that the act allowing women possessing the prescribed qualifications to vote at school meetings and to hold office as school trustees was not in conflict with the Constitution and was valid. *State v. Cones*, 15 Neb. 444. When in 1917 the general election law was amended (section 1893,

above quoted) so as to apply to all elections, it did not expressly amend or repeal any part of the school laws. It did, however, leave in force preexisting section 1898 (of the same chapter) Comp. St. 1922, as follows:

"Elections for school district officers, except for members of the boards of education in cities, are excepted from the provisions of this chapter."

From this it is argued, under the rule that the mention of one thing excludes another, that at rural school meetings the qualifications of electors set forth in the laws relating to schools control as to election of school district officers, but that on all other matters to be voted in such school meetings the qualifications described in the general statutes control. But this canon of statutory construction is not of universal application.

"It is a cardinal rule of construction that an act whose provisions are general will not, unless unavoidable, be so interpreted as to affect more particular and positive provisions of a prior act on the same subject." *Dawson County v. Clark*, 58 Neb. 756.

The school laws, prior to and at all times since the amendment of the general election law in 1917, defined the qualifications of a school elector for all purposes, and provided that such person should "be entitled to vote at any school meeting." Moreover, the general election law requires that an elector under its terms must be a resident for a specified time in "the precinct, township, or ward," but does not mention residence in a school district. Such omission indicates that it was the legislative purpose to deal by section 1893 only with general elections, and not to amend or supplement the school laws.

It must also be noted that section 6272 requires a person whose vote at a district meeting is challenged to make oath that he owns property assessed in his name, or has children of school age, and the following section provides that the vote of any person who refuses to take such oath shall be rejected. Compliance with these sections, which are unrepealed, would deny, under section 1893, the vote

to a general elector not possessing such special qualifications.

Ample considerations of public policy have dictated that school district affairs should be under the control of those persons only who have a property or parental interest in its management. For similar reasons special qualifications have been fixed for electors in irrigation districts, requiring ownership of land affected, and in drainage districts, allowing one vote for each acre owned, to the end that only those vitally interested should have voice in the government of such districts. Did the legislature intend, by a broad amendment purporting to apply to all elections, to confer the management of such district affairs upon all general voters who happened to live within the territory of the district, irrespective of their actual interest? In the absence of a clear expression of that intention, we cannot declare that a new scheme of such far-reaching effect was adopted. Finally, some weight should be given to the thought that, under the view of the lower court, only those who have property or children of school age could vote in the selection of school officers, but, on the more important questions of taxation, bond issues, or schoolhouse sites, another body of voters, without property or parental interest, could step in and perhaps control results. Such a dual body of electors would tend to defeat the orderly conduct of the business of the district.

Our conclusion being that the general election law was not intended to prescribe qualifications for school district electors, it follows that Mary Dolezal was not a voter.

Considerable discussion has been had of the eligibility of three young men to vote at the school election. They were allowed to vote. They voted for the change of site. It is contended that their ownership of taxable personal property was not in good faith, was merely colorable, and that it was transferred to them only to qualify them to vote at the school election. It was held in *Starkey v. Palm*, 80 Neb. 393, to be a question of good faith. We do

not find it necessary to take the time and space to discuss the effect of the evidence as to these three and to decide whether or not they were qualified electors. Even if their votes were counted, as they were by the trial judge, it would not change the result of our decision.

Assuming that the three young men were qualified and that Mary Dolezal, who voted for the change of site, was disqualified, as we have shown she was, it follows that there were 23 votes that may be considered as favoring the change of site. In addition to the 11 shown by the record to have voted against removal Kubik must be counted as present. There were therefore 35 qualified electors present. Twenty-three being less than two-thirds of 35, it follows that the vote was insufficient to effect the change of site and the injunction should have been granted.

The judgment of the district court is reversed, with directions to enter a permanent order of injunction.

REVERSED.

Note—See Schools and School Districts, 35 Cyc. 875 n. 53, 938 n. 40; 21 L. R. A. 662; 27 L. R. A. n. s. 552; L. R. A. 1915B, 247; 9 R. C. L. 1030.

STACY HENSLEY, APPELLEE, V. CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY, APPELLANT.

FILED JULY 2, 1929. No. 26379.

1. **Appeal: PLEADING: ISSUES.** The general rule that the allegations of the pleadings and proof thereunder must agree will not be applied to reverse a judgment, where an issue is tried by both parties without objection from either that such issue is not sufficiently pleaded. Under such conditions, the appellate court will consider the pleadings as sufficient to raise the particular issue.
2. **Courts: ACTS OF CONGRESS: INTERPRETATION BY FEDERAL SUPREME COURT.** The interpretation placed upon an act of congress by the United States supreme court is controlling and binding upon the state courts.
3. **Commerce: EMPLOYMENT IN INTERSTATE COMMERCE.** The test of whether an employee of a railway company is subject to the

federal employers' liability act is: Was the employee, at the time of the injury, engaged in interstate transportation, or in work so closely related to it as to be practically a part of it?

4. ———: ———. In the repair of the tracks of a railway company engaged in both intrastate and interstate traffic, numerous items of iron and steel were removed from the track as unfit for use. At intervals, this rejected material was gathered upon cars and hauled to Emerson, Nebraska, where it was unloaded upon a storage platform. When enough of such material to make a carload had been accumulated, it was reloaded into a car and shipped to another state. Plaintiff was injured while engaged in unloading some of this rejected material onto the platform from a car which had been standing in its then location for a period of four or five days. *Held*, that at the time he was not engaged in interstate commerce, within the meaning of the federal employers' liability act.

5. Master and Servant: INJURY TO SERVANT: JUDGMENT. A judgment for plaintiff in an action brought and tried under the federal employers' liability act cannot be sustained as a judgment in a common-law action for negligence, because the federal act eliminates certain defenses and modifies others that would be available to a defendant in a common-law action for negligence.

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

Wymer Dressler and *Robert D. Neely*, for appellant.

M. F. Harrington and *George M. Harrington, contra.*

Heard before ROSE, DEAN, GOOD, EBERLY and DAY, JJ., and RAPER and REDICK, District Judges.

GOOD, J.

This action was brought under the federal employers' liability act, to recover damages for personal injuries alleged to have been sustained by plaintiff while working for defendant as a section laborer. Plaintiff recovered a judgment for $14,000. Defendant appeals.

Of the many assignments of error, we shall consider only such as seem necessary to a proper determination of the cause.

From the record it appears that the defendant operates a system of railways, extending into and through a num-

ber of states. Plaintiff had been employed for a number of years by the defendant as a section laborer. His duties as such required him to work over and on a limited portion of defendant's right of way, in keeping its railway tracks in proper condition for both interstate and intrastate traffic. It appears that over the various branches of defendant's right of way repairs are made from time to time, and that when such repairs are made there are removed, as unfit for use, bolts, nuts, angle bars, base plates, parts of rails and other iron and steel material. This rejected material will hereinafter be referred to as "scrap." It was collected in small quantities at various places along the right of way of the several branches of defendant's railway. From time to time this scrap was gathered up and loaded onto cars and transported to Emerson, Nebraska, where it was unloaded upon a storage platform. When, from the various branch lines of railway, a sufficient quantity of scrap had been accumulated upon the platform to make approximately a carload, it was reloaded into a car and shipped to Hudson, Wisconsin, where defendant maintained shops and where the scrap was used in its business. Plaintiff in this case had nothing to do with the gathering of the scrap and loading it onto the cars for transportation to Emerson.

Some four or five days before the injury of which plaintiff complains, two cars, containing scrap which had been gathered up along the line, had been placed on a switch at Emerson adjacent to the storage platform. One of these cars was a flat-car and the other what is known as a gondola car. The flat-car was equipped with a collapsible or disappearing brake; that is, one in which the brake shaft operates in a sleeve or drum and, by a mechanical device, the brake shaft may be lowered through the sleeve or drum until the brake wheel is flush with the floor of the flat-car. The brake end of the flat-car was next to the gondola car.

On the morning of the day that plaintiff was injured, when he went to his place of employment, he, with the other

members of the section crew, was ordered to assist a yard crew in unloading the scrap from the two cars. They had unloaded the major portion of the scrap from the flat-car when plaintiff stepped upon the brake wheel on the flat-car for the purpose of seeing the nature of the material in the gondola car. The brake shaft descended through the sleeve, and plaintiff was thrown between the two cars and received the injury of which he complains.

Defendant argues that there is no evidence which supports any act of alleged negligence. Plaintiff alleged that it was a common practice for the train employees to sit upon the brake wheel and ride thereon; that when plaintiff got upon the brake wheel he believed it to be strong and in a proper state of repair, but that, in fact, the brake was worn, loose and unsafe, which was unknown to plaintiff. He alleged that he got upon said brake wheel carefully and with due regard to and in the line of his duty as a section hand, *as prescribed by defendant,* for the purpose of ascertaining what tools would be needed for unloading the scrap from the gondola car. There is some evidence tending to show that the brake shaft was not perpendicular, that it was rusted and somewhat worn, but there is no evidence to show, nor any from which it might be properly inferred, that the brake was not in a proper condition to be used as a brake, or that it would not operate properly and safely for the purpose for which it was designed. However, plaintiff testified that he was ordered by his foreman to climb upon the brake wheel for the purpose of seeing into the gondola car, and that, pursuant to the order, he stepped upon the brake wheel.

It may be seriously doubted whether this evidence was properly admissible under the facts as pleaded, but the evidence was received without objection and without any motion to strike it from the record. Defendant, in turn, introduced evidence tending to contradict that given by plaintiff, and tending to prove that no such order was given and that plaintiff acted voluntarily and out of curiosity in climbing upon the brake. Under the circumstances,

it is evident that, for the purposes of the trial, both parties treated the allegations of the petition as sufficient to admit evidence of the order, requiring plaintiff to climb upon the brake and into a place of danger that was unknown to him, and as a consequence he was injured.

Defendant invokes the rule that the allegations of the pleadings and proof thereunder must agree. This rule has often been anounced in this court and is no doubt a sound one. *Clarke v. Omaha & S. W. R. Co.*, 5 Neb. 314; *Traver v. Shaefle;* 33 Neb. 531; *Ayers v. Wolcott,* 66 Neb. 712; *Cockins v. Bank of Alma,* 84 Neb. 624; *Boyd v. Lincoln & N. W. R. Co.*, 89 Neb. 840. To this rule there are well-recognized exceptions, one of which is that if an issue is tried by both parties, without objection from either that the issue is not sufficiently pleaded, such objection will not be considered in the appellate court as a ground for reversal. *Boyd v. Lincoln & N. W. R. Co., supra; Sjogren v. Clark,* 106 Neb. 600; *Auld v. Walker,* 107 Neb. 676.

Defendant contends that, since there were several obviously safe ways by which plaintiff could have seen into the gondola car, and since it was so plainly perilous for one to climb and stand upon the brake wheel when there was no necessity therefor, it is silly and unreasonable to believe that such an order should be given, and that testimony that it was so given is unworthy of credence. It may seem improbable that such an order would be given under the circumstances. It is a matter of common knowledge that unreasonable and absurd orders are sometimes given to workmen by their foremen. Whether such an order was given to plaintiff presented a question of fact for the jury to determine.

Defendant urges that the evidence shows plaintiff was not engaged in interstate commerce when he was injured, and that no recovery may be had in this action brought under and based upon the federal employers' liability act.

Since the legislation is federal, the interpretation placed upon it by the federal courts is controlling. The United States supreme court has many times held that the test

of whether the employee was subject to the act is: Was the employee, at the time of the injury, engaged in interstate transportation, or in work so closely related to it as to be practically a part of it? This principle has been so frequently announced and adhered to that no citation of authorities seems necessary. While the principle is plain, its application to a particular state of facts is not always easy.

There have been many decisions by the United States supreme court, as well as the courts of other jurisdictions, which shed light upon what facts or class of facts will bring an employee within the protection of the federal employers' liability act, a number of which cases we will now proceed to examine and discuss.

In *Philadelphia & R. R. Co. v. Di Donato*, 256 U. S. 327, it was held that a person, employed as a railway flagman at a public crossing to signal both interstate and intrastate trains, was, without regard to the character—intrastate or interstate—of the particular train which he was flagging when killed, engaged in interstate commerce, within the meaning of the federal employers' liability act. In the opinion it was observed that the duty of the flagman was not only to flag trains, but to see that the track was kept clear and in proper condition for the passage of both interstate and intrastate trains, and for that reason his employment was held to be in interstate commerce.

In *Erie R. Co. v. Collins*, 253 U. S. 77, it was held: "Plaintiff's duties on a railroad engaged in interstate and intrastate commerce were to attend to a signal tower and switches and also, in a nearby building, to run a gasoline engine to pump water into a tank for the use of the locomotives, whether operating intrastate or interstate trains. While engaged in the latter employment, he was injured and disfigured by burns resulting from an explosion of gasoline. *Held*, employed, at time of injury, in interstate commerce, within the federal employers' liability act."

In *Erie R. Co. v. Szary*, 253 U. S. 86, it was held: "An employee of a railroad engaged in both interstate and in-

trastate commerce, whose duty it was to dry sand in stoves in a small structure near the tracks and supply it to the locomotives, whether operating in the one kind of commerce or the other, was injured while returning from an ash-pit whither he had gone to dump ashes taken by him from one of the stoves after sanding several locomotives bound to other states. *Held,* employed in interstate commerce within the meaning of the federal employers' liability act."

In *Philadelphia, B. & W. R. Co. v. Smith,* 250 U. S. 101, it was held: "An employee of an interstate railroad whose duties were to cook the meals, make the beds, etc., for a gang of bridge carpenters, in a camp car which was provided and moved from place to place along the railroad line to facilitate their work in repairing the bridges, and who, at the time of his injury, was within the car, on a side-track, and occupied in cooking a meal for the carpenters and himself while they were repairing one of the bridges in the vicinity, *held,* engaged in interstate commerce, within the meaning of the federal employers' liability act." In the body of the opinion it was said: "The significant thing, in our opinion, is that he was employed by defendant to assist, and actually was assisting, the work of the bridge carpenters by keeping their bed and board close to their place of work, thus rendering it easier for defendant to maintain a proper organization of the bridge gang, and forwarding their work by reducing the time lost in going to and from their meals and their lodging place. If, instead, he had brought their meals to them daily at the bridge upon which they happened to be working, it hardly would be questioned that his work in so doing was a part of theirs. What he was in fact doing was the same in kind, and did not differ materially in degree. Hence, he was employed, as they were, in interstate commerce, within the meaning of the employers' liability act."

In *Pedersen v. Delaware, L. & W. R. Co.,* 229 U. S. 146, it was held: "One carrying materials to be used in repairing an instrumentality of interstate commerce is

engaged in such commerce; and so *held,* that a railroad employee carrying bolts to be used in repairing an interstate railroad and who was injured by an interstate train is entitled to sue under the employers' liability act of 1908."

In *Kibler v. Davis,* 109 Neb. 837, this court held: "Where one is engaged in shoveling coal into a pit, to be elevated by machinery into a coal chute for immediate use in engines, used in both interstate and intrastate traffic, he is engaged in a work so closely related to interstate transportation as to be a part of it, and is within the protection of the federal employers' liability act."

These cases serve to illustrate to what extent the principle above quoted is applied in holding that employees are engaged in interstate commerce, or work so closely related thereto as to be a part thereof.

In *Minneapolis & St. L. R. Co. v. Winters,* 242 U. S. 353, it was held: "The injury occurred while plaintiff was repairing an engine. The engine had been used in interstate commerce before the injury and was so used afterwards, but there was nothing to show that it was permanently or specially devoted to such commerce, or assigned to it at the time. *Held,* not a case within the federal employers' liability act." In that case it appeared that the injuries occurred on October 21; that the last time the engine was used before the injury was on October 18, and that it was used again after the injury on October 21. In the opinion it was pointed out that an engine, as such, was not permanently devoted to any kind of traffic, and it did not appear that the engine in that case was destined especially to anything more definite than such business as it might be needed for. At the time the repairs were being made upon it, it was engaged in neither interstate nor intrastate traffic. Its character as an instrument of commerce depended on its employment at the time, and not upon remote possibilities or accidental later events.

In *Shanks v. Delaware, L. & W. R. Co.,* 239 U. S. 556, it was held: "Where a railroad company, which is engaged in both interstate and intrastate transportation, con-

ducts a machine shop for repairing locomotives used in such transportation, an employee is not engaged in interstate commerce while taking down and putting up fixtures in such machine shop, and cannot, if injured while so doing, maintain an action under the employers' liability act, even though on other occasions his employment relates to interstate commerce." In the course of the opinion it was said:

"Having in mind the nature and usual course of the business to which the act relates and the evident purpose of congress in adopting the act, we think it speaks of interstate commerce, not in a technical legal sense, but in a practical one better suited to the occasion, * * * and that the true test of employment in such commerce in the sense intended is, was the employee at the time of the injury engaged in interstate transportation or in work so closely related to it as to be practically a part of it. * * *

"Without departing from this test, we also have held that the requisite employment in interstate commerce does not exist where a member of a switching crew, whose general work extends to both interstate and intrastate traffic, is engaged in hauling a train or drag of cars, all loaded with intrastate freight, from one part of a city to another, * * * and where an employee in a colliery operated by a railroad company is mining coal intended to be used in the company's locomotives moving in interstate commerce. * * * In neither instance could the service indicated be said to be interstate transportation or so closely related to it as to be practically a part of it.

"Coming to apply the test to the case in hand, it is plain that Shanks was not employed in interstate transportation, or in repairing or keeping in usable condition a roadbed, bridge, engine, car or other instrument then in use in such transportation. What he was doing was altering the location of a fixture in a machine shop. The connection between the fixture and interstate transportation was remote at best, for the only function of the fixture was to communicate power to machinery used in repair-

ing parts of engines some of which were used in such transportation."

In *Chicago, B. & Q. R. Co. v. Harrington,* 241 U. S. 177, it was held: "An employee of a carrier engaged in removing coal from storage tracks to coal chutes is not engaged in interstate commerce, even though the coal had been previously brought from another state and was to be used by locomotives in interstate hauls."

In *Shauberger v. Erie R. Co.,* 25 Fed. (2d) 297, it was held: "Engineer of switching engine, injured while distributing cars in the yard, none of which were shown to be in use in interstate commerce, *held* not employed in such commerce within federal employers' liability act." It appears that some of the cars being switched had been brought in from other states, and that some of the cars were later destined for interstate shipment, but it was noted in the opinion that at the particular time neither the engine nor the cars were engaged in interstate commerce.

This court, in *James v. Chicago & N. W. R. Co.,* 115 Neb. 164, in an opinion by Eberly, J., held:

"The test of the employment and the application of the federal employers' liability act is: 'Was the employee, at the time of the injury, engaged in interstate transportation, or any work so closely related to it as to be practically a part of it?'

"The test of jurisdiction in repair cases is whether the rolling stock, engine, or car is withdrawn from service at the time the repairs are made, as distinguished from being interrupted in the course of an interstate haul to go on.

"A machinist's helper, under the facts in this record, injured, while making repairs in the roundhouse, upon an engine which had been used in hauling over the railway company's lines freight trains carrying both intrastate and interstate freight, and which was used in the same way after the accident, was not then employed in interstate commerce within the meaning of the federal employers' liability act of April 22, 1908, governing the liability of an

interstate carrier for injuries to its employees when employed in interstate commerce."

Generally speaking, it may be said that the federal courts hold that a railway employee, who is engaged in maintaining or repairing a railway track that is used for carrying both interstate and intrastate freight, is within the protection of the statute; also that any employee who is engaged in operating a train that is carrying interstate freight and all those who may be engaged in repairing a car or an engine that is, at the time of repair, being used in interstate traffic are within the protection of the federal employers' liability act. On the other hand, those railway employees who are engaged in working upon any instrumentality that is not, at the time, engaged or being used in interstate traffic are generally without the statute.

In the instant case, the scrap that was being unloaded from the cars was not being used for the purpose of aiding or in any manner furthering interstate traffic; nor does it appear that it was intended to be thereafter so used. It was scrap which undoubtedly required many independent kinds of treatment before it could be put to such use, and, therefore, the mere unloading of it was a factor too remote to meet the requirements of close connection with interstate commerce. *Malandrino v. Southern N. Y. P. & R. Corporation,* 190 App. Div. (N. Y.) 780. Transportation, wholly intrastate, had ended; the unloading was the completing act, and interstate transportation did not begin until the scrap was again loaded. The final shipment to Hudson, Wisconsin, was a matter resting only in the railroad company's intention, which it might or might not carry out. When the scrap had been hauled into the town of Emerson it had wholly ceased any function in connection with interstate traffic. The unloading thereof from the car onto the platform for storage purposes was a work that had no connection with interstate transportation. Such transportation could be carried on just as well whether or not the scrap was unloaded, and, therefore, the operation in which plaintiff was engaged did not assist in any

manner transportation, intrastate or interstate. *Perez v. Union P. R. Co.*, 52 Utah, 286. See, also, *Cincinnati, N. O. & T. P. R. Co. v. Hansford,* 173 Ky. 126.

We are constrained to hold that, under the circumstances, plaintiff was not engaged in interstate commerce, within the meaning of the federal employers' liability act. It necessarily follows that the action, based on that act, cannot be maintained.

Counsel for plaintiff contend that the allegations of the petition and the evidence are sufficient to sustain a common-law action for negligence, and that the judgment should, therefore, be affirmed. We are confronted, however, with the proposition that the rules of law and the defenses in an action arising under the federal employers' liability act and in a common-law action for negligence are not the same. Under the federal employers' liability act certain defenses which might be urged in a common-law action are eliminated. Again, in a common-law action for negligence, under the statutes of this state, the rule of comparative negligence obtains. Under the federal employers' liability act contributory negligence is not a defense, but only goes to the extent of mitigating the amount of recovery, while under the Nebraska statute contributory negligence is a complete defense, unless the negligence of the defendant is gross and the contributory negligence of the plaintiff is slight in comparison therewith. The same instructions are not applicable to the two classes of cases. In the instant case, plaintiff alleged facts in his petition which would bring him within the protection of the federal employers' liability act, and it was upon that theory that his case was tried and submitted to the jury. He must either stand or fall upon the proposition that he is entitled to recover under that act.

In *James v. Chicago & N. W. R. Co.*, 115 Neb. 164, there were originally two causes of action or two cases consolidated. It was contended by plaintiff that one of the causes of action was under the federal employers' liability act and the other was not, and for that reason the judgment

should not be reversed. Upon this proposition, in the opinion Eberly, J., said (page 173):

"It is to be noted further that the federal employers' liability act by its terms eliminates certain defenses that exist at common law, and qualifies others. To concede plaintiff's contention would be to permit him to take advantage of the benefit of these provisions in an action to which the law itself did not apply. This court cannot say that, deprived of the advantage which the federal employers' liability act confers, the plaintiff would have prevailed in the trial had in the district court. For, indeed, not only the issues, but the proof, might well have been quite different. It follows, therefore, that for the purposes of this case the plaintiff must stand or fall on the basis which he himself determined for the bringing of his lawsuit."

The conclusion which we have reached upon the proposition under discussion renders it unnecessary to consider the other errors assigned. Since the action was brought under and based upon a right to recover under the federal employers' liability act and the evidence is insufficient to show that plaintiff was engaged in either interstate transportation or in work so closely related thereto as to be a part thereof, it follows that the judgment cannot be sustained.

The judgment of the district court is reversed and the cause remanded to the district court for further proceedings consistent with this opinion.

REVERSED.

DEAN, J., dissenting.

At the time of the accident the plaintiff, a day laborer, was working under the immediate direction of Reuben Groves, a section foreman, and was then engaged in shoveling scrap iron from a flat-car onto a platform at Emerson. The foreman was on the flat-car at the time and, referring to a gondola car which was coupled to the flat-car, he gave plaintiff this order: "Get up on the brake and see what is in the (gondola) car." In obedience to his

foreman's order, the plaintiff testified: "I got up with my left foot and stood on the (flat-car) brake with my left foot. I started to raise my other foot and the brake went down. I fell between those two cars." It was then and there that plaintiff sustained his injuries. It may here be noted that the end frame of the gondola car was so high that a man, standing on the flat-car, could not see over it into the car ahead; hence, the order to plaintiff, from his superior, to "get up on the brake." The foreman denied that he told plaintiff to look into the gondola car and see what was there. But this question of disputed fact was for the jury. The foreman, however, testified: "Q. As a matter of fact, can't you see into the gondola without climbing up anything? A. No, you couldn't." In this he corroborated an important statement in plaintiff's evidence.

In respect of his condition immediately following the accident, plaintiff testified that his injured leg was treated by the defendant's local physician and that he was bedfast three weeks at his home and was then removed to a Sioux City hospital where he remained eleven days. From thence plaintiff returned to his home, but later his injury was such that he was again sent to the hospital for treatment and, for the space of four months, he was compelled to use crutches. But there was an intervening period of 15 or 20 days when he could not use a crutch. He testified: "I didn't have any strength in my hands for a cane and I was so sore that I couldn't be touched by my crutches." Plaintiff went twice to a mud bath health resort but obtained no relief. He testified: "I was weak, in bad shape. * * * I was in bed part of the time and up part of the time."

The present case differs materially from the cases cited by defendant in that plaintiff Hensley did not voluntarily place himself in a dangerous position. He mounted the brake wheel because he was imperatively ordered to do so by his superior, one of defendant's employees, under whose orders the plaintiff worked. And in the eight or

ten cases cited in the main opinion it is not made to appear that the injured railway employees, therein said to have suffered injuries, so suffered from the fact that they were ordered into a place of danger. So far as the quoted language of the cited opinions discloses the employees there were injured by accidents that did not arise out of an order from a foreman to do certain specified work, as in the present case.

It is argued in the main opinion that plaintiff "selected" a dangerous way of obeying the command of his boss. But plaintiff made no selection. The foreman made the selection and he, as defendant's representative, and in its place, gave the imperative command that led instantly to the calamitous result in question here.

Quoting from the main opinion: "Defendant contends that, since there were several obviously safe ways by which plaintiff could have seen into the gondola car, and since it was so plainly perilous for one to climb and stand upon the brake wheel when there was no necessity therefor, it is silly and unreasonable to believe that such an order should be given, and that testimony that it was so given is unworthy of credence." And the argument in the opinion concludes: "Whether such an order was given to plaintiff presented a question of fact for the jury to determine."

The above conclusion is elementary. Nothing affecting trial practice in this jurisdiction is better settled than that, in a case tried to a jury, it is, of course, the office of the jury, and not that of the court, to determine controverted questions of material fact when presented under the recognized rules of practice. This function, for time out of mind, has so rested within the province of the jury in Anglo-Saxon jurisprudence. And the jury believed the plaintiff's statement and refused to accept that of the opposing party. It is the big point in the case. In the class of repair work in which plaintiff was engaged, the order of the immediate superior must be promptly obeyed by the subordinate. It is not his to reason why. It is his to obey and that promptly. This is clearly the vital point

before us here. The trial court and the jury having seen and having heard the witnesses and having observed their demeanor while testifying were thereby better enabled to judge of the truth or the falsity of the witnesses, and their fairness or the lack of it, than any reviewing court.

From the facts and under the law applicable thereto, I respectfully submit that the verdict of the jury and the judgment rendered thereon by the learned trial court should be affirmed.

Note—See Commerce, 12 C. J. 44 n. 15, 46 n. 23; 47 L. R. A. n. s. 55; L. R. A. 1915C, 62; L. R. A. 1918E, 859; 10 A. L. R. 1184; 14 A. L. R. 732; 24 A. L. R. 635; 49 A. L. R. 1342; 18 R. C. L. 850; 3 R. C. L. Supp. 861; 4 R. C. L. Supp. 1216; 5 R. C. L. Supp. 1007; 6 R. C. L. Supp. 1091; 6 R. C. L. Supp. 612.

SADIE S. LEWIS, ADMINISTRATRIX, APPELLEE, V. UNION PACIFIC RAILROAD COMPANY, APPELLANT.

FILED JULY 2, 1929. No. 26652.

1. **Trial**: VERDICT: PRESUMPTION. "Where two persons were sued as defendants and the verdict was in favor of plaintiff and against one of the defendants, and silent as to the other, and is received by the court, without objections or question by the parties, and there is sufficient proof to justify a verdict in favor of such defendant, the judgment rendered on such verdict will not be reversed on that ground; the presumption being that the jury found in favor of the defendant not referred to in the verdict." *Cox v. Ellsworth*, 97 Neb. 392.
2. **Master and Servant**: ACTION AGAINST MASTER AND EMPLOYEE: VERDICT AGAINST MASTER. A jury may properly return a verdict in favor of a servant and against the master in a negligence case, where contributory negligence is pleaded and proved, if the plaintiff alleges and the evidence supports a finding of other negligence chargeable to the master than that of the servant exonerated by the verdict.
3. **Railroads**: COLLISION AT CROSSING: CONTRIBUTORY NEGLIGENCE OF AUTOMOBILE DRIVER. Where buildings obstruct the view of a railroad track, as is claimed by plaintiff in this case, and the deceased is familiar with the location, it is more than slight

negligence for one to drive an automobile on said track without looking and listening for an approaching train. It is the duty of the driver of the automobile to have his car under such control that, when he comes to a place where it is possible to see and to hear an approaching train, he can stop it to avoid a collision. Failure to do so is negligence more than slight in comparison with that of the defendant, and will defeat a recovery, even though the whistle was not blown and the bell not rung, or the speed may have been excessive.

4. ———: ———: COMPARATIVE NEGLIGENCE. In view of the facts disclosed by the record, *held*, that the negligence of the deceased was more than slight as compared with the negligence of the defendant, and therefore defeats a recovery.

5. ———: ———: DUTY TO DIRECT VERDICT. In such a case, it was the duty of the court, upon motion at the close of the evidence, to direct a verdict for the defendant.

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

C. A. Magaw, Thomas W. Bockes and *T. F. Hamer*, for appellant.

Halligan, Beatty & Halligan and *W. E. Shuman, contra.*

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

DAY, J.

This case was brought to recover damages for the death of John S. Lewis, whose automobile was struck on February 13, 1925, by a fast mail train of the Union Pacific Railroad Company at a place in Cozad, Nebraska, where the main street, which is also the Lincoln Highway through the town, crosses the defendant's tracks. Sadie S. Lewis, as administratrix, on behalf of herself as widow and for a minor child brings this action against the railroad company and one Getty, who was the engineer in charge of the train. The jury returned a verdict in favor of plaintiff against the defendant railroad company and was silent as to the defendant Getty.

This form of verdict is a question to be considered by

us. It was argued to the trial court and also to this court that such a verdict was in effect a verdict in favor of defendant Getty. The motion of Getty for a judgment of dismissal was overruled by the trial court by an order which stated that, "as to him, the cause is retained for trial." The exact question presented is whether a verdict in favor of a plaintiff and against only one of two defendants is, by necessary implication, a verdict in favor of the defendant not named therein. Both the appellant and appellee cite *Cox v. Ellsworth*, 97 Neb. 392. There the court held that it was presumed that, where the jury found in favor of a plaintiff and against only one of two or more defendants, said jury found for the defendants not named in the verdict. As suggested in that case, the trial court should not have received such a verdict without correction. The above case seems to be the only expression of our court upon this question, but it is in accord with the weight of authority, as evidenced by the following cases: *Begin v. Liederbach Bus Co.*, 167 Minn. 84; *James v. Evans*, 149 Fed. 136; *San Antonio & A. P. R. Co. v. McCammon*, 181 S. W. (Tex. Civ. App.) 541; *Lawson v. Robinson*, 68 Kan. 737; and many others. The logic of the argument of these cases is compelling, and leads us to the conclusion that, when the jury found that one defendant should pay the verdict, by implication, they necessarily released the other defendant. When the trial court refused to enter judgment on the verdict in favor of the defendant Getty, but retained the case for trial as to him, the effect was to grant a new trial. This verdict was received without objection by any of the parties, and the question is not properly presented to this court at this time to review the action of the trial court, in connection with the verdict as to Getty.

We now come to consider the effect of the verdict in favor of Getty on the case as against the defendant Union Pacific Railroad Company. Getty was the engineer in charge of the train involved in the collision. If the plaintiff relies for recovery in this case upon the rule of *re-*

spondeat superior, and the only negligence of the company charged and proved was the negligence of its engineer, Getty, then such a verdict as we have is inconsistent and must be set aside. "A verdict in favor of one defendant and against another, based upon conflicting evidence, which is the same as to both defendants, cannot be permitted to stand as to either." *Gerner v. Yates,* 61 Neb. 100, followed and approved in *Mansfield v. Farmers State Bank,* 112 Neb. 583. However, if there is other and different evidence against one of the defendants and there is actionable negligence against the defendant sufficient to sustain a verdict, it will not be disturbed. *Garrison v. Everett,* 112 Neb. 230. In this case, the petition alleges negligence on the part of the railroad company, other than the negligence of its engineer. Evidence was introduced on behalf of plaintiff tending to prove such negligence. The appellant urges that there can be no liability on the part of the master in a case where the servant himself is not liable. It cites numerous cases to support that contention. The cases cited only hold that this is true, when the negligence of the employee is the only negligence charged against the defendant. The appellant cites *Zitnik v. Union P. R. Co.,* 91 Neb. 679, to support this contention. As pointed out by this court in *Hook v. Payne,* 109 Neb. 254, there was no issue of contributory negligence in that case, and the application of the rule of comparative negligence was not involved. Paraphrasing the language of the opinion, the jury may have properly found that there was negligence on the part of the engineer, Getty, but not enough to amount to gross negligence in comparison with that of the plaintiff, and hence not enough to hold him liable. And then, imputing the negligence of the said engineer to the company under the doctrine of *respondeat superior* and finding, as they could, that the company was negligent in other respects which, added to the negligence of the company, was gross as compared to the slight negligence of the plaintiff, they might properly find against it. In other words, a jury may prop-

erly return a verdict in favor of a servant and against the master in a negligence case, where contributory negligence of plaintiff is pleaded and proved, if the plaintiff alleges and the evidence supports a finding of other negligence chargeable to the master than that of the servant exonerated by said verdict. Applying the rule in this case, the verdict is not to be set aside merely because of technical construction; the jury returned a verdict in favor of the engineer and against the company.

This brings us naturally to the main question in this case for our determination. Is the evidence in this case sufficient to sustain the verdict against the appellant? Its challenge is that the evidence shows the act of the plaintiff's decedent in driving on the track to be of such a character that it must be determined to be "more than slight negligence," as a matter of law. He was a resident of Gothenburg, which is twelve miles distant. He was a frequent visitor to Cozad and had traveled frequently the road crossing the tracks where the accident occurred. He was familiar with the street and the crossing; with the depot and the various buildings which might obstruct his view of the tracks to his right and left. There is a conflict in the evidence as to the view of the track and its disclosure of trains some distance from the track. There is no dispute that the track was 23½ feet from the depot, and that the view of the track to the east, whence the train in question was approaching, was not obscured to deceased after he passed the depot. The rule is well established in this state that it was the duty of the decedent in going upon the track, a place of danger, with which he was familiar, to look and listen for the approach of trains. It was his duty to look, where, by looking, he could see, and listen, where, by listening, he could hear, and if he fails without reasonable excuse to exercise such precautions, he is guilty of negligence. *Askey v. Chicago, B. & Q. R. Co.*, 101 Neb. 266.

The deceased in this case attempted to stop the car and stopped it fully upon the track. This would lead us to con-

clude that he saw the approaching train when he passed the depot, but was unable to stop before reaching the track. It is undisputed that his automobile was stopped when it was struck. The appellee contends that deceased saw the train when he passed the depot and stopped his automobile almost instantly. In *Allen v. Omaha & S. I. R. Co.*, 115 Neb. 221, reviewing our decisions, this court said:

"We have repeatedly held that it is the duty of a traveler on a highway approaching a railroad crossing to look and listen for approaching trains; that he must look, where, by looking, he could see, and listen, where, by listening, he could hear; that it is the duty of one approaching in an automobile a railroad crossing with which he is familiar, where his view is obstructed until he gets within a short distance of the track, to keep his car under control and to drive at a speed which will enable him to stop in time to avoid a collision after discovering a train; and that a speed which prevents such control under the circumstances is negligence as a matter of law. *Rickert v. Union P. R. Co.*, 100 Neb. 304; *Askey v. Chicago, B. & Q. R. Co.*, 101 Neb. 266; *Seiffert v. Hines*, 108 Neb. 62; *Stanley v. Chicago, R. I. & P. R. Co.*, 113 Neb. 280; *Haffke v. Missouri P. R. Corporation*, 110 Neb. 125; *Tyson v. Missouri P. R. Corporation*, 113 Neb. 504."

Under the facts disclosed by the record, the negligence of the plaintiff's decedent was in driving upon the track of the appellant and failing to have his automobile under control so that, where he was in a place to see the approaching train, he could stop it in a place of safety. In *Moreland v. Chicago & N. W. R. Co.*, 117 Neb. 456, we said: "Where it is undisputed that a traveler on a highway failed to exercise reasonable precaution, by not looking at a reasonable point where he could have seen an approaching train, his negligence will defeat a recovery for a collision with a train at a crossing, even though no signal by the locomotive bell or whistle was given." Where buildings obstruct the view of a railroad track, as is claimed by plaintiff in this case, and the deceased is familiar with the

location, it is more than slight negligence for one to drive an automobile on said track without looking and listening for an approaching train. It is the duty of the driver of the automobile to have his car under such control that, when he comes to a place where it is possible to see and to hear an approaching train, he can stop it to avoid a collision. Failure to do so is negligence more than slight in comparison with that of defendant, and will defeat a recovery, even though the whistle was not blown and the bell not rung, or the speed may have been excessive.

It was therefore the duty of the court at the close of the testimony to have sustained the motion of the appellant to dismiss. There are other assignments of error; but, since we have concluded that the plaintiff is not entitled to recover on the evidence as a matter of law, the judgment of the district court is reversed and the cause dismissed.

REVERSED AND DISMISSED.

Note—See Negligence, 28 A. L. R. 957 *et seq.;* 21 L. R. A. n. s. 794; 29 L. R. A. n. s. 924; 46 L. R. A. n. s. 702; 2 R. C. L. 1184, 1205, 1206; Perm. Supp. 645, 680.

EDWIN JACOBSON, APPELLEE, V. SKINNER PACKING COMPANY, APPELLANT.

FILED JULY 2, 1929. No. 26617.

1. **Evidence:** HYPOTHETICAL QUESTIONS. "Hypothetical questions propounded to an expert, if so framed as to fairly and reasonably reflect the facts proved by any of the witnesses in the case, will be sufficient, provided the subject is one proper for expert testimony." *Landis & Schick v. Watts*, 82 Neb. 359.
2. ———: ———. A hypothetical question should not include improper irrelevant statements that can in no wise assist the witness in arriving at the conclusion sought by the question, and should not contain assumptions which are at variance with or not supported by proof.
3. **Corporations:** SALE OF STOCK: MISREPRESENTATIONS BY AGENTS. Where an agent employed by a corporation to sell its stock makes false representations concerning the subject-matter of the

contract, the company is responsible, and the buyer, when injured, may recover from the company in an action for damages on the ground of fraud, since representations as to the character of the business of the company, its earnings, its financial condition, and assets, and other representations of fact which affect the value of the stock are within the scope of the agent's actual or apparent authority. In such case it is no defense that the company had not authorized such misrepresentations and did not know they had been made.

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

Ritchie, Chase, Canaday & Swenson, for appellant.

North & O'Reilly and *F. H. Pollock, contra.*

Heard before ROSE, DEAN, GOOD, EBERLY and DAY, JJ., and RAPER and REDICK, District Judges.

RAPER, District Judge.

The plaintiff, Edwin Jacobson, filed his petition in this case on November 20, 1923, which was stricken because of objectionable statements, and later, on September 22, 1927, filed an amended and substituted petition, in which he made the Skinner Packing Company, the Skinner Company, Lloyd M. Skinner, and Robert Gilmore, defendants. All these defendants were later dismissed from the case except the Skinner Packing Company.

The petition alleges that he purchased 100 shares of the preferred stock of the Skinner Packing Company for the sum of $100 a share, a total of $10,000, and gave two notes to the company for the purchase price, and that, as an inducement to plaintiff to purchase said stock, Paul F. Skinner, Lloyd M. Skinner, D. C. Robertson, and Robert Gilmore, who were officers of that company, and one James Smith, the agent of the company, represented to plaintiff that the Skinner Packing Company was at the time of such sale of said stock (1) making profits of about 30 per cent. per annum on its capital stock, (2) that such preferred stock was worth and of the actual value of more than $100 a share, (3) that Paul and Lloyd

Skinner had invested $400,000 in cash of their own money in the company, and (4) that dividends had been paid to the stockholders from the profits earned by said packing company; that plaintiff believed and relied upon such statements; that each of said statements was false, and that said stock was at that time worthless; that about the summer of 1921 plaintiff first learned that said representations were fraudulent; that plaintiff paid the notes he gave for the stock; and prays for damages in the sum of $10,000, with interest at 7 per cent. from November 20, 1918.

The defendant Skinner Packing Company admits the sale of the stock, and denies every other allegation in the petition.

A ten-jury verdict was returned finding for plaintiff, $8,000 damages and interest thereon, a total of $13,072.22.

At the time the suit was instituted an attachment was allowed and levied on some real estate of the company, which defendant company moved to dissolve, but the court refused to set the attachment aside.

Defendant Skinner Packing Company appeals, alleging many errors, which, in so far as may be necessary, will be taken up.

Error is claimed on admission of testimony by the witness Rosenblum that the stock in question at the time it was purchased was worthless, because said witness was not qualified to give such opinion. His examination was long and cannot be set out. He testified he had made inquiries as to such value in the fall of 1918 from brokers and others, and went to banks to inquire as to loan value of the stock; that he had visited the produce department of the defendant then in operation and saw some of its stock and asked employees how business was. The parties from whom he made inquiries, particularly the bankers and brokers, lived and perhaps still live in Omaha. None of those were called. He said he knew of grading being done for proposed buildings, but he did not know how much stock was outstanding, nor what the assets of the com-

pany were worth. There was much testimony along similar lines, but on the whole we are constrained to hold that he was not shown to have proper information upon which to base an estimate of value.

As to the witness Ralph Smith, who testified to value, his answers were based on a hypothetical question concerning a hypothetical company. Mr. Smith is manager of the sales department for stocks and bonds of the Peters Trust Company and was called by plaintiff as an expert on the values of stocks. Just why it was necessary to assume a hypothetical company is not apparent. This question was long, involved, and contained several assumed facts that had no bearing upon the actual value of the stock, about statements made by the salesman to a farmer of little business experience, and included all the misrepresentations which plaintiff claims as the basis of his action, and witness was asked if he would be able from the statement of facts to give an opinion as to the value of the stock so sold to the farmer on November 20, 1918. And witness was permitted to answer that its value was from $15 to $35 a share. The question does not state whether the representations so made to the farmer were true or false. The only apparent reason for injecting the alleged statements made by the salesman to the farmer was for the purpose of prejudicing the jury and they no doubt had that effect. They could in no wise assist the witness in estimating the value of the stock. The same kind of question in a still more objectionable form had been before that asked the witness and withdrawn, thus emphasizing the objectionable matter. The question assumes, without proof to support, that a dividend had been declared by the company two months before the charter was granted, that the company had paid out for promotion up to November, 1918, approximately one-half million dollars, that there was credited on the books a set-up of over $200,000 in increased value of its real estate, without proof that there was no actual increase in such value, and the question was very indefinite

as to the value of the notes held by the company and other doubtful assumptions. As to the "set-up" in valuing assets of the $200,000 appreciation of real estate, if there was an actual increase in value of the real estate, such fact would be reflected in the value of the stock. *Rewick v. Dierks Lumber Co.*, 109 Neb. 300. It was error to assume without proof that there was no appreciation in the real estate. There were many questions also asked the witness as to what effect it would have on values if stock had been misrepresented to plaintiff and other subscribers, and like questions, some of which were ruled out by the court. Such questions naturally would have the effect of improperly influencing the jury. The hypothetical question does not state the value of the real estate of the defendant, nor does it with reasonable certainty state the value of the work done in the process of building the packing plant. Without more definite proof of the value of the assets, no one could give a fair estimate of the value of the stock. The ruling of the court permitting the witness to answer such hypothetical question about a hypothetical company was prejudicial error. Three witnesses gave testimony as to the value of the stock, O'Donnell, Rosenblum, and Ralph Smith. O'Donnell testified the stock was worthless, but that was stricken out. The witness Rosenblum, as above stated, was not competent to fix value, and the testimony of Smith was erroneously admitted. In O'Donnell's testimony he stated that he heard one of the defendant's stock salesmen, in talking with another man whom he assumed to be also a salesman, refer to purchasers of the stock as suckers. This was incompetent, but was not stricken out. Counsel for plaintiff in several instances persisted in reforming improper questions that had been ruled out, but stating substantially the same matter. Such practice should not be permitted.

The measure of damages in a suit based upon fraudulent representations is the difference between the value of the stock if it had been as represented, or what was paid for it, and its actual value at the time it was purchased.

The burden of proof was upon plaintiff to show such actual value. The company was newly formed, had sold and was still selling a large amount of stock, had begun to build a large and costly packing plant, had a produce business already going. Under these conditions it no doubt is difficult to prove the real value of the stock, but the fact that it is difficult to get proof does not dispense with the necessity of producing competent proof of its real value at the time plaintiff purchased it.

Defendant claims that there was no proof that the company had authorized its salesman to make the alleged misrepresentations and had no knowledge that they had been made, and therefore the defendant company is not liable in an action for deceit or fraud of the agent. The company had employed the salesman to solicit and receive subscriptions for stock. The natural inquiry of a proposed purchaser would be directed to the condition and situation of the company, its officers and promoters, the kind of business proposed to engage in, the profits, and like questions. To give such facts was necessarily incumbent on the salesman and was strictly in the line of his duties, and the company is responsible for any misrepresentations in an action for fraud and deceit. *Dresher v. Becker,* 88 Neb. 619; *Osborn Co. v. Jordan,* 52 Neb. 465; *Donelson v. Michelson,* 104 Neb. 666.

Defendant alleges error in giving instruction No. 3, to the effect that plaintiff had the right to bring his action within four years after discovery of fraud. The instruction was properly given. Defendant complains of refusal of the court to give proffered instructions concerning plaintiff's testimony. An instruction was given which is in language usually stated about the interest of a witness, which was sufficient.

Misconduct of plaintiff's attorney is alleged as a ground of error. Counsel in his zeal in several instances overstepped the rules that should govern advocates in offering and repeating offers of incompetent and irrelevant questions, frequently made statements of fact to opposing coun-

sel and to the court in the presence of the jury and made comments on the testimony during the examination of witnesses. Counsel for defendant was not wholly without fault, but to a lesser degree. In another trial perhaps there will be no cause to complain.

A letter written by a receiver who had been appointed in December, 1923, to the stockholders, pleading for funds in the way of contribution to assist the company was admitted. The letter indicated that the company was insolvent and about to lose its property by foreclosure. The receiver is not a party to this action and the letter was hearsay and should not have been admitted. Some latitude must be given in the evidence in a case like this as to the financial condition of the company before the date of purchase of the stock and after that time, but it should not be extended too far, and only to such competent evidence as to its later condition as will furnish information bearing on the value of the stock in November, 1918, when the stock was purchased. In some instances, testimony was received concerning matters too long a time after the sale. These can be guarded against in another trial.

Another alleged error is the refusal of the court to dissolve the attachment. The record does not disclose any valid reason why it should be dissolved, but the defendant can, if desired, renew its motion in the district court to dissolve the attachment.

The record is very long, and many errors are alleged, but the ones above referred to are all that seem now necessary to mention.

The judgment is reversed and the cause remanded to the district court for a new trial.

REVERSED.

Note—See Corporations, 14 C. J. 614 n. 61; 33 L. R. A. 721; 7 R. C. L. 238; Perm. Supp. 1946—Evidence, 22 C. J. 708 n. 35, 712 n. 82, 713 n. 96.

IRVIN R. MOREARTY, APPELLEE, V. HARRY D. STRUNK ET AL., APPELLANTS.

FILED JULY 5, 1929. No. 26726.

1. Process: SUMMONS TO ANOTHER COUNTY. The authority of plaintiff to summon a defendant in a county other than the one in which the action is brought depends on plaintiff's right to recover judgment against a resident defendant or a defendant served with summons in the county of the forum. Comp. St. 1922, sec. 8570; *Smith v. Atlas Refining Corporation*, 112 Neb. 6.
2. Dismissal. Defendants who preserve in their answers their objections to jurisdiction are entitled to a dismissal of the action as to them, where the evidence conclusively shows that they were summoned outside the county of the forum and that plaintiff is not entitled to judgment against the only defendant served with summons therein.
3. Libel: NEWSPAPER PUBLICATION: INTERPRETATION. A newspaper publication alleged to be libelous should be considered in its entirety, including any headline or question asked and surrounding circumstances.
4. ———: ———: ———. The words and expressions in an alleged libel, in connection with the entire publication, should be construed in their ordinary and popular meaning according to the sense in which they would be understood by the readers to whom they were addressed.
5. ———: ———: ———. In determining whether a newspaper article constitutes an actionable libel, due weight must be given to every part of it, including the occasion for its publication.
6. ———: POLITICAL ARTICLE. As a political advertisement before a city election, a newspaper article directed to the candidacy of the mayor for reelection, headed "Big Graft in Paving?" referring to the candidate as the officer who had employed the engineer, and reproducing a former newspaper article that truthfully reported paving supervised by the same engineer in another city as about 50 per cent. deficient, when completed by the contractor, *held*, under the facts narrated in the opinion, not an actionable libel in a suit by the engineer against the publishers and other alleged conspirators.

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

Perry & Van Pelt, Cordeal, Colfer & Russell and *L. A. Kiplinger*, for appellants.

Charles B. Morearty, C. D. Ritchie, Bernard McNeny and *Benjamin S. Baker, contra.*

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

ROSE, J.

This is an action to recover $100,000 in damages for libel. The alleged libelous publication appeared in a newspaper called "The McCook Gazette" and consisted of an article copied from the Grand Island Independent with a new headline and other additional matter. The original article discussed at length street paving as about 50 per cent. deficient in a Grand Island paving district and identified I. R. Morearty as the city engineer under whose supervision it was constructed, details of the defects being published as shown by a municipal investigation containing, in substance, findings to the effect that as a result of deviations from specifications the city of Grand Island received in value only about 50 per cent. of the improvement for which it contracted and that the contractor did not reduce the cost accordingly. Preceding a city election in McCook the article in the Grand Island Independent was reproduced in the McCook Gazette as a political advertisement under the inquiring headline: "Big Graft in Paving?" Thereunder were these words: "The following article taken from the Grand Island Independent answers this question: — Shortage in Paving Job." The article in its original form follows in the McCook Gazette and the political advertisement closes thus:

"The engineer who had this Grand Island work in charge is the same I. R. Morearty employed by the present Mayor and City Council of McCook.

"Do you want to run the risk in the huge paving program outlined for McCook and get a 50 per cent. value?

"From June 22, 1925, to March 8, 1926, this same City Engineer has drawn from the city of McCook $6,572.75.

"(Signed) Committee Citizens Ticket."

The I. R. Morearty mentioned in the original publication

and in the political advertisement is plaintiff herein. In his petition he charged defendants with a conspiracy to injure him by issuing false, scandalous and defamatory statements regarding his business and integrity, and that pursuant thereto they published in the McCook Gazette the article and comments already mentioned. The defendants and alleged conspirators were Harry D. Strunk, Mark H. Knight, Harold P. Waite, Clarence F. Dann, Rex Scott, Roy M. Green, and Floyd Hegenberger. April 6, 1926, was the date of the city election in McCook. The mayor then in power had engaged Morearty, plaintiff, as engineer in charge of street paving and sewer and water extensions. The mayor at the time was a candidate for reelection and was the nominee of the Municipal League Party for the ensuing term. A rival candidate had been nominated by the Citizens Party. The political advertisement consisting of the alleged libel was published April 3, 1926. Strunk was publisher and Knight was managing editor of the McCook Gazette. Hegenberger was a candidate for councilman on the Citizens Party ticket. Scott, Waite and Dann were members of the Citizens Party committee. Green was the chemist who investigated the paving in Grand Island and reported the defects to the city council there.

The action was commenced in the district court for Douglas county and Scott was served with summons while temporarily therein. None of defendants resided in Douglas county. Summonses for Green and Knight were served on them in Lancaster county and other defendants were summoned in Red Willow county. Each defendant except Scott made a special appearance and challenged the jurisdiction of the court on the ground that Scott was not a proper or necessary party defendant and that service of summons outside of Douglas county was void. The challenges to jurisdiction were overruled. Each defendant with the exceptions of Scott and Dann preserved by answer objections to jurisdiction.

The publication in the McCook Gazette was admitted by defendants, but the conspiracy and the libel were denied.

In addition, the truth of the published statements and the good faith, the justification and the privilege of the publishers were pleaded in answers to the petition. Affirmative matter pleaded by defendants was put in issue by replies to the answers.

The cause was tried to a jury. At the close of the testimony the district court dismissed the action as to Hegenberger and Knight. The jury rendered a verdict against the other defendants for $4,000, and from a judgment thereon they have appealed.

The defendants who preserved in their answers their objections to jurisdiction present the same point on appeal and insist that the failure to dismiss the action as to them was an error fatal to a recovery by plaintiff. Authority to issue a summons to a county other than Douglas was granted by a statute providing:

"When the action is rightly brought in any county, according 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.

Under this statute as formerly construed the authority of plaintiff to bring nonresident defendants within the jurisdiction of the district court for Douglas county depended upon his right to recover, upon the cause of action pleaded, a judgment against the defendant who was served with summons therein. *Smith v. Atlas Refining Corporation*, 112 Neb. 6; *Hinds State Bank v. Loffler*, 113 Neb. 110; *Stull Bros. v. Powell*, 70 Neb. 152.

Scott was the only defendant upon whom summons was served in Douglas county. All defendants resided in other counties. A critical examination of the record shows that the evidence was insufficient to make a case against Scott. On the witness-stand plaintiff said Scott told him in conversation that he did not sign the article published in the McCook Gazette, but that he told the committee to publish it. On cross-examination, however, plaintiff testified in substance that he did not know that Scott at the time had

the same article in mind. Testimony of other witnesses was direct and positive that Scott had nothing to do with the publication. He did not participate in any conspiracy to injure plaintiff. Surrounding circumstances and conversations among defendants do not warrant an inference that Scott had an actionable connection with the publication. In any event Scott, on a ground hereinafter considered on another question, is not liable to plaintiff in this action. The issue of his liability should not have been submitted to the jury. When the insufficiency of the evidence as to him was obvious at the close of the testimony, the action should have been dismissed as to him and as to all defendants who preserved in an answer the objections to jurisdiction. The failure to so rule was a reversible error.

Dann was the only defendant served with summons outside of Douglas county who did not preserve in his answer objections to jurisdiction. Without saving that right he answered to the merits and thus appeared and submitted to the jurisdiction of the trial court. The remaining question on appeal relates to the sufficiency of the evidence to establish an actionable libel. Did the article published in the McCook Gazette amount to that? The inquiry is not confined to an imputation found in a single statement without reference to the entire publication. It should be considered in its entirety, including headline, question and surrounding circumstances. 17 R. C. L. 313, sec. 54; *Pentuff v. Park*, 194 N. Car. 146, 53 A. L. R. 626; *Bathrick v. Detroit Post & Tribune Co.*, 50 Mich. 629. The words and expressions should be considered in their ordinary and popular meaning according to the sense in which they would be understood by the readers to whom they were addressed. 17 R. C. L. 312, sec. 53; *World Publishing Co. v. Mullen*, 43 Neb. 126; *Marion v. Davis*, 217 Ala. 16, 55 A. L. R. 171. In determining whether an article constitutes an actionable libel, due weight must be given to every part of it, including the occasion for its publication. *Sheibley v. Nelson*, 75 Neb. 804; *Norfolk Post Corporation v. Wright*, 140 Va. 735, 40 A. L. R. 579, and cases cited in note.

The occasion for the article was a city election at which the mayor, who had selected plaintiff as supervising engineer, was a candidate for reelection. The Citizens Party supported a rival candidate. One reason for the opposition was the mayor's action in selecting plaintiff as an engineer. The article was directed to the mayor's candidacy. The political issue was a legitimate one. The city of McCook contemplated extensive paving. If plaintiff as an engineer employed by the mayor had permitted a paving contractor in Grand Island to furnish in value only about 50 per cent. of the improvement for which he had contracted, that fact could properly be communicated in good faith by the committee of the Citizens Party to the electors of McCook. On its face the article is an attack on the candidacy of the mayor of McCook. What was said about plaintiff was incidental to the main purpose. If the statements respecting him were true and were made in good faith with good motives and for justifiable ends, the occasion and the privilege were present.

The article in the Grand Island Independent contained the details of a scientific investigation by an expert chemist. The report was official for the purpose of calling the contractor to account. It imports the truth. The facts originally published were not denied by plaintiff who was a witness in his own behalf. In testifying he said in substance on cross-examination that there was not a thing in the Grand Island Independent that he objected to; that he was city engineer when the paving was put in; that he did not object to the article in the Grand Island paper and was not depressed by it; that the contractor had to settle for the defects. He thus verified the truth of the article reproduced in the McCook Gazette.

It is argued, however, that the two articles are different and that the headline and paragraphs following the original article in the McCook Gazette contain sinister matter that makes the reproduction an actionable libel. As already explained the headline is a part of the entire article. It cannot be separated from the text to give it a meaning

at variance with the publication as a whole. While a question may impute a charge amounting to a libel, the meaning of the question must be found in the entire publication. In the headline, "Big Graft in Paving?" the sinister word "Graft," as used in common parlance, is identified with what follows—"Shortage in Paving Job," as exposed in the Grand Island Independent. The publication therein calls attention to the fact that the city of Grand Island received in value only about 50 per cent. of the improvement for which it contracted and that the contractor did not reduce the cost accordingly. The imputation of graft, if any, was directed to the contractor and not to plaintiff. The latter testified that the contractor had to settle for the defects. Plaintiff was not charged in either article with profiting by graft or by failure of the contractor to comply with specifications. The publication and surrounding circumstances will not bear that interpretation or the charge of dishonesty. Graft is not imputed to plaintiff. The paragraphs following the original article in the McCook Gazette are statements or implications of fact published in good faith with good motives and for justifiable ends. In connection with the entire political advertisement they do not constitute an actionable libel. The publication, being lawful and proper under the circumstances, was not the subject of a conspiracy to injure plaintiff. He was not entitled to a judgment against defendant Dann nor against any other defendant. It follows that the judgment is reversed and the action dismissed.

REVERSED AND DISMISSED.

Note—See Dismissal and Nonsuit, 18 C. J. 1185 n. 17—Libel and Slander, 36 C. J. 1155 n. 61, 1158 n. 72; 40 A. L. R. 583; 17 R. C. L. 313; 3 R. C. L. Supp. 650; 4 R. C. L. Supp. 1116; 6 R. C. L. Supp. 1007.

FONTENELLE FOREST ASSOCIATION, APPELLANT, V. SARPY COUNTY, APPELLEE.

FILED JULY 5, 1929. No. 26765.

1. **Taxation: LEGISLATIVE POWER.** In the absence of constitutional inhibition, legislative power to impose taxes lies within its discretion.
2. ———: **EXEMPTIONS.** The legislature has provided that the real estate known to this record as the Fontenelle Forest Association, located in Douglas and Sarpy counties, shall be exempt from taxation, and this on the ground that such association real estate is "held in trust for the education of the public." It follows that any relief that the defendant feels it is entitled to should be addressed to the legislature.
3. ———: **PROPERTY OF STATE.** While in the absence of any constitutional prohibition the state might tax its own property, it is presumed that no legislature intends so to do, and therefore such property, even when not exempted from taxation by constitutional or statutory provisions, is so exempted by necessary implication, unless unmistakably included in the tax laws. 37 Cyc. 872.

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

Will H. Thompson, for appellant.

William P. Nolan and *E. S. Nickerson, contra.*

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

DEAN, J.

This suit was begun by the Fontenelle Forest Association, plaintiff, against Sarpy county, defendant, in the district court for that county, to cancel certain taxes, or assessments, levied against the property of plaintiff, and to enjoin county officials from collecting such taxes or thereafter attempting to levy any taxes upon the association's property. The court dismissed the plaintiff's action. Thereupon an appeal was prosecuted to this court by the plaintiff association.

The Fontenelle Forest Association, hereinafter called the

association, became an incorporated body in 1913 by a special act of the legislature which appears as sections 623-633, Comp. St. 1922. The act provides generally that the corporation shall consist of certain citizens who are named therein and also provides for the election of their successors. The association is also empowered to adopt by-laws and to elect officers from its membership. And it is also provided in the articles of incorporation that no compensation shall be received by such members, nor shall any member be pecuniarily interested directly or indirectly in any contract relating to affairs of the corporation, nor shall the association make any dividend or division of its property among the members or officers. Seven of the association's members, elected by the corporation, and including the president, vice-president, secretary and treasurer, shall constitute a council and conduct the affairs of the association under the general direction and approval of the corporation.

Sections 623, 624, and 629, Comp. St. 1922, outline the main object of the creation and establishment of the association in the following language:

"Section 623. A corporation is hereby created and established which shall be known as the 'Fontenelle Forest Association.' It shall be and remain, at all times, under the patronage and control of the state, and its powers and obligations may, at the pleasure of the legislature, be enlarged, contracted or otherwise changed by amendment of this charter.

"Section 624. The object of this association shall be the securing and developing, for the education of the public, of lands lying along the Missouri river in Douglas and Sarpy counties, Nebraska."

"Section 629. This corporation shall have no capital stock, and shall have no power to sell, mortgage or otherwise incumber its property; and all of its property, being held in trust for the education of the public, shall be exempt from taxation."

Following the above sections, the act provides that the

corporation shall have authority to secure possession of suitable lands, and to receive appropriations of funds from national, state, and municipal governments, and to secure moneys by private subscription for the upkeep of the property and the like. Section 630. And it is also provided (section 631) that the association shall "preserve and renew the forest growth and native bird-life" upon all of the land, and that it may construct necessary buildings and establish botanical and zoological gardens, with other features necessary to promote the object of the association. Section 632. It is also provided that the corporation may arrange other grades of affiliation for the purpose of raising funds for the carrying out of the objects of the association. Section 633.

The secretary of the association has been such officer for more than ten years. He testified that no revenue from any farming operations had ever been collected by the association, nor had any of the land ever been rented to any person. In respect of a tract of alfalfa ground, consisting of five to seven acres, the secretary testified that this tract was without trees or other growth. When asked to tell why "this particular point" was kept clear, he informed the court that it was "to preserve an especially good view from that tract of land, and to develop some growth of plants that we wouldn't get inside of timbered land." On the cross-examination he testified that no portion of the land, except the small tract above mentioned, had ever been farmed, and that no buildings had been constructed, nor had any general landscaping been done, and that very little fencing had been built, nor was the underbrush removed. And from his evidence it appears that the property is being kept, in part, to preserve bird life, of which there is a great variety in the vicinity, and also because it is visited by many people. No driving is permitted inside the grounds, nor is any one permitted to enter the grounds with fire-arms, and the molestation of birds or of animals by any person is strictly prohibited. One of the Sarpy county commissioners testified that no buildings or improvements

or botanical gardens or the like are on the land, nor have any been placed thereon since the land was acquired by the association.

In *Herman v. City of Omaha*, 75 Neb. 489, we held that public parks of a city are not taxable.

"The immunity of the property of the state, and of its political subdivisions, from taxation does not result from a want of power in the legislature to subject such property to taxation. The state may, if it sees fit, subject its property, and the property owned by its municipal divisions, to taxation, in common with other property within its territory. But inasmuch as taxation of public property would necessarily involve other taxation for the payment of the taxes so laid, and thus the public would be taxing itself in order to raise money to pay over to itself, the inference of law is that the general language of statutes prescribing the property which shall be taxable is not applicable to the property of the state or its municipalities. Such property is, therefore, by implication, excluded from the operation of laws imposing taxation, unless there is a clear expression of intent to include it." *Trustees of Public Schools v. City of Trenton*, 30 N. J. Eq. 667, 681.

"The taxing power vested in the legislature is without limit, except such as may be prescribed by the Constitution itself. The maxim, *expressio unius est exclusio alterius*, does not apply in the construction of constitutional provisions regulating the taxing power of the legislature." *State v. Lancaster County*, 4 Neb. 537.

In the absence of constitutional inhibition, it appears that the legislative power to impose taxes lies within its discretion. In the present case the legislature has provided, as above pointed out, that the real estate known to this record as the Fontenelle Forest Association shall be exempt from taxation, and this on the ground that such association real estate is "held in trust for the education of the public." It follows that any relief that the defendant city feels it is entitled to should be addressed to the legislature.

"The property of the several states is not subject to taxation by the federal government, and while in the absence of any constitutional prohibition the state might tax its own property, it is presumed that no legislature intends to lay taxes on the state's own property, and therefore such property, even when not exempted from taxation by constitutional or statutory provisions, is so exempted by necessary implication, unless unmistakably included in the tax laws. The public property which is thus exempt includes all property which in fact and equitably belongs wholly to the state, no matter on what basis its title rests, and no matter in what person or body the legal title may temporarily be lodged; and these rules apply not only to land but also to personal property of all descriptions, including corporate stock, banks, railroads, and other institutions wholly owned and controlled by the state; but it is only such property as may properly be said to belong to the state that is exempt, and it is not sufficient that the state may have some indirect or expectant interest therein." 37 Cyc. 872.

The judgment of the district court is reversed, with directions that a judgment be entered in conformity with the views set forth herein.

REVERSED.

Note—See Taxation, 37 Cyc. 724 n. 33, 872 n. 94, 885 n. 92; 57 L. R. A. 34; 26 R. C. L. 27; 3 R. C. L. Supp. 1457; 4 R. C. L. Supp. 1635; 7 R. C. L. Supp. 873.

OMAHA GRAIN EXCHANGE, APPELLANT, V. O. S. SPILLMAN, ATTORNEY GENERAL, APPELLEE.

FILED JULY 5, 1929. No. 26831.

1. **Constitutional Law.** "It is a general rule that courts will not pass upon the constitutionality of a statute unless it becomes necessary to a proper disposition of a case properly pending before the court." *State v. Fulton, ante*, p. 400.
2. **Injunction: PLEADING.** "The mere averment in a petition for an injunction that the applicant will suffer an irreparable injury,

unless the injunction be granted, is not of itself sufficient to authorize its issuance." *State Bank of Nebraska v. Rohren*, 55 Neb. 223.

3. ———: CONSTITUTIONALITY OF STATUTE. In an action to enjoin a state officer from enforcing the provisions of a statute, alleged to be unconstitutional, injunctive relief will be denied, unless it clearly appears that the applicant is without adequate remedy in the usual course of the law and will suffer irreparable loss or injury unless injunctive relief is granted.

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

C. L. Waldron and *Smith, Schall, Wright & Sheehan*, for appellant.

C. A. Sorensen, Attorney General, John P. Breen, Hugh LaMaster and *Irvin A. Stalmaster, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, EBERLY and DAY, JJ., and RYAN, District Judge.

GOOD, J.

This is an action to enjoin the attorney general of the state from enforcing the provisions of chapter 8, Laws 1927, upon the ground that said act and particularly sections 2 and 3 thereof are violative of both the federal and the state Constitutions. A general demurrer to the petition was sustained. Plaintiff elected to stand on its petition. Judgment of dismissal was entered. Plaintiff appeals.

In its petition plaintiff sets forth generally the nature of the business transacted by it and also pleads certain of its rules and regulations relative to the buying, selling, inspecting and weighing of grain, and that such rules and regulations are just and reasonable, but in conflict with the provisions of sections 2 and 3, ch. 8, Laws 1927. It is further alleged that the attorney general has threatened to commence proceedings against plaintiff, charging violations of said chapter 8, and is threatening to bring *quo warranto* to forfeit the plaintiff's charter, or otherwise secure an order, forbidding it to enforce its rules and regulations against its members, and it is alleged that the at-

tempted enforcement of the law by the attorney general will subject plaintiff to financial loss and irreparable injury, for which it has no adequate remedy at law.

Chapter 8, Laws 1927, consisting of three sections, bears the following title: "An act to regulate terms of settlement on car-lots of grain handled on or through any public markets, elevators, grain exchanges or trade associations within the state of Nebraska." Section 1 deals with the sale of car-lots of grain. Section 2 deals with the subject of reshipment of grain after inspection by licensed inspectors, and authorizes its reshipment without having to be unloaded and weighed where inspected. Section 3 provides that no person shall be deprived of this right of diversion by any rule or regulation of any market, board of trade, chamber of commerce exchange, inspection department, or similar organization, operating within the state of Nebraska. There are no penal provisions contained in said chapter 8.

It is apparent that the only actions which would be available to the attorney general would be either in the nature of *quo warranto* or an action to enjoin plaintiff from continuing certain practices, pursuant to its rules and regulations, which are inconsistent with the provisions of said chapter 8. It is also apparent that, if any such action is begun by the attorney general and chapter 8 is unconstitutional, such fact will be a complete and absolute defense available in such an action to the plaintiff herein. While plaintiff has alleged in its petition, in general terms, that it has no adequate remedy at law and will suffer irreparable loss and injury unless an injunction is granted, no facts are pleaded in the petition from which it may be inferred that any such irreparable loss will be sustained.

Both parties to this action have requested this court to pass upon the constitutionality of chapter 8, Laws 1927. For the reasons hereinafter set forth, we find it unnecessary to comply with this request. The rule is well established in this jurisdiction that this court will not pass upon the constitutionality of a statute unless it is necessary

to a proper disposition of an action pending in this court. *State v. Fulton, ante,* p. 400. In the opinion in that case it is said: "It is a general rule that courts will not pass upon the constitutionality of a statute unless it becomes necessary to a proper disposition of a case properly pending before the court."

In *Morse v. City of Omaha,* 67 Neb. 426, it is held: "The appellate court will not pronounce a statute unconstitutional and void where a determination of the case does not require that the constitutionality of the statute be determined."

In 12 C. J. 780, sec. 212, it is said: "It is a well-settled principle that the constitutionality of a statute will not be determined in any case, unless such determination is absolutely necessary in order to determine the merits of the suit in which the constitutionality of such statute has been drawn in question."

The reason for the rule is set forth in *Ex parte Randolph,* 20 Fed. Cas. 242, No. 11558, in the following language: "The decision of a question involving the constitutionality of an act of congress is one of the gravest and most delicate of the judicial functions, and while the court will meet the question with firmness, where its decision is indispensable, it is the part of wisdom, and a just respect for the legislature renders it proper, to waive it, if the case in which it arises can be decided on other points."

And the reason for the rule is further stated in *Hoover v. Wood,* 9 Ind. 286, as follows: "While courts cannot shun the discussion of constitutional questions when fairly presented, they will not go out of their way to find such topics. They will not seek to draw in such weighty matters collaterally, nor on trivial occasions. It is both more proper and more respectful to a coordinate department, to discuss constitutional questions only where that is the very *lis mota.*"

In the instant case there are no facts pleaded from which it appears that plaintiff will suffer an irreparable loss if an injunction is not granted, and if any actions are brought by the attorney general for the enforcement of the provisions

of chapter 8, Laws 1927, and if the statute is unconstitutional, a perfect defense is thereby afforded plaintiff.

In *Hotchkiss v. Keck,* 84 Neb. 545, it is held: "The extraordinary writ of injunction is one of the last resorts of the litigant, and its aid should not be invoked unless it clearly appears there is no adequate remedy at law."

In *Powers v. Flansburg,* 90 Neb. 467, this court holds: "The remedy of injunction cannot be used where there are adequate remedies in the usual course of the law."

In *State Bank of Nebraska v. Rohren,* 55 Neb. 223, it is held:

"To authorize a court of equity to interfere by injunction, the facts averred in the petition must show that if the injunction be denied, the complainant will suffer an irreparable injury for which he has no adequate remedy at law.

"The mere averment in a petition for an injunction that the applicant will suffer an irreparable injury, unless the injunction be granted, is not of itself sufficient to authorize its issuance."

In *Wabaska Electric Co. v. City of Wymore,* 60 Neb. 199, it is held: "A petition for an injunction should disclose with definiteness and particularity the threatened injury which the court is asked to restrain the defendant from committing."

In *School District v. DeLong,* 80 Neb. 667, it is held: "The rule that under the code pleadings should be construed liberally applies only to ordinary actions. In all cases of application for any extraordinary writ, the petition will receive a strict construction."

Since the record does not disclose that plaintiff would suffer any irreparable loss, and since it does appear that it would have an adequate and perfect defense in any action instituted by the attorney general for the enforcement of chapter 8, Laws 1927, it follows that the trial court properly sustained the demurrer to the petition. The conclusion which we have reached renders it unnecessary and inexpedient to consider the constitutionality of chapter 8, since it is not essential to the proper disposition of this cause.

The judgment of the district court is right and is

AFFIRMED.

Note—See Injunctions, 32 C. J. 244 n. 94, 97, 330 n. 29; 14 R. C. L. 435; R. C. L. Perm. Supp. 3612.

STATE BANK OF BEAVER CROSSING, APPELLANT, V. WILLIAM H. MACKLEY, APPELLEE.

FILED JULY 5, 1929. No. 26186.

Where an action is brought to this court on appeal or error, determination thereof had, and a mandate issued therein which is filed in, and some action taken thereon by, the district court, the latter becomes vested with exclusive jurisdiction of such action.

APPEAL from the district court for Custer county: BRUNO O. HOSTETLER, JUDGE.

Motion to vacate order to recall mandate. *Motion sustained and judgment of reversal adhered to.*

H. R. Ankeny, for appellant.

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

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

THOMPSON, J.

This case was first tried in the district court for Custer county wherein the State Bank of Beaver Crossing, hereinafter called plaintiff, sought recovery against Mackley, defendant, on two negotiable promissory notes. Judgment was rendered in favor of the defendant. On appeal to this court the judgment was reversed and the cause remanded, with directions to enter judgment for the plaintiff for the full amount of the notes in suit. A motion for rehearing was lodged and overruled, and a mandate issued. Thereafter defendant filed a motion "to recall the mandate issued herein, and to examine the record, motion for rehearing and brief in support thereof," and, upon the record as it then stood, it not appearing that action had been taken on such

mandate by the district court, the motion was sustained April 17, 1929. Thereupon the plaintiff filed a motion to vacate the foregoing order of this court, and, on the record as presented on this motion, it now appears that, after the cause was remanded to the district court, that court had taken action upon the mandate on February 12, 1929. Thus, at the time the aforesaid motion of defendant was sustained by this court, and for some time prior thereto, we had lost jurisdiction of the case because of the fact that the district court had taken action upon the mandate previously issued. *Horton v. State,* 63 Neb. 34; *State v. Lincoln Street R. Co.,* 80 Neb. 352, 355. It is not conceivable that both the supreme court and the district court could at the same time have jurisdiction of this cause. On the filing of the mandate in the district court, and some action being taken thereon by it, that court acquired jurisdiction, and this court lost any power thereafter to act in the case except upon a subsequent appeal.

It is urged, however, that on motion being filed on the part of the defendant, after we had sustained the motion to recall mandate and reconsider motion for rehearing, the district court reversed and set aside all its previous actions had and performed in pursuance to the mandate, and that by so doing the case then stood as though no action had ever been taken by it. To this view we cannot assent, because, when some action was taken by the district court upon the mandate, that court acquired exclusive jurisdiction of the cause and did not lose jurisdiction because of its vacating a previous order by it entered.

It follows that all proceedings had and orders made by this court, after the original mandate was filed in the district court and action first taken thereon, were without jurisdiction. The motion to vacate the order of April 17, 1929, is therefore sustained, and all orders made by the supreme court after the district court had taken action on the mandate, to wit, February 12, 1929, are hereby vacated and set aside, and the original judgment and mandate of this court are adhered to.

JUDGMENT ACCORDINGLY.

LEE PRATT, ADMINISTRATOR, APPELLEE, v. WESTERN BRIDGE & CONSTRUCTION COMPANY, APPELLANT.

FILED JULY 5, 1929. No. 26884.

1. Highways: OBSTRUCTIONS: REMOVAL OF BARRIERS: LIABILITY FOR DEATH. Where a person charged with the duty of warning the traveling public of the unsafe condition of a highway erects or places suitable barriers at or near the place where the dangerous condition exists, and after the erection thereof such barriers are removed or destroyed without the knowledge or consent of the person erecting the same, the person upon whom is cast the duty of giving such warning will not be liable to a party injured, unless it appears that he had actual knowledge of the removal or destruction of such barriers, or that such removal had existed for such a length of time that a person in the exercise of ordinary care should have discovered their removal, and the refusal of the trial court to submit to the jury a tendered instruction embodying this doctrine constitutes reversible error.
2. ———: ———: ———: QUESTION FOR JURY. Where suitable barriers, warning persons of the unsafe condition of a highway, have been destroyed without the consent or knowledge of the persons erecting the same, the necessary period of time which must elapse between the destruction thereof and the injury, in which the person charged with the duty of giving such warning should have, in the exercise of ordinary and proper care, discovered the removal of such barriers, is a question for the jury to determine, and should have been submitted under proper instructions.

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

Dressler & Neely and *H. J. Lutz,* for appellant.

G. F. Harrington, M. F. Harrington and *Helm & Lewis, contra.*

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

CHASE, District Judge.

This is an action by Lee Pratt, administrator, against the Western Bridge & Construction Company to recover

damages for the wrongful death of Rodney J. Pratt, a minor son of plaintiff, alleged to have been caused by the negligent acts of the defendant. The action is brought by the administrator for the benefit of himself as father, and Cora Pratt as mother, of the deceased child. This is the second appearance of this case in this court. See 116 Neb. 553.

The facts as disclosed by the record are about as follows: That the defendant was under contract with the board of public works of the state of Nebraska, and Sheridan county, to install culverts on a public highway passing through Sheridan county; that it commenced the installation of such culverts in the latter part of the summer of 1922; that the defendant undertook to install a culvert just west of the incorporated limits of the village of Gordon, Nebraska; that it placed across the graded portion of said highway a metal tube and excavated at each end of said tube for the purpose of putting in cement bulkheads, but for some reason the work stopped before the bulkheads were erected and the excavations at either end of the culvert were left unfilled; that sometime after nightfall on February 8, 1923, the plaintiff, together with his wife and their three and one-half years' old son were riding toward the village of Gordon in a Ford automobile driven by plaintiff; that as the plaintiff approached the culvert in question he discovered some 300 feet ahead of him a woman walking along the highway in the same direction the plaintiff was going; that when he first discovered the woman he sounded the horn, but she heeded not the warning; that when he got within 30 feet of the woman he sounded his horn again. At the sound of the second blast of the horn the woman became startled and suddenly stepped to the left of where she was walking, toward the center of the road. The plaintiff testifies that, in order to avoid striking her, he turned the car abruptly to the left; that he drove to the left side of the road to pass her; that while on such side of the road, and before he could turn back to the proper side, the left wheel of his automobile struck the excavation at

the north end of the culvert in question, causing such a violent lurch of the automobile as to throw Rodney J. Pratt, his three and one-half years' old son, out of the automobile, causing an injury which produced his death. Plaintiff relies for his recovery upon the fact that the defendant negligently left this culvert in a dangerous condition with an unguarded excavation at the end and no barriers or guard rails were erected to warn the traveling public of the presence of this condition. The case was tried, submitted to a jury, and the jury found for the plaintiff, whereupon the trial court entered judgment on the verdict. To reverse that judgment the defendant appeals to this court.

The defendant relies for reversal of the case upon ten separate assignments of error. We shall discuss only such alleged errors as, in our judgment, appear to be essential in the determination of the issues involved.

One of the principal assignments of error is based upon the refusal of the trial court to give instruction No. 8½ proffered by the defendant. In the decision of this case the disposition of that question, we think, will be sufficient to dispose of the entire case. The tendered instruction is as follows:

"You are instructed that if you find from the evidence that the defendant constructed a guard or a barricade at the north side of the culvert in question at the time it discontinued work for the winter, and that such guard was reasonably adequate to protect any excavation which existed at the north end of the culvert for ordinary and usual purposes of public travel, and that such guard so constructed was destroyed only a few days before the accident by a herd of cattle which was driven over said culvert, crowding against said barrier and breaking it down, and that the defendant was not notified of such occurrence prior to the happening of the accident, then in such case defendant would not be liable for the absence of said barrier, so destroyed, unless and until defendant had been notified in some manner that said barrier had been destroyed so as to give defendant an opportunity to restore

the same. If you believe, therefore, from the evidence, that said barrier was destroyed only a few days before the accident, there being no evidence before you that the defendant was in any manner notified of such destruction of the barrier, your verdict will be for the defendant."

In order to dispose of this question it will be necessary to refer to the evidence upon that branch of the case. The record discloses that the defendant left the culvert in question sometime in the fall of 1922; that at the time barriers were placed up at either end of this particular culvert. These barriers consisted of 2 by 4 uprights set in the ground, one on either side of the hole, about fourteen feet apart, with a 2 by 4 nailed on top of the uprights and a board nailed to each 2 by 4 at one end with the other resting upon the ground. The testimony is somewhat conflicting as to whether or not these barriers had been continually up from the time they were originally placed there by the defendant, but most of the disinterested witnesses agree that the barrier on the north end of the culvert was up the day of the accident, but the next morning the west portion of the same was broken off and the entire barrier was broken down and scattered about. The witness Mielke, who had been a mail carrier about the time of the accident, testifies to traveling this road daily. He testified that the barriers at both ends of the culvert had been up, but the one at the north end was down some three or four days prior to the accident. Upon cross-examination, when asked how he knew this one was down three or four days before the accident, he stated that he saw a herd of cattle knock it down three or four days before the accident. The witnesses, other than the plaintiff and his wife, testified that they inspected the tracks of the automobile which struck the hole, and that these tracks started to angle to the left straight toward the north side of the grade some distance back from the culvert, and led in a straight line, but at an angle into the excavation. The defendant's contention is that according to the testimony of the plaintiff's own witnesses this barrier was up until three or four days before

the accident, and that it was knocked down by a herd of cattle driven along the highway by some third person; that the defendant could not be held responsible for the accident in question unless it were notified of the destruction of the barrier so that it would have an opportunity to replace it, and tenders an instruction to the court presenting that principle of law to the jury. It seems to be a well-established doctrine of the law in cases where negligence is relied upon for recovery that the person who leaves a highway in a dangerous condition must erect a sufficient barrier; but, after the erection of the same, such person is only bound to exercise ordinary or common care and diligence in maintaining it.

In 13 R. C. L. 441, sec. 361, we find the following doctrine announced:

"If a sufficient barrier is erected, the municipality is only bound to use ordinary or common care and diligence in maintaining it, and if it is afterward removed or thrown down by a stranger, or from any cause, without the knowledge or fault of the city authorities, and they have no actual notice that it is so removed or thrown down, and a sufficient time has not elapsed, under the circumstances, to raise a presumption that they had notice thereof before the accident, the city is not liable."

In *Weers v. Jones County*, 80 Ia. 351, the court had a similar question under consideration. In that case the county was aware of the defective condition of a bridge and had placed signboards across the entrance at either end thereof, bearing the words "Bridge Unsafe," and had also placed wires from one railing to the other at either end of said bridge. From some cause the barriers had become torn down and the plaintiff drove upon the bridge, which collapsed with him, causing an injury. The trial court refused an instruction similar to the one tendered by the defendant in this case, but gave an instruction to the jury in which the court told the jury that it was the duty of the defendant to see that such notices and obstructions were kept and continued there in such a manner as would be

sufficient to inform a person exercising ordinary care of the unsafe condition of the bridge. In that case the giving of such an instruction was held reversible error, and the following rule was laid down:

"Where suitable notices are posted and barriers erected by a county on an unsafe county bridge, and the barriers are afterward removed without the county's knowledge or consent, the county is not liable for injuries sustained by a person attempting to cross the bridge, if it had no actual knowledge of the removal of the barriers, or could not have known it by the use of reasonable care and diligence." (45 N. W. 883.)

The court in that case cites numerous other decisions in support of that doctrine of law.

The rule seems quite well established that where a person charged with the duty of warning the traveling public of a defective or unsafe condition of a highway or bridge places or erects suitable barriers at or near the place where the dangerous condition exists, and after erection thereof such barriers, through no act of the party erecting the same, become destroyed or knocked down, the party upon whom is cast the duty of erecting such barriers will not be liable to the person injured, unless it appears that he had actual knowledge of the destruction of such barriers, or that the same had been down for a sufficient length of time that a person in the exercise of ordinary care should have discovered their destruction. At any rate, under a proper instruction the question of reasonable diligence in discovering the destruction of the barrier is a question for the jury to determine. We believe the instruction herein tendered sufficiently states the law to have entitled the same to have been submitted to the jury.

The testimony shows by the plaintiff's own witness that he saw the barrier knocked down three or four days before the accident by a herd of cattle. The defendant is a corporation whose home office is not in Sheridan county. The question of whether or not this barrier having been knocked down and remained down for three or four days previous

to the happening of the accident was sufficient length of time for the defendant, in the exercise of ordinary care, to have discovered its destruction depends upon the facts of the particular case; but the courts, so far as we have been able to ascertain, uniformly hold that such a fact or circumstance is for the jury to determine. In the case of *Thompson v. Reed,* 29 S. Dak. 85, it was held that whether or not the dangerous condition of the premises, of which defendant had no actual notice, had existed for a sufficient length of time that the defendant, in the exercise of ordinary care, should have discovered it, depends upon the particular case and is a question for the jury to determine. The same doctrine was announced in *Western Union Telegraph Co. v. Engler,* 75 Fed. 102. "What constitutes sufficient time to discover a defect or danger must depend upon the circumstances of each case." 45 C. J. 655, sec. 27.

Where the evidence shows that the barrier was destroyed three or four days before the accident and there was no evidence of any actual notice in the record of its destruction, the question of whether or not sufficient length of time had elapsed for the defendant to have discovered the dangerous condition was a matter for the jury to determine under proper instructions. It became the duty of the trial court, when requested so to do, to instruct the jury upon this very important branch of the case.

Therefore, in the light of the record as it stands, instruction No. 8½, as tendered by the defendant, sufficiently stated the law of the present case to entitle it to be given to the jury, and a refusal to so give it constituted reversible error.

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

REVERSED.

Note—See Motor Vehicles, 42 C. J. 843 n. 5, 869 n. 73; 13 R. C. L. 441; 20 R. C. L. 604, 671.

STATE, EX REL. O. S. SPILLMAN, ATTORNEY GENERAL, V. FARMERS STATE BANK OF ERICKSON, APPELLANT: ELKHORN LIFE & ACCIDENT INSURANCE COMPANY OF NORFOLK, APPELLEE.

FILED JULY 5, 1929. No. 26674.

1. **Banks and Banking: GUARANTY FUND: CLAIM DISALLOWED.** Where a deposit in a state bank was induced by a collateral agreement between the bank and the depositor for the benefit of the latter, such deposit is not allowable as a claim against the guaranty fund.
2. ———: ———: ———. A renewal of a certificate of deposit, by the special agent of the department of trade and commerce in charge of an insolvent bank, will not have the effect to charge the depositors' guaranty fund with a deposit which was not a proper charge thereon at the time the department took possession.

APPEAL from the district court for Wheeler county: EDWIN P. CLEMENTS, JUDGE. *Affirmed in part, and reversed in part.*

C. M. Skiles, I. D. Beynon and *Lanigan & Lanigan,* for appellant.

Jack Koenigstein, contra.

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

REDICK, District Judge.

This is a controversy between Elkhorn Life & Accident Insurance Company, claimant, and the Farmers State Bank of Erickson. November 1, 1925, the bank issued to claimant certain certificates of deposit for full consideration, but under circumstances contravening the bankers' guaranty fund law. On January 15, 1926, the bank was in a failing condition and was taken over by the department of trade and commerce, with Howard Guilfoil, special agent, in charge; and a receiver was appointed February 17, 1927. May 17, 1926, claimant sent the certificates to the bank for renewal, with a letter of transmittal containing the follow-

ing: "A new certificate for this amount for a period of six months at your regular rate of interest, deposited by and payable to M. L. Koehn, together with draft for accrued interest on the certificate inclosed, will be acceptable, upon the understanding that this deposit is made and accepted without any collateral agreement or condition other than that set forth in the certificate of deposit." Renewals in usual form were thereupon issued, signed "Howard Guilfoil, Special Agent." The certificates were again renewed in the same manner November 21, and December 21, respectively. The certificates in each case were issued to M. L. Koehn, an officer of claimant company, but claimant was at all times the owner thereof. The claims were allowed by the district court against the bank and ordered paid out of the depositors' guaranty fund; and from the latter allowance the receiver appeals.

Only one question is presented on this appeal, and that is whether or not the issuance of the renewal certificates on May 21, 1926, in response to claimant's letter, and the subsequent renewals thereof constituted an abandonment of the collateral agreement under which the original certificates were issued November 1, 1925, thus purging the transaction of its original taint and making the deposits a charge against the guaranty fund. This question must be answered in the negative. It has been held a number of times by this court that ordinarily a receiver takes charge of banking affairs where the bank left them, and, in the absence of fraud, mistake or violation of law, cannot open closed transactions which would conclude the bank if solvent. *State v. Farmers State Bank,* 112 Neb. 788; *State v. South Fork State Bank,* 112 Neb. 623. The same principle is applicable to the department of trade and commerce when it takes over an insolvent bank. The effect of these holdings is that the rights of the bank and depositors are fixed at the time the department takes possession. If, at that time, a certain item is not a charge against the guaranty fund, its status with relation to that fund is fixed.

In the situation shown by the record, the special agent

had no power to subject the guaranty fund to the claim in suit, and therefore none to accept the condition contained in claimant's letter. If the rule were otherwise, it would be a very simple matter, after a bank had failed, to subject the fund to the payment of all deposits, regardless of the circumstances of their origin, by the simple issuance of renewals.

Claimant cites *State v. Newcastle State Bank*, 114 Neb. 389, *State v. Wayne County Bank*, 112 Neb. 792, and *State v. American Exchange Bank*, 112 Neb. 834, all of which were cases in which renewal of certificates were held valid in consequence of an abandonment of the unlawful contract from which they originated; but in all those cases the abandonment took place prior to the failure of the bank and its taking over by the department or the appointment of a receiver, and in two of those cases direct evidence of a new contract at the time of the renewal was presented, and in the third abandonment was clearly inferred from the circumstances.

It follows that the judgment of the district court must be reversed in so far as the allowance of the claim against the guaranty fund is concerned, but in all other respects it is affirmed.

AFFIRMED IN PART, AND REVERSED IN PART.

GOOD, J., dissents to the rule announced in the second paragraph of the syllabus.

ANN L. FLANAGAN, APPELLEE, V. H. A. OLDEROG: SNYDER STATE BANK, INTERVENER, APPELLANT.

FILED JULY 5, 1929. No. 26707.

1. Trusts: CREDITORS' BILL. As a general rule the interest of a debtor under a trust created for his benefit by a third person may be reached by a creditors' bill, unless it was placed beyond the reach of his creditors by the instrument creating the trust.
2. ———. To create a valid spendthrift trust, the language of the founder must be clear and unequivocal to that effect. 25 R. C. L. 356, sec. 7.

3. ———: DEVISE: TRUSTEE'S TITLE. A devise to A. L. F. to hold title to real estate in trust for B. W. F., his heirs and assigns, but with no duties to perform and no estate in remainder or gift over, vests in the trustee a naked legal title, and none other. *Hill v. Hill*, 90 Neb. 43.
4. ———: ———: ———. A devise in the following language: "I give and bequeath unto my beloved daughter A. L. F., to be held in trust by her for my beloved son B. W. F., his heirs and assigns, one-fourth (¼) of all the residue of my estate"—creates a mere passive dry trust and vests an absolute title in B. W. F.
5. ———: ———: ATTACHMENT. Under such a devise, a creditor of B. W. F. may, by proper proceedings, levy an attachment on the devised premises, and maintain a creditors' bill to have the legal title adjudged in B. W. F. and the debtor's interest in the real estate sold to satisfy the attachment.

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

Swarr, May & Royce, C. M. Skiles and *I. D. Beynon*, for appellant.

James H. Hanley, contra.

Heard before ROSE, DEAN, GOOD and DAY, JJ., and RAPER and REDICK, District Judges.

RAPER, District Judge.

Peter J. Flanagan by his last will devised the north half of section 16, township 13, range 10, in Sarpy county, to his wife during her life, and, subject to her life estate, by item 7 in his will, made the following devise:

"I give and bequeath unto my beloved daughter Ann L. Flanagan, to be held in trust by her for my beloved son Bernard W. Flanagan, his heirs and assigns, one-fourth (¼) of all the residue of my estate subject only to the bequests and devises above set forth in paragraphs, first, second and sixth."

This will was duly probated in Douglas county, and, soon after the probate thereof, the Snyder State Bank began an action in the district court against Bernard W. Flanagan to recover judgment on two promissory notes held by the bank against Bernard W. Flanagan, who was a nonresident

of the state. The bank by appropriate proceedings procured an attachment against the interest of said Bernard in the above described land and secured valid service on him as a nonresident. Bernard W. Flanagan made no appearance, and the cause was heard by the district court, judgment rendered by the court in favor of plaintiff, and order of sale was directed to issue to sell the attached property to satisfy the amount found due plaintiff. The order of sale was duly issued and the land advertised for sale thereunder. Before sale day, Ann L. Flanagan began this action to restrain the sheriff, H. A. Olderog, from proceeding with the sale. The State Bank of Snyder seasonably and by leave of court intervened. In her petition plaintiff alleges that the attachment proceedings and judgment rendered thereon against Bernard W. Flanagan were wholly null and void, and constituted no lien upon said real estate, as the said Bernard W. Flanagan since the recovery of said judgment has had no interest in said real estate, and a sale thereof under said judgment and execution would cast a cloud upon the legal title of said Ann L. Flanagan; and she prays that a perpetual injunction be granted restraining the sheriff from selling the land, and she prays that the title to the land be quieted and confirmed in her.

In its petition the intervener set out the proceedings in attachment, the judgment and the issuing of the execution thereon, and pleaded that said devise to Ann L. Flanagan, in trust, was a mere naked trust, and that the title to one-fourth of the land vested in Bernard W. Flanagan, and prayed that the land be held subject to the payment of its judgment against Bernard W. Flanagan.

On the hearing the court found generally for plaintiff, and granted a perpetual injunction against the sheriff and the intervener to restrain the sale, and decreed that the legal title to the real estate be quieted in plaintiff as trustee; from which decree the intervener bank appeals.

It is claimed by appellee that, because the legal title to the land was in her name as trustee, it was not subject to the payment of any debt against Bernard W. Flanagan, and

appellee further claims that the bequest establishes a spendthrift trust and as such the land cannot be held for payment of Bernard's debts. The appellant contends that the devise is a mere naked trust, and the title vested absolutely in Bernard W. Flanagan. At the trial it was testified by appellee that her brother Bernard was in a way a spendthrift, because he was somewhat reckless in business deals; that he owed several thousand dollars and the testator had told her that he did not want the land to go to the payment of Bernard's debts because it was a personal gift.

In the case of *Hill v. Hill*, 90 Neb. 43, this court held that a devise to hold the title in trust for another, but with no duties to perform and no estate in remainder or gift over, vests in the trustee a naked legal title, and none other. The language in the devise in the case at bar brings it squarely within the rule announced in the *Hill* case. But appellee claims that the oral testimony of Ann L. Flanagan establishes a spendthrift trust. Without determining to what extent oral testimony may be received to amplify or explain a devise to make it a valid spendthrift trust, it is plain that her testimony does not materially affect or alter the words in the will. The language of the will, in conjunction with her testimony, falls far short of establishing an active or spendthrift trust. 25 R. C. L. 356, sec. 7. Under the rule in the *Hill* case, the devise vests the title and right of possession in Bernard W. Flanagan, which he was entitled to have on his demand.

The trustee further claims that, inasmuch as the legal title was devised to her, the land was not subject to attachment or execution sale for Bernard's debt. For the purposes of this case it may be conceded that a judgment creditor may not sell an equitable interest of his debtor in the debtor's land, but it is a well-settled rule of practice in this state that a creditor may levy an attachment on the land, or, if there be a personal judgment against the debtor, an execution can be levied on the land, and a lien thereby established which will furnish a basis for an action by creditor's bill to remove the impediment in the title and have

the land decreed to be subject to the lien of the attachment or execution. Where the action, as in this case, was begun by attachment, and subsequently the court adjudged the amount due and directed sale of the attached property, it was not necessary to have an execution returned unsatisfied before proceeding by creditors' bill to have the title adjudicated in the attachment defendant, and subject to sale to satisfy the debt. It may be that the property in this case could not have been sold under the execution held by the sheriff when appellee brought this action, although the courts of Tennessee seem to hold otherwise when the party holding the legal title is a mere naked trustee. *Turley v. Massengill,* 7 Lea (Tenn.) 353. However, that question is not decisive here. The plaintiff, in her petition, not only prayed for an injunction to restrain the sheriff from selling the land, but she also prayed that the title to the land be quieted and confirmed in her. The intervener in its petition set forth every element necessary in a creditors' bill, and prays the court to decree the legal title to the one-fourth interest in the real estate to be vested in Bernard W. Flanagan, and subject to the satisfaction of plaintiff's attachment and judgment. The issue of the title was thus squarely raised and in effect is the same as if the intervener had first filed its creditors' bill and the trustee had answered.

The will gives only a naked legal title to the trustee, and vests the said Bernard W. Flanagan, not only with the beneficial use and enjoyment, but also the right to the legal title and the immediate possession of his portion of the estate. The intervener is entitled to a decree adjudging Bernard W. Flanagan the absolute owner in fee of his share of the property, and directing that his one-fourth interest in the attached property, subject to the life estate of the widow of testator, be sold to satisfy attachment and judgment.

The decree of the district court is reversed, the injunction dissolved, and the cause is remanded to the district court, with directions to enter a decree in accordance with this opinion, and order the sheriff to proceed in manner pro-

vided by law to have the attached property sold to satisfy intervener's attachment.

REVERSED.

Note—See Trusts, 39 Cyc. 57 n. 20, 219 n. 68, 222 n. 73, 237 n. 71; 25 R. C. L. pp. 356, 357; 3 R. C. L. 1419; 6 R. C. L. Supp. 1469.

DENNIS W. KILLEEN, APPELLEE, V. JOHN DORAN, APPELLANT.

FILED JULY 16, 1929. No. 26740.

1. **Banks and Banking: PURCHASE OF STOCK: RESCISSION.** The rule that a contracting party who is unwilling to perform his part of the agreement is not entitled to a rescission *held* inapplicable to a person contracting for the purchase of bank stock representing the controlling interest, where the seller was unable to make the stipulated transfer.
2. **Escrows.** "An escrow is a written instrument which by its terms imports a legal obligation, and which is deposited by the grantor, promisor, or obligor, or his agent, with a stranger or third party, to be kept by the depositary until the performance of a condition or the happening of a certain event, and then to be delivered over to the grantee, promisee, or obligee." 10 R. C. L. 621, sec. 2.
3. ———. An escrow providing that an initial payment under a contract of purchase shall be intrusted to the temporary custody of the depositary may imply conditions not performed by the seller at the time the contract of purchase was signed.
4. **Banks and Banking: PURCHASE OF STOCK: RESCISSION.** Under the facts outlined in the opinion, plaintiff who signed a contract to purchase bank stock representing the controlling interest in the bank *held* entitled to a rescission on the ground that the holder of the stock was unable to make the stipulated transfer.

APPEAL from the district court for York county: LOVELL S. HASTINGS, JUDGE. *Affirmed in part, and reversed in part.*

Thomas & Vail, for appellant.

Corcoran & Sprague, W. L. Kirkpatrick, C. M. Skiles and *W. W. Wycoff, contra.*

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

ROSE, J.

This is a suit in equity to rescind a contract to purchase the controlling interest in the Farmers State Bank of York. The capital stock consisted of 500 shares of the par value of $100 each. Dennis W. Killeen agreed to buy from John Doran 251 shares for $12,000 payable in three instalments. They reduced their contract to writing and signed it. It was dated October 2, 1926, and required Killeen to pay Doran $2,000 by means of a certificate of deposit, $2,000 November 15, 1926, and $8,000 January 15, 1927, subject to stipulated conditions and requirements. The contract refers to Doran, the seller, as first party, and to Killeen, the buyer, as the second party, and contains the following provisions:

"Fourth. When this agreement has been duly executed by both parties, in duplication, a copy thereof or an original thereof shall be deposited in escrow with the said Farmers State Bank. The conditions of the escrow to be supervised and carried out by the president of said bank.

"Fifth. When the first payment of $2,000 in a certificate of deposit is delivered to the escrow agent, the same is to be delivered to first party, when the following conditions have been fully complied with: (a) Thirty (30) shares of said capital stock, a part of the sale herein made, shall be duly assigned and delivered to second party, transferred to second party on the stock records of said bank, and new certificates issued therefor to second party, and first party shall file with said bank his resignation from the board of directors and from any other office he may hold in said bank. (b) Second party is to be elected to the board of directors of said bank and by said board of directors elected to the office of vice president of said bank and be admitted to that office and to the usual duties and responsibilities thereof. The person holding such office at the date of the transfer of said first thirty (30) shares of stock is to vacate the same and make possible the election of second party.

"Sixth. On or before November 15, 1926, second party is to pay said escrow agent the second $2,000, the same to be delivered to the first party when first party has delivered to second party an additional thirty (30) shares of said stock and the same have been transferred to second party on the stock books of said bank and new certificates therefor duly issued to second party.

"Seventh. On or before January 15, 1927, the balance of said purchase price, $8,000, is to be delivered by second party to said escrow agent and by said agent delivered to first party, when first party has duly assigned and delivered the remaining one hundred ninety (190) shares of said stock, and the same have been duly transferred on the stock records of said bank and new stock issued to second party.

"Eighth. No interest shall be paid by second party on any of the deferred payments.

"Ninth. It is agreed that a majority of directors of said bank must indorse their approval of this sale on this contract and therein consent to the same and agree that the conditions as to membership on the board of directors and election to the vice-presidency shall be carried out by said board of directors in conformity to provision of this contract."

Following the contract on the same instrument a majority of the officers and directors of the Farmers State Bank consented in writing to the transfer and agreed to elect Killeen director and vice-president. In addition to signing the contract, Killeen on the same day gave a bond for performance on his part. Four days later, October 6, 1926, Killeen procured from the First State Bank of North Bend a certificate of deposit for $2,000 and afterward indorsed it to Doran and turned it over to the Farmers State Bank in compliance with the escrow. Killeen also executed a note for each of the other payments and the notes were likewise left with the depositary in charge of the escrow. Doran assigned and delivered the first block of 30 shares. October 13, 1926, the state department of trade and com-

merce notified the Farmers State Bank that the transfer of stock from Doran to Killeen would not be permitted. The notice contained instructions not to allow any transfer of stock on the books of the company and forbidding "any party to enter into the bank in an executive capacity" without leave and approval of the department. A copy of this notice was mailed to and received by Doran. Killeen immediately stopped payment of the draft.

Killeen is plaintiff herein and Doran, the First State Bank of North Bend, the Farmers State Bank of York, Clarence G. Bliss, secretary of the department of trade and commerce, Van E. Peterson, secretary of the guaranty fund commission, and the sureties on Killeen's bond were made defendants. The petition contains pleas that plaintiff complied with the terms of his purchase and that Doran made default, failed to transfer and deliver the shares of stock as agreed, refused to put plaintiff in possession of the Farmers State Bank, attempted to convert to his own use the proceeds of the certificate of deposit, and did not return the paper received by him as the consideration. Plaintiff prayed for the return of the certificate of deposit, or, if not returned, for judgment against the First State Bank of North Bend for the amount due thereon, and for the return of his notes and his bond.

In an answer and cross-petition Doran admitted the making of the written instruments pleaded in the petition; alleged that he performed on his part his obligations under the contract of sale or tendered performance thereof; that plaintiff made default and, with the sureties on his bond for performance, became liable to Doran on the notes aggregating $10,000 with interest; that the First State Bank of North Bend refused to pay him the amount due on the certificate of deposit. In the cross-petition Doran prayed for judgment in the sum of $10,000 and interest on the notes and bond, for judgment against the First State Bank of North Bend for the amount due on the certificate of deposit and for other equitable relief.

The First State Bank of North Bend admitted that it

held the deposit of $2,000 and prayed for a direction as to whom it should be paid.

The Farmers State Bank of York pleaded that the notes and the bond were left in its custody with the escrow, disclaimed any interest in them and tendered them to the district court subject to its order.

Upon a trial of the cause the district court found the issues in favor of the plaintiff, including findings that plaintiff was entitled to a rescission and that Doran's cross-petition should be dismissed. From a decree in favor of plaintiff Doran appealed.

On appeal Doran argued that plaintiff was first in default and that consequently he was not entitled to a rescission of the contract of purchase, citing *Te Poel v. Shutt*, 57 Neb. 592, and *Pryor v. Hunter*, 31 Neb. 678, to the effect that a contracting party who is unwilling to perform his part of the agreement is not entitled to a rescission. The applicability of this rule depends on the facts. The parties to the contract provided in it for an "escrow." That term was used in its technical sense in connection with the terms on which the stock was bought and sold. In that sense it has been defined as follows:

"An escrow is a written instrument which by its terms imports a legal obligation, and which is deposited by the grantor, promisor, or obligor, or his agent, with a stranger or third party, to be kept by the depositary until the performance of a condition or the happening of a certain event, and then to be delivered over to the grantee, promisee, or obligee." 10 R. C. L. 621, sec. 2.

The escrow itself implied conditions not performed by Doran when the contract was signed. The contract provided for payments of the purchase price when Doran complied with conditions subsequently specified in the written instrument. Doran agreed to sell what amounted to a controlling interest in the bank. That was what plaintiff agreed to buy—a controlling interest in a commercial state bank in actual operation. This was contemplated by both parties. In compliance with his agreement plaintiff pro-

cured and indorsed to Doran a certificate of deposit for the initial payment of $2,000 and left it with the depositary in charge of the escrow. Doran complied with the condition to transfer the first block of 30 shares. His own testimony is that the certificate of deposit was delivered for him to his son-in-law, C. P. Hildebran. "I think I ordered him to send it to the Live-Stock National Bank for credit" were the exact words of Doran while testifying. He therefore received the certificate of deposit and attempted to procure the proceeds thereof. It was payable six months after date and on its face stated that it was nonnegotiable. Before it was cashed plaintiff stopped payment. This seems to be regarded the first default upon which Doran relies to prevent a rescission, but it did not amount to such a default. It was justified by the circumstances. The reserve of the Farmers State Bank was nearly exhausted and it held unauthorized paper to the extent of $6,000 or more. It was at the time in a failing condition that might subject it to the control of the state department of trade and commerce. October 15, 1926, 13 days after the contract was signed, the secretary of the state department of trade and commerce made an order which prevented Doran from transferring his stock in compliance with his agreement. Doran did not restore his bank to a condition warranting a withdrawal of the order preventing the transfer. Officers of the state took charge of its affairs December 16, 1926. It was after the order preventing the transfer to plaintiff that the latter stopped payment of the certificate of deposit. He was not then required by law or equity to make payments for stock and for a controlling interest which could not be transferred to him pursuant to his contract of purchase. On the contrary, he was entitled to a rescission and to the return of the certificate of deposit, the notes and the bond for performance. In those particulars the findings of the district court in favor of plaintiff were correct. No other conclusion could be sustained under the pleadings and evidence.

The personal judgment against Doran for the amount

due on the certificate of deposit, however, seems to be erroneous, not being within the pleadings and the evidence. It is therefore reversed. Otherwise, the judgment of the district court is affirmed, plaintiff to pay his own costs in the supreme court.

AFFIRMED IN PART, AND REVERSED IN PART.

Note—See Escrows, 21 C. J. 865 n. 1; 10 R. C. L. 621; L. R. A. 1916A, 502; 10 R. C. L. 635; R. C. L. Perm. Supp. 2714.

STATE, EX REL. O. S. SPILLMAN, ATTORNEY GENERAL, APPELLEE, V. INTERSTATE POWER COMPANY ET AL., APPELLANTS: NORTHERN NEBRASKA POWER COMPANY ET AL., APPELLEES.

FILED JULY 16, 1929. No. 26291.

1. **Monopolies: STATUTORY PROVISIONS.** The production, sale and distribution of electricity within the state of Nebraska is within the purview of section 3432, Comp. St. 1922, providing: "Any person, firm or company, association or corporation, foreign or domestic, doing business in the state of Nebraska and engaged in the production, manufacture or distribution of any commodity in general use, that shall intentionally, for the purpose of destroying the business of a competitor in any locality, discriminate between different sections, communities, or cities of this state by selling such commodity at a lower rate in one section, community or city, than is charged for said commodity by said party in another section, community or city, after making due allowance for the difference, if any, in the grade or quality and in the actual cost of transportation from the point of production, if a raw product, or from the point of manufacture, if a manufactured product, shall be deemed guilty of unfair discrimination, which is hereby prohibited and declared unlawful."
2. ———. Any person or corporation who shall monopolize or attempt to monopolize or combine or conspire with any other person or persons to monopolize any part of trade or commerce in what is commonly known as electricity within the state of Nebraska, and also, when engaged in business of producing, selling or distributing the same, shall enter into a contract, combination or conspiracy to, or who shall give direction or authority to, do any act for the purpose of driving out of business any other

person engaged therein, or who for such purpose shall in the course of such business sell any article or product at less than its fair market value or at a less price than it is accustomed to demand or receive therefor in any other place, under like conditions, is within the prohibitions of sections 3448, 3449, and 3453, Comp. St. 1922, and such acts are in contravention of the public policy established thereby.

3. Evidence examined, and *held* to justify and support the findings and decree of the district court.

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

Hainer, Flansburg & Lee and *H. E. Burkett,* for appellants.

O. S. Spillman, Attorney General, T. J. McGuire, B. Ready and *C. P. Craft, contra.*

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

EBERLY, J.

This is a suit in equity to enjoin the defendants from alleged combining and conspiring to and from unlawfully destroying the business of a competitor, and also from combining and conspiring to and actually monopolizing and restraining intrastate commerce in contravention of law and in violation of the public policy of this state. Plaintiff's petition reduced to its briefest terms had for one of its important and immediate purposes the enjoining of defendants named from putting into force a schedule of rates for electrical energy carrying a top rate of 6 cents per K. W. H. in the city of Hartington, Nebraska, which schedule, it was alleged, was adopted and maintained to further and effect the unlawful purposes above recited. In opposing this petition the defendants challenged its sufficiency as a matter of law, and the truth of its allegations as a matter of fact. In a trial to the court evidence offered in behalf of both parties to the litigation was voluminous. Upon consideration of the evidence adduced the trial court determined that as to the defendants, Interstate Power Com-

pany of Delaware, Interstate Power Company of Nebraska, Tri-State Utilities Company, Cedar Light & Power Company, the allegations contained in the petition were sufficient as a matter of law and true as a question of fact, and to this general finding added certain special findings consistent therewith, and, based thereon, entered an order enjoining the proposed schedule of rates, which will be hereafter referred to as the "6 cents per K. W. H. rate." From this order the defendants last named above prosecuted an appeal and the matter is before this court for a trial *de novo*.

We have made a careful examination of the record. Our conclusion is that the defendants, at the time of the institution of this action, were not engaging in, or proposing to engage in, merely a *bona fide* effort to meet competition, but that a fair preponderance of the evidence adduced in the case sustains the conclusion of the trial judge on this question of fact, who found to the contrary, and it must be conceded had the advantage of hearing and observing the many witnesses who appeared in person before him and testified in his presence.

There is little or no conflict in the evidence as to the essential nature and interrelations of the several defendants. They owe respectively their existence to the result of a definite plan and policy. This plan contemplated the Interstate Power Company of Delaware, a Delaware corporation, as a parent or controlling organization. Pursuant to this plan the properties and assets of the Minnesota Electric Distributing Company, the Tri-State Utilities Company, as well as those of other owners, were, in effect, merged in and consolidated with the Interstate Power Company of Delaware, so that at the time of the institution of this suit by the state in the district court, that company owned and controlled more than 42 million in assets situated in Iowa, Illinois, Wisconsin, Minnesota, North Dakota, South Dakota, Nebraska, and Oklahoma. The evidence obtained from defendant sources discloses that this plan, so far as amalgamation of properties of the Tri-State Util-

ities Company (including later the Hartington plant) was concerned, had been substantially effected, though possibly not formally completed, on or before May 1, 1926. The defendant Interstate Power Company of Nebraska, organized and existing under the laws of Delaware, was formed in 1927 to acquire and operate the properties formerly belonging to the Minnesota Electric Distributing Company and the Tri-State Utilities Company in Nebraska. The purchase price of the properties thus acquired and placed in the name of the Interstate Power Company of Nebraska was exclusively represented by all of the stock of the Interstate Power Company of Nebraska, none of which was disposed of to the public, but all of which passed to, and were, and are owned, held and controlled by the parent company, the Interstate Power Company of Delaware. It was the latter company that secured the cancelation and retirement of all of the "underlying securities" of the Tri-State Utilities Company and the Minnesota Electric Distributing Company, including all stocks and bonds issued by the last two organizations, and which organizations thereafter, so far as practical purposes were concerned, ceased to exist.

Horace H. Dodd, commercial manager of the Interstate Power Company of Delaware, as well as other affiliated entities, appearing as a witness in this case in behalf of the defendants, and in his testimony referring to that company and its subsidiary components, summarizes the existing situation in the following language: "The Interstate Power Company * * * owns and operates certain properties in its own name, it owns. Then it owns certain of these other companies, the reason being that in certain states it is more easy to comply with the local laws by having a separate company operating in the state. From an operating standpoint, as far as the operating organization goes, we consider it all one company." In substance, Mr. Dodd said: "We consider the Interstate Power Company of Delaware and the Interstate Power Company of Nebraska all as one company. In my capacity, as manager,

I circulate all over and conduct it and operate it in that way."

It further appears that the Interstate Power Company of Delaware is itself subsidiary to, and is owned and controlled in a manner quite similar by, the Utilities Power & Light Corporation of Chicago, which operates, owns and controls similar properties in some twelve different states.

The Cedar Light & Power Company is also a defendant, and in its name the business at Hartington, Nebraska, formerly operated by the Tri-State Utilities Company, the ostensible control of which was taken over by the Interstate Power Company of Nebraska, purports to be carried on. The Cedar Light & Power Company was organized after the Hartington Electric Light Company had been granted a franchise by the city of Hartington. It was known at that time there would be competition to be met at this point. It appears that the articles of incorporation of the Cedar Light & Power Company were drawn up and executed in the law office of Matthews & Koegel of Chicago, who are now and were then attorneys for the Utilities Power & Light Corporation of Chicago, the ultimate control, and are and were then attorneys for all subsidiaries thereto at that time, including the Interstate Power Company of Delaware and the Interstate Power Company of Nebraska. The incorporators executing these articles were Francis E. Matthews of the last-named firm of attorneys, J. N. Canavan, vice-president of the Utilities Power & Light Corporation of Chicago, also vice-president of the Interstate Power Company of Delaware, and also vice-president of the Interstate Power Company of Nebraska, and later president of the Cedar Light & Power Company. The third incorporator was J. W. Perkins "who works in the law office of Matthews & Koegel." The directors of this corporation were J. N. Canavan, J. W. Perkins, already mentioned, and C. C. Summers who was the managing officer of the business at Hartington under the Tri-State Utilities Company regime, as well as its successor, and F. E. Laramore. It appears that F. E. Laramore is

connected with the Utilities Power & Light Corporation of Chicago, though the exact nature of the relation does not definitely appear in the evidence before us.

The officers of the Cedar Light & Power Company were J. N. Canavan, president; C. C. Summers, vice-president; O. E. Koegel, vice-president; W. A. Horner, secretary of the Utilities Power & Light Company; J. L. Cross, auditor of the Utilities Power & Light Company; J. Neill Richards, assistant auditor of the Interstate Power Company of Delaware. In this connection it is to be noted that C. C. Summers was the person who had been in personal charge of the business at Hartington, and that O. E. Koegel, who appears as vice-president, was an attorney at law and attorney in the firm of Matthews & Koegel, already mentioned, and that J. N. Canavan was not only president but also the treasurer of the new corporation.

It fairly appears that not a dollar of money was ever paid in or any property whatsoever turned over to the Cedar Light & Power Company by any of the persons above named. It further appears from the evidence that this corporation purchased on Febuary 21, 1927, ostensibly from the Tri-State Utilities Company, "certain real property, electrical distribution system, and franchises pertaining to the same, situated in the city of Hartington, Cedar county, Nebraska, and paid therefor $65,000 by the execution and delivery of its promissory note dated February 21, 1927, for $65,000 due in thirty days."

The undisputed evidence is that the physical properties thus "purchased" were substantially all that the Cedar Light & Power Company owned or possessed, and that at this time did not exceed in value the sum of $25,000, reproduction value, less depreciation, being but $20,346; that, after "purchase" thus made, this corporation made immediately an application to the Nebraska railway commission for authority to issue a total of $65,000 in stock, with the express stipulation attached that this stock was not to be sold or disposed of to the public, but was to be delivered to and be the property of the Interstate Power

Company of Delaware. Subsequently, this application was amended so as to restrict the issue of stock to the sum of $25,000, but the announced plan was in no other manner changed.

It is admitted in the evidence on behalf of the defendants that the Cedar Light & Power Company is in fact, and was, from the time of its organization, as well as at the time of the trial in the district court, controlled and operated through, by and under the supervision of the officials of the Interstate Power Company of Delaware in promotion of the latter's policies and for the latter's benefits.

No other conclusion is possible than, in a business sense, the interest and even the actual controlling factors of the defendants, the Interstate Power Company of Delaware, the Interstate Power Company of Nebraska, and the Cedar Light & Power Company, are identical. Operatively, these corporations are controlled by unity of interest and of management. Considering the nature of the business transacted, as an entirety, and the manner it is carried on, as reflected by the record, these several related corporations appear to function as members of a single body dominated by, and for the exclusive advantage of, a single controlling will.

To summarize the events disclosed by the records before us that precede this litigation, it may be said that among the towns served by the Tri-State Utilities Company, hereafter referred to in Nebraska, was the city of Hartington, where this organization had acquired a franchise. There it owned and operated a distributing plant from which it furnished electrical current to its patrons. The charges exacted by it, as well as its predecessors, were governed by a prescribed "sliding scale." Under this scale the "top," which may fairly be taken as a basis of comparison with all sliding scales hereinafter referred to, was 18 cents per K. W. H. These charges the patrons at Hartington deemed excessive. After fruitless negotiations with agencies in immediate control and operation of their electric plant, and

with the representatives of the Interstate Power Company of Delaware, the parent and controlling organization, the city of Hartington, Nebraska, in an endeavor to secure relief from what was deemed exorbitant charges induced the promoters of the proposed Hartington Electric Light Company, doing business as the "Western States Public Utilities Company," to submit a proposition to furnish electrical energy to that city in the form of contract at the "top rate of 9 cents per K. W. H." This proposition, in turn, was by the mayor and council of that city submitted to the electors thereof and by them accepted at an election held for that purpose.

As a result of the agitation on this subject preceding the election, the rates were changed by the "control" of the Interstate Power Company before the granting of a franchise to the Hartington Electric Light Company from 18 cents per K. W. H. to a top rate of 14 cents per K. W. H.

The Hartington Electric Light Company, however, thereafter erected a plant, and prior to the commencement of this lawsuit actually engaged in the business of furnishing electric current to its customers, pursuant to a schedule of rates in which the top rate was 9 cents per K. W. H., and which was in accord with the written proposition which had been submitted to and accepted by the electors of the city of Hartington. Thereupon, the Cedar Light & Power Company was organized in the manner hereinbefore set out, and the defendants under the label of the Cedar Light & Power Company again attempted to reduce their rates to a sliding scale, the top rate of which was 6 cents per K. W. H.

At this point the state of Nebraska intervened by the institution of the present action. A careful perusal of the record in this case fairly discloses that it was the settled and controlling policy of the defendants, referring thereby to the control of the affiliated organizations already mentioned, to preserve the monopoly that it enjoyed at Hartington prior to the appearance of the Hartington Electric Light Company at all costs, and that all steps taken by them thereafter had this end in view.

In advancing this purpose it carried on an energetic campaign before the municipal electorate of Hartington in the newspapers and elsewhere to obtain a denial of the right of the Hartington Electric Light Company to enter this field. The circumstances surrounding the reduction of the rates from 18 cents to 14 cents per K. W. H. are such that it may well be inferred that this reduction was made to aid in securing the exclusion of all competitors from the Hartington field. These efforts were carried even to the extent of adopting a policy of intimidation, diplomatic, it is true, but no less effective, forcible and efficient in accomplishing the desired object.

Among the evidence sustaining these conclusions it may be noted that Mr. Horace H. Dodd, who in the transaction now referred to represented the "control" of all of the affiliated defendants and acting for and in their behalf, and whose authority in the premises is unquestioned in the record before us, in an admitted endeavor to prevent the Hartington Electric Light Company becoming a competitor in that city, called on Mr. Heber Hord, the head of the interests represented by the Hartington Electric Light Company, after the proposition made in its behalf had been approved and accepted by the electors of Hartington, but before the construction of the new plant had been commenced and before the old organization had lost a dollar's worth of business. Of the conversation which took place at the time, Mr. Dodd, a witness for defendants, on direct examination, says in part: "I called him (Mr. Hord) up and made an appointment and went down there (Central City, Nebraska) and Mr. Hord received me *very cordially.* I assured him I had come in a *friendly spirit.* * * * I showed him (Mr. Hord) a map of *our territory* (which, at the very least, covered parts of Nebraska, Iowa, Illinois, Wisconsin, Minnesota, North Dakota, South Dakota, and Oklahoma, and represented the situation and location of the clear assets aggregating forty-two million dollars), told him of our banking connections, and asked him to write to these banks and ascertain how we ranked in the utility business,

discussed the electric business in general, and Hartington in particular, *as to its* being a natural *monopoly*. I told him that we naturally felt that, having made this investment here in good faith, we were entitled to the business; that we expected to hold it, and put up as good a scrap as we could to hold it; that, if necessary, we would reduce the rates to whatever was necessary in order to hold the business."

Of course, in this evidence Horace H. Dodd is merely telling us, largely in the form of conclusions, the substance of his conversation with Mr. Hord. What the nature of the language was that he used, the force and effect which he employed, and the impression he created, and intended to create, may fairly be inferred from his own testimony, as he further says: "We visited perhaps for 45 minutes. Just as I left, Mr. Hord says: 'Well, I will tell you this much, *that I will not go into any of your other towns*. But, being at Hartington, they have gone so far there that I don't want to decide myself without talking to my associates'."

As a conclusion from the record, bearing in mind the sanctions of the Nebraska statute directed against those "engaged in the production, manufacture or distribution of any commodity in general use that shall intentionally, for the purpose of destroying the business of a competitor in any locality, discriminate between different sections, communities, or cities of this state by selling such commodity at a lower rate in one section, community or city, than is charged for said commodity by said party in another section, community or city, after making due allowance for the difference, if any, in the grade or quality and in the actual cost of transportation from the point of production, if a raw product, or from the point of manufacture, if a manufactured product," it is fairly established that the defendant organizations, each a separate corporate entity, were designed and intended by the "control," so far as effects produced were concerned, to secure the identical results which the public policy evidenced by the statute quoted

prohibited. For it appears without dispute that, of all thus exclusively owned and operated by an "identical control," one entity establishes a 6-cent rate at Hartington and the others give directions authorizing or maintaining elsewhere in Nebraska, under like situation, rates exceeding the Hartington rate by 100 per cent. In short, by multiplicity of corporate forms under a single "control" the commands of the statute were to be circumvented and the public policies established thereby were to be defeated. It fairly appears from the record as an entirety, what certain testimony establishes as an admission on the part of the agents of the "control" then engaged in the transaction of its business, that the "6-cent rate was a fighting rate," and "that the Cedar Light & Power Company was a fighting company" organized for that purpose "and to get around the damned Nebraska antidiscrimination statutes."

The first act of this new corporation, the Cedar Light & Power Company, after the business incident to its organization had been completed, was to secure the acceptance of its name in place of the name of its predecessor as subscriber to an advertisement then running in the local press of Hartington, which proclaimed to the local electorate the fact that there was to be established in Hartington a new sliding scale of electric rates with a 6-cent per K. W. H. "at the top." The intended effect of this move as plainly disclosed by what may be said to be the controlling evidence in the record, in view of the determination made by the district judge, was the absolute destruction of the Hartington Electric Light Company.

It is unquestionably true that the business of electric light and power generation and distribution, as now carried on, is one governed by the "economic law of increasing returns." In short, its very inherent nature invites monopoly. That fact is fully admitted by defendants' "control," and their witnesses frankly admit that the business they carry on, by its very inherent nature, is regarded as possessing the characteristics of a natural monopoly. There is no serious conflict in the evidence that the annual consumption

of electrical energy of all kinds at Hartington was, and is, approximately 600,000 K. W. H. Evidence in the record justifies the conclusion that on the basis of furnishing 100 per cent. of this amount at 9 cents per K. W. H., deducting for operating expenses and fixed charges at 6 per cent. and deducting for an annual depreciation of 5 per cent., which are the amounts as fixed by the plaintiff's experts, would show a profit of $8,535.52. The same amount of current furnished under the terms of a 6-cent top rate schedule, making similar deductions, would result in an unavoidable loss of $4,104 annually. It follows, in effect, that the difference to the consumers between the 6-cent rate and the 9-cent rate is $12,639.52 in favor of the 6-cent rate. True, under the terms of the 9-cent rate, on the basis of the contract with the Hartington Electric Light Company, $8,535.52 would be credited on the purchase price of the plant, as was stipulated by the contract and ordinance adopted pursuant thereto. But under the 6-cent rate upon the basis stated, it would not only be impossible to secure this credit or realize this profit, but there would be an unavoidable net loss of $4,104. However, the effect of the law of increasing returns is not to be forgotten. Under this, when that business is divided between two competitors, as the amount of business to each decreases, the loss suffered under the 6-cent rate would decidedly increase. This conclusion is more than borne out by the estimate furnished by the engineers of the "control" which appears in the record in the form of analysis of the proposition made by the Western States Public Utilities Company to Hartington, Nebraska, on the basis of the generation and distribution of 250,000 K. W. H. annually, and that discloses that there would be an annual deficit resulting of $15,630. Competent evidence also tends to establish that the cost to the "control" of generating the electrical energy for use at Hartington at the time of the institution of the state's action was, as near as could be ascertained, not less than 2.45 cents per K. W. H. wholesale, and in view of the division of business at that place, following the commencement of business by the Hart-

ington Electric Light Company, results in an actual loss to the Cedar Light & Power Company. In fact, there can be no question but what the 6-cent rate, with the business divided as it now exists in the city of Hartington, not only eliminates from consideration the provisions of the contract made by the city of Hartington relative to the acquirement by it of the plant erected by the Hartington Electric Light Company, but is inadequate and noncompensatory to such a degree as to render permanent competition on this basis wholly impossible and the ultimate destruction of the Hartington Electric Light Company unavoidable.

A careful consideration of this phase of the evidence in the record impresses the mind with the truth of the conclusion that the "control" who directed the installation of the 6-cent rate must be taken to have intended the natural consequences of their act. On this basis the conclusion is also inevitable that the Cedar Light & Power Company was dedicated when brought into being by those responsible for its existence to the work of the restoration and preservation of the monopoly which had previously existed at Hartington in the field of business in which it was destined to engage. This necessarily entailed the destruction of competition and ruination of its competitor. This conclusion is not only consistent with the measures it is actually sought to carry out but with the motive which its "control" undisputably expressed. There is no escape from the conclusion that what was done by it and its agents and the several corporate entities thus controlled in furtherance of its plan and purpose was done intentionally for the purpose of destroying the business of the Hartington Electric Light Company, in a manner inhibited by the terms of the Nebraska statutes and violative of the public policy of the state; that, so far as the question of fact is concerned, the conclusion upon which the decree of the district court in this case rests not only finds ample support in the record but is the conclusion which the record as an entirety necessitates this reviewing court to adopt.

We do not overlook the contention of defendants that

the establishment of the 6-cent per K. W. H. rate was insufficient to hold the patronage at Hartington, a result which, it is asserted, evidences the fact that this rate from a competitive standpoint is not too low. We cannot agree to this, for the period of time involved is too brief. As demonstrated elsewhere, the substantial difference between the 6-cent rate and the 9-cent rate is manifest. That the citizens of Hartington would continue for a substantial period of time to pay 9 cents when the same "product" or "commodity" was procurable at 6 cents is not in accord with the common experience of more than two centuries of competition. Besides, this temporary result evidently involves factors other than that now before the court for investigation.

Good business character and reputation are valuable elements in the good-will of any business. It is conceivable that the conduct of a business institution at a certain place, dealing in a certain commodity, might be characterized by such lack of "business morals" or "business morality," evidence such "depravity," in the commercial sense of that term, as to practically exclude it from securing customers irrespective of the values it may offer in the way of service of merchandise. Bad business character and bad business reputation are not ordinarily appealing elements to prospective customers, and certainly not to the conscience of a court of equity; at least, not to the extent that the results of the bad business character and bad business reputation and bad business standing may be made the basis of favorable consideration in tribunals administering equity.

However, in the instant case, the contention, it would seem, is fully answered by the fact that, as heretofore shown, the 6-cent per K. W. H. rate was, as a matter of fact, adopted with the express purpose of destroying the business of the Hartington Electric Light Company, and under it the defendants with this intent were selling electricity or electrical energy at a noncompensatory rate, and cheaper in that locality than was charged for the same to patrons elsewhere, who were similarly situated.

But this feature of the case is met by the defendants with the further contention that electricity or electrical energy as supplied by them, as well as their competitors at Hartington, is not a "commodity," nor "a raw product," nor "a manufactured product," nor is it a "thing in general use," nor "any article" or "product," as these terms are employed in the provisions of the laws of Nebraska on which the state relies in this case; that, in truth, and in fact, they are engaged in furnishing a "service" affected with a public interest, and are probably subject to the regulations of the Nebraska state railway commission only, and that the business thus carried on by them is not within the purview of sections 3432, 3448, 3449, 3453, Comp. St. 1922 of the state of Nebraska, nor are the principles of the common law upon which the state relies applicable to the situation. It must be conceded, however, that the Nebraska state railway commission is vested with no regulatory powers over rates for electricity in cities of the class to which Hartington belongs. It may be observed that, properly construed, "in general use" as used in section 3432, Comp. St. 1922, relates to the date of the offense, and not to the date of the passage of the act defining the same. Thus, radios were unknown in 1907, but it could hardly be contended now that dealers in radios are not strictly within the purview of the act. If we accept in part defendants' treatment of the terms "raw product" and "manufactured products" as mutually exclusive terms, but together embracing all to which the term "products" is applicable, we cannot agree with the definitions they propose, nor with the contention that the term "products" is inapplicable to electricity.

"Product" is defined by authoritative lexicographers as "a thing produced by nature or the natural processes; that which is produced by any action, operation or work; a production; the results; that which results from operation of a cause, consequence, or effect." So, too, the word "commodity" has been defined, "a thing of commodity; a thing of use or advantage to mankind; especially useful products;

material advantages, elements of wealth;" also "a kind of thing produced for use or sale; an article of commerce, an object of trade; especially goods, merchandise, wares, products; anything that one trades or deals in." Indeed, a distinguished economist has defined it: "A commodity is any portion of wealth." Thus, in the language of everyday life and in the strictly commercial sense of the term, "electricity" is "produced," "stored," "measured," "bought and sold." It is moved or transported from place to place in containers or by cable. It is something that one trades or deals in. We buy it and pay for it and determine the amount of our purchases by definite and well-understood "standard." Brought into being as a product, it exists in modern life as a commodity.

The conclusion is that, as a matter of strict definition, "electricity" in the commercial sense of the term is not only included within the literal terms of the statutes on which the state relies, but is plainly within the reason and spirit of the enactments, and that the principles of the common law are not without application to the situation before us. 20 C. J. 305; Curtis, Law of Electricity, p. 6, sec. 3; *Terrace Water Co. v. San Antonio Light & Power Co.*, 1 Cal. App. 511; *Seaton Mountain Co. v. Idaho Springs Investment Co.*, 49 Colo. 122; *People v. Wemple*, 129 N. Y. 543; *Beggs v. Edison Electric Illuminating Co.*, 96 Ala. 295; *Mill Creek Coal & Coke Co. v. Public Service Commission*, 84 W. Va. 662; *Scranton Electric Light & Heat Co.'s Appeal*, 122 Pa. St. 154; *San Antonio Gas Co. v. State*, 22 Tex. Civ. App. 118; *People v. Epstean*, 102 Misc. Rep. (N. Y.) 476; *Hetherington v. Camp Bird Mining, L. & P. Co.*, 70 Colo. 531.

Recurring again to the findings of fact heretofore made as to the interrelations of the defendant corporations, the purpose and object of their organization, the use of their respective corporate entities by their common control as devices by and through which the requirements of the laws of Nebraska applicable to the subject-matter in this action would be circumscribed and thwarted and the public policy established thereby be defeated, the reasoning and prin-

ciples announced by Rose, J., in *Enos v. Hanff*, 95 Neb. 184, appear applicable to the matters presented for determination, viz.:

"In a business sense the interests of the controlling factors in both corporations are identical. Where the financial interests * * * are thus united, the court, in furtherance of a public policy established by the legislature, will look beyond the legal entity of a corporation to the relations of the individuals behind it and enforce the law according to its terms."

See *United States v. Reading Co.*, 253 U. S. 26; *Lee Line Steamers v. Memphis H. & R. Packet Co.*, 277 Fed. 5; *United States v. United States Steel Corporation*, 251 U. S. 417; *United States v. Union P. R. Co.*, 226 U. S. 61; *Missouri v. Standard Oil Co.*, 218 Mo. 1, affirmed, *Standard Oil Co. v. Missouri*, 224 U. S. 270; *State v. National Cash Register Co.*, 13 Ohio Cir. Ct. Rep. (n. s.) 73; *Cooke v. People*, 231 Ill. 9; *Hunter v. Baker Motor Vehicle Co.*, 225 Fed. 1006; *Yazoo & M. V. R. Co. v. Searles*, 85 Miss. 520; *National Lead Co. v. Grote Paint Store Co.*, 80 Mo. App. 247; *Northern Securities Co. v. United States*, 193 U. S. 197; *Standard Oil Co. v. State*, 117 Tenn. 618; *McCaskill Co. v. United States*, 216 U. S. 504.

Upon reargument of this cause, certain questions were submitted by this court relative to whether sections 5, 6, and 7, art. XV, Constitution of Nebraska 1920, were self-executing and applicable to the situation presented in the instant case; whether the words of the Constitution, "use of the water of every natural stream within the state" and "use of the waters of the state for power purposes," in connection with the dedication thereof "to the people of the state," and also in connection with the limitation therein expressed that the same shall constitute "a public use," and "shall never be alienated," were effective to create a "public charity," and to embrace within their scope electrical current or electrical energy generated by use of such waters, and the legal effect of the dedication thus made. *Kirk v. State Board of Irrigation*, 90 Neb. 627; *Hudson County*

Water Co. v. McCarter, 209 U. S. 349; *West v. Kansas Natural Gas Co.*, 221 U. S. 229.

However, while the record discloses that undisputed evidence establishes that the "control of the defendants" through the agency of its constituent members has caused a series of written contracts and assignments thereof to be made relative to electricity generated by use of the Niobrara river water power commencing November 21, 1926, the first of which bearing that date being between the Northern Nebraska Power Company and the Interstate Power Company of Delaware, and the series ending with a contract in writing between the Interstate Power Company of Nebraska and the Cedar Light & Power Company, under date of February 24, 1927, by the terms of which the latter is to receive from the former at a substation maintained and operated by the Interstate Power Company of Nebraska at or near Hartington, Nebraska, electrical energy or electrical current generated by the hydro-electric plant of the Northern Nebraska Power Company at 1 cent per K. W. H., the record fails to disclose whether the date of the appropriation of the waters of the Niobrara, as required by statute, which must constitute the foundation rights of the Northern Nebraska Power Company, was made prior or subsequent to the adoption of the constitutional provisions referred to. We also find no evidence disclosing that transmission of electricity under the terms of the contract last referred to had actually been commenced at the date of the institution of this action by the state, or, in fact, at the time of the trial thereof in the district court.

It further appears, however, that the price per K. W. H. as fixed by the contracts between the Interstate Power Company of Delaware, the Interstate Power Company of Nebraska, and the Cedar Light & Power Company, due to their interrelation, would be without any controlling significance in determining the propriety of the rate of 6 cents per K. W. H. fixed by the Cedar Light & Power Company at Hartington, which is in controversy in this action. *United Fuel Gas Co. v. Railroad Commission*, 278 U. S. 300.

The questions suggested by the court as to the effect of the constitutional dedication referred to therein are therefore not decided but expressly reserved for future consideration of this tribunal.

In view of the principles of law heretofore discussed and the findings of fact as herein determined, it appears that the decree of the district court entered in this case is right, and its findings and orders made herein are in all things approved and affirmed.

AFFIRMED.

GOSS, C. J., dissenting.

With regret I record myself as unable to assent to the views of the majority on some of the matters actually decided in the opinion. This is a suit in equity. Reduced to its briefest terms, it had for its purpose the enjoining of Cedar Light & Power Company from keeping in force in the city of Hartington a top rate of 6 cents per kilowatt hour for electric energy. It was alleged that the defendants conspired to practice unlawful discrimination in rates for the purpose of destroying the business of a competitor (Hartington Electric Light Company, a new company, recently granted a local franchise), in violation of section 3432, Comp. St. 1922; conspired to restrain trade and commerce in violation of section 3448; conspired to monopolize commerce in violation of section 3449; and conspired to market electric energy in Hartington at less than market value and at less price than in other towns in Nebraska, under like conditions, for the purpose of driving a competitor out of business, in violation of section 3453. The competitor, named above, had in effect a top rate of 9 cents. That rate was fixed by its franchise, but the franchise provides that all net earnings shall be set aside to provide a fund to pay for the cost of the plant and 6 per cent. interest thereon. When such items are paid the title to the plant and system is to pass to the city.

In 1908, section 3432 was held by this court to be constitutional, but the opinion stressed the legislative preservation of the rights of a defendant by saying that a violation

must be predicated upon proofs that it was "for the purpose of destroying the business of a competitor." *State v. Drayton,* 82 Neb. 254. Had the act failed to state the "purpose as an element of the offense" it would have infringed the Fourteenth amendment of the federal Constitution. *Fairmont Creamery Co. v. Minnesota,* 274 U. S. 1. So into the law must be read the individual right to meet competition.

But to my mind the proofs have utterly failed to show that a cause of action for injunction existed at the time the suit was commenced or at the time of the trial. There was no satisfying evidence that the 6-cent rate of the defendant was lower than the 9-cent rate of the competitor with the lure of municipal ownership thrown in to absorb the difference. The proof of the pudding is in the consumption thereof. The most practical test was shown by the evidence which indicated that, at the time of the trial, the bulk of the customers had left the old company and had gone to the new. At Bloomfield, another point where the same conditions existed, the new company had secured about 97 per cent. of the customers of the old company. These persuasive evidences and tests, rather than conclusions based on prophetic conjecture, should be taken as authoritative. They show that the new company had not been injured by the rate and that the injunction had no basis but prophecy. It cannot be truly said that a competitor has been stifled or driven out of business or injured by a competitive rate, when the evidence shows that competitor to be thriving on the competition. While other matters are argued in the opinion, this matter of the difference in rates is the crux of the opinion, as indicated by the second paragraph of the syllabus. That is what all parties, including the trial court, thought was the suit they were trying in the district court. I do not object to the first paragraph of the syllabus, to the effect that electric energy is a commodity and comes within the purview of section 3432.

The majority opinion in effect puts the old company out of business at Hartington. It leaves the field to the new.

If the new company works out, as the majority seems to think it will, then the consumers of electric energy at Hartington will be well served and at the same time their municipality will ultimately acquire the plant as a municipal asset. If it should fail to meet its advertised ends, they will be in the hands of a single company. As a court of equity, I think we should provide against such a contingency rather than to aid it needlessly. My opinion is that we should have reversed the judgment of the district court because the evidence did not warrant an injunction, and should have provided that, if at any time the facts warranted it, our judgment should not prevent the state, or others injuriously affected by the rates, from bringing another suit on account thereof. This would protect the consumers at Hartington and would protect the property rights of the defendants.

ROSE, J., dissents on the grounds stated by the Chief Justice.

Note—See Monopolies, 41 C. J. 128 n. 11, 203 n. 92; 52 A. L. R. 169.

E. J. DEMPSTER, RECEIVER, APPELLANT, V. STANLEY WILLIAMS ET AL., APPELLEES.

FILED JULY 16, 1929. No. 26641.

1. **Banks and Banking: LIABILITY OF STOCKHOLDERS: ENFORCEMENT.** In a suit under sections 4 and 7, art. XII, of the state Constitution, to recover double liability of stockholders in a banking corporation, the cause of action does not accrue until the deficit is determined and the amount due from the stockholders is judicially ascertained after applying the proceeds from the sale of all the corporate property to the payment of the corporate debts.
2. **Limitation of Actions.** Under the allegations of the petition in this case, the statute of limitations did not begin to run against the cause of action pleaded therein until the amount found due from the stockholders was judicially determined, which was on July 15, 1927.

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

C. M. Skiles and *I. D. Beynon,* for appellant.

Heasty, Barnes & Rain, E. A. Wunder and *J. A. Brunt, contra.*

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

CHASE, District Judge.

The receiver of the insolvent Endicott State Bank brought this action against the defendants, appellees here, to recover for the so-called double liability of stockholders in banking corporations under the Constitution of this state. The defendants assail the plaintiff's amended petition by general demurrer, for the reason that the same does not state facts sufficient to constitute a cause of action. This demurrer was sustained by the trial court, and the plaintiff, having elected to stand upon its petition, refused to plead further, whereupon the action was ordered dismissed. For the purpose of disposing of this case, the parties will be designated as plaintiff and defendants as they appeared in the court below.

The only question presented by the record is whether or not upon the face of the petition it appears that the action is barred by the statute of limitations. The plaintiff relies for his recovery against the defendants, who are stockholders of the failed Endicott State Bank, upon sections 4 and 7, art. XII, of the state Constitution.

In order to determine the question presented by the demurrer, resort must be had to the allegations of the petition. This action was commenced on July 22, 1927. The petition avers, *inter alia,* the following facts: That plaintiff is the receiver of the Endicott State Bank; that the Endicott State Bank was a banking corporation operating under the laws of Nebraska; that the claims of preferred depositors were allowed on the 14th day of September, 1922, amounting to $41,161.43, and on October 14, 1922, the

court ordered said claims paid out of the guaranty fund; that said preferred depositors' claims were paid from the guaranty fund on or about December 30, 1922; that on January 8, 1923, the physical property of this bank, including the real estate, notes and bills, were sold and converted into cash, amounting to $5,530, which was held by the receiver until October 7, 1925, when an order of court was made directing the receiver to turn over said fund to the depositors' guaranty fund, and thereupon on said date the assets of said bank became exhausted; that on July 15, 1927, it was adjudged and ascertained in said receivership proceedings by the court that the exact amount justly due from said Endicott State Bank was the sum of $45,747.42; that on said date the court also found that the amount realized from the assets of said bank was $21,394.12, and that the balance remaining was the sum of $24,393.30; that, this sum having accrued while the defendants were stockholders of said bank, the court ordered the receiver to proceed to collect the amount from the stockholders. The court also found that some of the stockholders had paid their double liability, and, allowing credit therefor, the amount to be collected from the defendants was reduced to $22,593.30. This epitomized statement of the facts will suffice for our determination of the issue involved.

All the parties seem to agree that, in an action to collect a stockholder's liability under the constitutional provisions herein quoted, it is first necessary to have the amount justly due ascertained and judicially determined before the present action can lie.

The appellant contends that the amount of the deficit was not ascertained until July 15, 1927, at which time the amount due from the stockholders was judicially determined, while the appellee contends that the petition shows upon its face that the claims of creditors were allowed on September 14, 1922; that all of the physical property, real estate, notes and bills were converted into cash on January 8, 1923, and it was upon this date that the amount of the deficit was ascertained and judicially determined; that

more than four years have elapsed since, and the bar of the statute precludes the right to bring the present action.

The appellees cite, in support of their contention, *Hastings v. Barnd,* 55 Neb. 93. We have carefully considered that case and reach the conclusion that it is easily distinguishable from the instant case. In that case it was not alleged in the petition that the claim of the bank had been ascertained, either by reducing it to judgment or proving it and having it allowed. Neither was it alleged that the corporate assets were exhausted. These facts sufficiently appear in this case. This court unquestionably reached the right conclusion in *Hastings v. Barnd,* but, had the petition in that case contained the allegations present in this case, the court would, we think, without doubt, have reached a different conclusion.

In *State v. German Savings Bank,* 50 Neb. 734, cited by appellees, which came to this court upon the proposition as to whether or not the order appealed from was a final order, the statute of limitations was not directly involved.

In *Bodie v. Pollock,* 110 Neb. 844, this court in construing the identical constitutional provisions involved here established the following rule:

"Sections 4 and 7, art. XII, of the Constitution, are self-executing when considered together, as they have been and should be; and, so considered, they form a complete constitutional rule to the effect that, while stockholders in banks are subject to double liability set out in said sections, such liability cannot be enforced until the property of the bank has been exhausted, and the amount justly due judicially determined."

These two sections must be construed together, and when so considered the court has said they are self-executing. Neither are complete standing alone; but, when considered as one, both the substantive law and the remedy are sufficiently declared to make them self-executing and need no legislative action to carry them into effect.

Section 7 provides: "Every stockholder in a banking

corporation or institution shall be individually responsible and liable to its creditors over and above the amount of stock by him held to an amount equal to his respective stock or shares so held, for all its liabilities accruing while he remains such stockholder."

It will be noted that by this section the stockholders' double liability is created. It is this section which declares the substantive law.

Section 4 provides: "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 subscription, and the liability for the unpaid subscription shall follow the stock."

The latter section prescribes the remedy by declaring the method and the time when the liability provided by section 7 becomes enforceable against the stockholders. By a careful reading of these two sections, their interdependence immediately becomes apparent.

This court has held in the case of *State v. Farmers State Bank*, 113 Neb. 497, that an action to recover stockholders' liability could not be maintained before the assets were sold and applied, and the amount due on stockholders' liability judicially determined.

If in the present case the property of the bank was sold and the proceeds applied toward the payment of the bank's debts, just when as a matter of law did this occur? On September 14, 1922, the preferred claims were allowed by the court. The finding of the court on the facts then before it could amount to no more than that the corporation owed debts, as it is well established that between bank and depositor the relation of debtor and creditor is created. On January 8, 1923, the court ordered the property of the corporation sold. The action of the court at this juncture of the proceeding had the effect of ordering conversion of the property into cash for the purpose of liquidation. On

October 7, 1925, the court ordered the receiver to pay all moneys in his hands from the sale of the bank's property into the depositors' guaranty fund. When this was done on October 7, 1925, the bank's assets became entirely exhausted. On the 15th day of July, 1927, according to the petition (which must be considered as true for the purpose of the demurrer), the court determined the amount of debts of the bank left unpaid after applying all the proceeds from the sale of the bank's property thereon, and found that this amount of indebtedness accrued while the defendants below were stockholders, and ordered the receiver to proceed to collect the amount. In view of the attendant circumstances, the time which elapsed between the exhaustion of the assets and the order determining the amount due from the stockholders did not amount to an unreasonable delay in taking the necessary steps to set the statute in motion. At any rate it is not made to appear how the defendants could have suffered any injury by such delay.

We think that it was the order of July 15, 1927, that ascertained the exact amount justly due, and judicially determined that such sum was justly due; that it was upon this date that the cause of action to collect the double liability from the stockholders actually accrued. It therefore follows that the statute of limitations has not barred the action. The action of the trial court in sustaining the demurrer was wrong. For reasons herein stated, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

EMMA WARREN ALLEBACH, APPELLANT, V. CITY OF FRIEND, APPELLEE.

FILED JULY 16, 1929. No. 26682.

1. **Charities: BEQUEST TO MUNICIPALITY.** Where a testator, by will, makes a gift to a municipal corporation, using the words, "to be

used for the erection of a hospital," and the funds thus received are inadequate to effectually complete such an enterprise, the donee may receive funds from other sources to aid in the completion of such hospital; and by so doing it does not do violence to the intention of the testator.

2. ———: ———: ACCEPTANCE. Where a gift to a municipality is created by will, and by the express terms thereof such fund is to be used for the erection of a hospital, this provision creates an estate upon a condition subsequent, and it is incumbent upon the donee to carry out the purposes of the bequest within a reasonable time; and if delayed for an unreasonable length of time in view of the attendant circumstances, such conduct will be considered to be a refusal to accept such gift and the same will revert.

3. ———: ———: ———. What constitutes a reasonable time in giving effect to the express directions of the testator's will is determined from all the circumstances affecting and surrounding the gift. The delay in consummating the purpose of the gift, as disclosed by the record, is *held* not to be unreasonable.

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

John J. Ledwith and *G. E. Price,* for appellant.

F. L. Bollen, contra.

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

CHASE, District Judge.

This is an action brought by the sole residuary legatee and devisee under the will of Norman E. Warren, deceased, to declare a reverter of a certain devise and bequest to the city of Friend, Nebraska. The cause was tried to the court without a jury, and the trial court found against the plaintiff and ordered the action dismissed. This controversy arose under the provisions of paragraph 11 of the will of the deceased.

It appears from the record that Norman E. Warren died testate, a resident of Saline county, Nebraska; that plaintiff is a niece of the deceased and sole residuary legatee and devisee under his will. His will was admitted to pro-

bate May 24, 1920. The paragraph of the will under which this contention of the parties arises is as follows:

"Eleventh. I give and bequeath to the City of Friend, the sum of ten-thousand dollars to be used for the erection of a hospital, to be built on the northwest corner lots belonging to my home place, located on the corner of Fourth and Spring street, also give and bequeath the said lots to the city. I give this money and lots to the city with the understanding that said hospital be called the 'Warren Memorial Hospital' and lettered to that effect over the front entrance to the building. I give this as a memorial to the Warren family and I request that said hospital be built as near up to date as possible, also built as near fireproof as possible, and I request that the city have charge and control of said hospital at all times and that the charges to patients patronizing said hospital be as reasonable as possible, to be managed in a way that it will be just self-sustaining. I would not want the city to use it as a money-making proposition as I would like to have all the people that cared to, to use and get the benefit of said hospital."

It is alleged in plaintiff's petition, and not directly denied, that the executor of said will paid over to the defendant on January 16, 1922, the sum of $10,000, less inheritance taxes, which was received by the defendant. The defendant also received and possessed itself of the real estate described in the above paragraph on the same day; that the actual net sum of money received by the defendant under this paragraph of the will was $9,466.06. This money was placed in a separate fund by the defendant, designated as the "Hospital fund;" that no part of the fund has ever been used except for hospital purposes. The plaintiff's contention is that the fund has at all times been adequate to erect a building and hospital, and that the defendant has had possession of the property above set forth since the 16th of January, 1922; that the failure to consummate the purpose of the gift during this period amounts

to a forfeiture thereof, and such property, because of such forfeiture, falls within the residuary clause of the will and passes to the plaintiff. The petition alleges further that the defendant has diverted and is attempting to divert said funds and apply the same to a different purpose than that pointed out in the will. We find no evidence to substantiate this allegation. In truth, the contrary appears to be the fact, that there has been no diversion of the fund nor any misappropriation thereof for any other purposes except toward the erection and construction of a hospital, so that a forfeiture, based upon a misappropriation of the fund or a misapplication thereof to some other and different purpose than that mentioned in the will, is entirely out of the case. Therefore, the sole question for this court to determine is whether or not a forfeiture arises because of the delay on the part of the donee to erect and equip a hospital out of the particular fund bequeathed. This action was commenced on March 26, 1926, so that a little more than four years had elapsed between the receipt of the gift and the commencement of the action.

Plaintiff argues strenuously that the case of *Marble v. City of Tecumseh*, 103 Neb. 625, is decisive of the question involved here. We have carefully considered that case and reach the conclusion that it is easily distinguishable from the instant case. In that case this court held the failure to perform the condition defeats the donee's title. The city of Tecumseh had already sold and conveyed the lots devised and had expended the funds toward the improvement of different real estate than that set forth in the will of the deceased. It will be noted in that case that the devise of certain lots to the city of Tecumseh was for the purpose of creating a park out of the real estate devised, and in addition to the devise the testatrix bequeathed the sum of $500 to be used in the improvement of the same. It appears that the city submitted to the people for their vote the question of whether or not they should improve this particular tract of land as a park or sell it and use the pro-

ceeds to improve some other tract, and at a city election the people voted to sell the particular lots devised, whereupon the city sold the lots devised and used the proceeds thereof and also the money bequest to purchase and improve other property. Upon such facts as this the court rightfully held that the will created an estate upon a condition subsequent, namely, that the lots and money be used for the purpose expressed in the will. From the opinion in that case we quote the following:

"From this language it is plain that the intent of the testatrix was that the identical lots described in her will, and not some other property that might be purchased from the proceeds of a sale thereof, should be 'known as Brandon Park.' The identical property so described, not some other tract, was 'always to be used as a public park.' It was her express intent that the $500 gift was to be used to improve the same; namely, the identical lots described in the will."

It is therefore apparent that the controlling fact in the mind of the court was that the city of Tecumseh had refused to accept the gift and misappropriated the funds.

In the instant case the fund has not been misappropriated nor the property sold, but the city still has the real estate and the money intact for the purpose of carrying out the testator's express directions in his will.

The plaintiff cites *Green v. Old People's Home,* 269 Ill. 134. In that case the gifts were made to existing institutions to use in carrying on the purposes of their charity. The will provided by its own terms that, in case any donee should fail or cease to carry out the objects of its origin, then the bequest should be void. The facts showed that more than 21 years had elapsed since the funds were received and no part thereof had been devoted to the purpose of the gift. The court held in that case that the donee had had a reasonable time to carry out the purposes of the gift, and having failed to do so within that period, such failure constituted a forfeiture. It will be noted by the provision of the will that under certain conditions the be-

quests became void. We find no such language in the present will.

By the terms of the will the testator created a charitable trust. Such trusts, from time immemorial, have been considered special favorites of equity.

The following definition of a charity is found in an early and very celebrated English case, *Morice v. Bishop of Durham,* 9 Ves. Jr. (Eng.) 399:

" 'Charity,' in its widest sense, denotes all the good affections men ought to bear towards each other; and in that sense embraces what is generally understood by benevolence, philanthropy, and good will. In its more restricted sense it means merely relief or alms to the poor."

And in *Webster v. Sughrow,* 69 N. H. 380, 48 L. R. A. 100, the court said:

"A 'charity,' in the legal sense, may be defined as a gift to be applied, consistently with existing law, for the benefit of an indefinite number of persons, either by bringing their hearts under the influence of education or religion, by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works, or otherwise lessening the burdens of government. It is immaterial whether the purpose is called charitable in the gift itself, if it is so described as to show it is charitable in its nature."

Bequests to hospitals are considered by the courts generally as gifts to charity:

"The term 'charitable bequest' includes a bequest for the establishment of an orphan asylum, and a hospital for sick and infirm persons." *Attorney General v. Moore's Ex'rs,* 19 N. J. Eq. 503.

It appears from the whole record that the donee of this gift has been making an earnest effort to erect and equip a hospital as near in accordance with the terms of the gift as possible; that it has received some funds and is endeavoring to receive additional funds to be added to the be-

quest so that it can construct a suitable hospital commodious enough to satisfy the needs of the community. It will be noted that the testator gives to the city of Friend the sum of $10,000, "to be used for the erection of a hospital." It is a well-established doctrine that courts will endeavor to give effect to the intent of the testator wherever possible, consistent with established principles of law. It is apparent to us, from the plain import of the language used by the testator, that he did not intend that the donee must construct and equip this hospital solely from the funds mentioned in the bequest. The fact that he uses these words, "to be used for the erection of a hospital," indicates to us that he meant by this expression that this fund was to be used as far as it would go toward the erection of a hospital, which would mean that the donee was not restricted entirely to the use of this fund alone, but would be authorized to receive donations from others, or raise additional money from any lawful means to assist in the establishment of the hospital, especially when we consider the fact that the amount donated by the testator is probably inadequate to erect and equip a hospital of the kind and character that he desired.

"Legacies and devises to the uses of charity are entitled to peculiar favor and are regarded as privileged testaments, and will not be declared void if they can by any possibility, consistent with law, be considered as good. So courts of equity go to the length of their judicial power rather than that such a trust should fail. They are construed so as to give them effect if possible, and to carry out the general intention of the donor, when clearly manifested, even if the particular form and manner pointed out by him cannot be followed." 5 R. C. L. 352, sec. 89.

In the brief of appellant the word "forfeiture" is used. With respect to this contention it will be noted that courts take the opposite view with respect to forfeitures that it does concerning charities. Forfeitures are in no sense favorites of the law, and courts are hesitant to divest persons

of title to property unless the person whose property is sought to be divested is guilty of some unlawful or wanton misconduct, or such inexcusable delay that the injury resulting therefrom would be greater to others than the divesting of the title would be to the guilty party. The conduct of the person who seeks to invoke this drastic remedy is viewed with a high degree of judicial suspicion and the rule is never applied unless the facts upon which it is based clearly show a right thereto.

"Forfeitures are odious in law and are not favored by the courts, and will not be enforced unless the facts which purport to require such drastic action come clearly and plainly within the provisions of the law or of the contract, as the case may be." *Meyer v. Supreme Lodge, K. of P.*, 104 Neb. 505, cited in *Donnelly v. Sovereign Camp, W. O. W.* 111 Neb. 499.

It is contended on the part of the defendant that the doctrine of *cy pres* applies. This doctrine is translated to mean "as near as may be." We will not devote time nor space to the discussion of the origin of this rule, which is as interesting as it is historic. It is a rule of construction and is generally held applicable where a literal compliance with the bequest becomes impossible through some unavoidable contingency to which the party seeking to carry out the legacy has made no contribution. This rule recognizes that a substantial compliance, carrying into effect the intention of the testator as far as possible, will be sufficient. It is a rule of construction and a wholesome doctrine of equity. It grows out of the principle of sound reason, that the donor could not and did not intend to require the donee to perform impossibilities, and that he only intended that the directions connected with the bequest be substantially executed, and when this is accomplished the condition is satisfied, though not literally fulfilled. This doctrine is usually applied by the American courts where the institution or object of the charity ceases to exist, in which case courts have permitted the bequest to be received

for the purpose of carrying out other charities, in many instances of a different kind or character than the one contemplated by the donor.

We do not conceive it to be necessary in the instant case to apply this doctrine, because the charity sought to be carried out on the part of the donee of the gift is the identical charity mentioned by the donor. The record shows that the city of Friend received this fund and has placed it at interest, and at the time of the trial of this case in the lower court the fund amounted to $11,762.97; that on April 13, 1928, the mayor and council passed a resolution, which is a part of this record, appointing a committee to employ an architect to prepare plans and specifications providing for the construction of the hospital. Several thousand dollars of donations have subsequently been received by the city to add to this fund for the purpose of erecting the hospital of sufficient size to meet the needs of the city and to make the institution, so far as possible, self-supporting. From an interpretation of the provisions of the will the city of Friend does not do violence to the terms thereof by receiving additional funds, neither does the record show that the city has been guilty of any undue or unwarranted delay in connection with the erection of this hospital sufficient to warrant the court in declaring a forfeiture or reverter of the gift.

In *Marble v. City of Tecumseh, supra,* wherein this court construed a will with a provision very similar to this will, the court held that that will created a condition subsequent, and that the city of Tecumseh, by its refusal to accept the gift and by the sale of the property and the diversion of the fund, breached the condition. Upon any reasonable theory of construction it must be said that the estate of the donee in the *res* of this gift is one upon condition; this condition making it incumbent upon the donee to carry out as near as practicable, within a reasonable time, the express directions of the will. It will be noted that the donee is a municipal corporation, a political subdivision of the state

of Nebraska, and the end of its existence cannot be safely asserted or even foreseen. In this respect the gift is unlike one to an individual whose existence under the ordinary processes of physical dissolution must end in a period certain. For a court to hold that the donee of this gift, which is likely to exist indefinitely, could retain the funds and the property, without obligation to carry it out, would do violence to every rule of proprietary interest known to the law, and would also be holding that no condition was attached to the gift. This provision of the will amounts to a condition subsequent, by the breach of which the right of reentry exists to the donor or his heirs, in which case there must appear some recusant action on the part of the donee concerning this gift amounting to a refusal to accept, or such negligent or protracted delay in carrying out the testator's request to such an unwarranted extent as would amount to a refusal. Neither of these elements are present.

Life presents no example more praiseworthy than that in which a person, actuated through compassion for afflicted humanity, at a time when he observes the sands running low in the hour-glass of life, makes provision by will in an apparent endeavor to effect some equitable balance of the inequalities of the world, by providing a means through which the distress and suffering of the poor and needy will be alleviated. Such motives spring from the virtue of human sympathy, which is considered by all codes of ethics as among the noblest attributes of the human soul. The testator, miniature in stature, and to whom nature had been quite unkind by visiting upon him a physical deformity, was probably, because of his own condition, moved to this most munificent act of charity. It is quite reasonable to suppose that in making this gift he had in mind some friend or acquaintance whom he desired to become the object of his beneficence. This being the case, it would do violence to his intention for the defendant to delay such a laudable enterprise until the living generation might pass from the scenes of life. It is as much a part of his intention to carry

out the trust with reasonable punctuality as it is to comply with the express conditions thereof as to manner and form.

The city of Friend should take steps with as much dispatch as practicable under present conditions to complete this hospital provided for in the will. The testator whose property formed the nucleus of the fund out of which a hospital is to be built should have the terms of his will carried out with as much strictness as is possible, and when the hospital is constructed it should be located on the identical lots devised. The first funds expended for this purpose should be from those received under the bequest; the name of the hospital should be "Warren Memorial Hospital;" and a tablet should be placed over the front entrance of the building bearing such inscription as directed by the will. The directions as to the kind and character of the building should control as far as can be; and the fees and charges to patients should be arranged as near as possible as contemplated by the will, so that the institution will only be self-sustaining, and not an object of profit on the part of the city.

From the facts disclosed by this record, we do not feel justified in holding that the elements necessary to a breach of condition subsequent exist. Neither do we intend to hold that the defendant can delay the carrying into effect of this provision of the will for an unreasonable length of time.

For reasons herein stated, we are of the opinion that the trial court correctly disposed of the issues, and the judgment is therefore

AFFIRMED.

Note—See Charities 11 C. J. 349 n. 95; 350 n. 7; 38 A. L. R. 44; 5 R. C. L. 363; R. C. L. Perm. Supp. 1367.

CHARLES C. YEGGY, APPELLEE, V. FIDELITY RESERVE COMPANY, APPELLANT.

FILED JULY 16, 1929. No. 26679.

1. **Appeal:** LAW OF THE CASE. Where a case has been reversed for error in instructing a verdict for defendant, and remanded generally, the holding that plaintiff is entitled to recover becomes the law of the case upon a second appeal, where the evidence upon both trials is substantially the same.
2. ———: RECOURSE TO FORMER OPINION. For the purpose of determining what matters were considered, upon what grounds the judgment was entered, and what was settled for the future disposition of the case, this court may examine its former opinion though the same was not introduced in evidence.
3. ———. Upon examination of the record in this case and the opinion on the first appeal, it appears that the evidence upon both trials was substantially the same with one exception affecting the amount of the recovery, and therefore that question alone is open for consideration on this appeal.
4. **Damages:** APPLICATION OF BANK DEPOSIT ON NOTE. Where property of plaintiff, in this case a deposit in an insolvent bank, is applied in payment of plaintiff's note upon which he was not liable for want of consideration, the defendant may show, in reduction of damages, that the deposit was not worth its face value owing to the insolvency of the bank.
5. ———. Compensation is the rule of damages in this state, and in an action for money paid or property lost or converted the recovery is limited to the amount paid or the value of the property, with lawful interest.

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

Hoagland & Carr and *C. S. Beck*, for appellant.

Allen & Requartte and *George N. Gibbs, contra.*

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

REDICK, District Judge.

This is an action brought by Charles C. Yeggy against the Fidelity Reserve Company to recover $729.90 and interest which plaintiff claims to have paid to the defendant

as the first premium on a life insurance policy which defendant refused to issue. The circumstances under which the claim arises are as follows: On July 27, 1920, the plaintiff made application for a life insurance policy with the defendent in the sum of $30,000, and passed the medical examination, and delivered to the agent of the insurance company his note of the above date for the sum stated, said note being due in six months thereafter, payable to the First National Bank of Chappell, the agent of the defendant being also an officer of the bank, having authority to write insurance for the defendant. The custom was in such cases for the bank to accept the note as cash and credit 40 per cent. thereof to the deposit account of the insurance company and 60 per cent. to an agent's insurance account. The note was then covered into the assets of the bank to be collected in due course. At the end of each year the amount in the insurance account was divided up among the agent of the insurance company and certain employees of the bank according to a certain ratio. The matter was so handled in the present instance except that, owing to the failure of the bank, there was no division of the insurance account among the employees. This account was not considered an asset of the bank, but was set up as a matter of bookkeeping. If the policy was not issued, the note would be returned to the insured and the credits to the insurance company and insurance account charged back. Shortly after this transaction, Yeggy went upon an extended trip to the Hawaiian Islands supposing his insurance policy would be issued in due course. As a matter of fact the application was never accepted by the company because of the disapproval at the home office of the result of the medical examination. Matters remained in this situation until about January 10, 1921, when the bank became insolvent and a receiver was appointed to wind it up. At this time the bank held two notes of Yeggy, the one just described, for $729.90, and one for $6,000. This latter note had been pledged to a Kansas City bank as collateral to a loan to the Chappell bank, but was after-

wards taken up by the receiver. At the time of the failure of the bank, Yeggy had on deposit the sum of $753.42, and the receiver offset this amount against the note for $729.90, leaving a deficiency of $9.40 which was afterwards paid for or on account of plaintiff. Upon this transaction is based the claim of plaintiff that he has paid the premium note.

Upon Yeggy's return from his trip and about February 19, 1921, he first learned that the policy had not been issued, and wrote the insurance company to that effect, and that his note had been presented by the bank for collection. Some considerable correspondence resulted, but no adjustment was made. A trial of the action was had and upon the close of plaintiff's testimony a verdict was directed by the court for the defendant and judgment rendered thereon. That judgment was reversed by this court and the case sent back for further proceedings, and on March 1, 1924, an amended petition was filed and issue joined.

Shortly thereafter, the receivership proceedings being still pending, the defendant took the matter up with the receiver and convinced him that he had no right to offset the plaintiff's deposit against the premium note, and thereupon the receiver canceled such offset, restored the deposit to the credit of Yeggy and applied the same upon the $6,000 note above mentioned. When the first offset was made the note was returned to Yeggy and he has never paid anything thereon except as may have resulted from the application of the deposit by the receiver, plus $9.40. The cause was again tried to a jury and resulted in a verdict for the plaintiff for the sum of $1,111.29, upon which judgment was rendered; motion for a new trial was overruled, and defendant appeals.

The claim of the plaintiff is that, by reason of the transaction above detailed, he has been compelled to pay the note for which he received no consideration, and that the defendant is liable for the loss thereby occasioned; that it was so held on the former appeal, which has become the law of the case. On the other hand, it is the claim of the

defendant that the receiver had no authority to offset the plaintiff's deposit against the premium note, on the ground that the bank had no title thereto, and could acquire none, unless or until the insurance policy was issued for the payment of the premium on which the note was given; that the most it had received was 40 per cent. of the face of the note, and that by way of credit in its deposit account with the bank; and further, inasmuch as the deposit of plaintiff when offset was worth only about 30 per cent. of its face value, or as stipulated, $216.27, that plaintiff's damages, if any, cannot exceed that amount with interest.

The first question for determination is whether the decision of this court upon the first appeal has become the law of the case. The record of the first trial is not before us, but it appears from the opinion of Commissioner Sandall filed therein that all the facts above detailed were in evidence upon that trial, and upon the question whether the holding upon the former appeal has become the law of the case we are permitted to consult that opinion for the purpose of determining what matters were considered, upon what grounds the judgment was entered, and what was settled for the future disposition of the case. *Thompson v. Maxwell Land Grant & R. Co.*, 168 U. S. 451; *Walker v. Freeman*, 94 Ill. App. 357.

Upon examining that opinion we find the holding of this court to have been that, upon evidence of the facts above detailed, the plaintiff was entitled to recover, and that the trial court erred in directing a verdict for the defendant. To reach that conclusion it must have been and was held that the offset of plaintiff's deposit against the premium note amounted to a payment thereof by the plaintiff; and this necessarily included a holding that the bank was the owner of the note, that it was part of the bank's assets in the hands of the receiver, and that the receiver had a lawful right to make the offset. We think that further discussion upon these points is precluded by our former decision, and that to that extent it has become the law of the case.

It does not follow, however, that the plaintiff is entitled

to recover the full amount claimed in his petition, if any new evidence bearing upon that question is brought into the case upon the second trial. On the former hearing the case was remanded generally. On the second trial the defendant offered evidence to the effect, and it was finally conceded upon the record, that, at the time of the offset by the receiver of plaintiff's deposit of $753.42, the same was actually worth only 30 per cent. of its face, or the sum of $216.27; in other words, if the plaintiff had sought to withdraw his deposit at that time, all he could have received was such 30 per cent. Inasmuch as the plaintiff had paid nothing upon the note except the sum of $9.40, and that the total value of his property taken and applied thereon did not exceed the sum of $216.27, and in view of the further facts that he has received his note back and his deposit for the full amount reinstated, whether the sum was offset against the $6,000 note or not, it is difficult to perceive how the plaintiff has been damaged or suffered loss in excess of $225.67. Upon the first trial it did not appear but that plaintiff's deposit was worth 100 per cent. and, therefore, the offset and cash were correctly held to amount in effect to full payment of the note. Upon the second trial, however, the new evidence showed the deposit to be worth only $216.27. The plaintiff should not be permitted to recover any sum in excess of his actual loss. In the present case plaintiff, in addition to the sum recovered herein, may be in a position to recover 30 per cent. of his deposit or obtain credit for the full amount thereof on his $6,000 note; but this result cannot be anticipated at this time, and the defendant is not in position to raise the point in view of the fact that it received credit in its deposit account for 40 per cent. of the note. The plaintiff is not entitled to recover this 40 per cent. because he has not paid it. The total amount paid by him is $225.67. Although plaintiff may secure a profit in the end, defendant has suffered no legal injury, as it is compelled to pay less than the amount credited in its deposit account from the proceeds of the note.

A number of other matters are discussed in the brief of

appellant and we have examined them but find no error therein prejudicial to the defendant.

We conclude that the judgment of the district court is excessive, that the plaintiff is entitled to recover the sum of $225.67, with interest at 7 per cent. per annum from January 10, 1921; and inasmuch as, under the facts shown, another trial would be of no benefit to either party, it is ordered that the judgment of the district court be reversed and the cause remanded, with instructions to enter judgment for the plaintiff in the sum of $359.67 and costs.

REVERSED.

WAR FINANCE CORPORATION ET AL., APPELLANTS, V. HENRY M. THORNTON ET AL., APPELLEES.

FILED JULY 19, 1929. No. 26645.

1. **Constitutional Law.** This court will not determine the constitutionality of a legislative act unless such determination is necessary to the proper disposition of an action pending before it.
2. **Statutes.** Unless it is clearly disclosed that the legislature intended a legislative act to operate retrospectively, it will be held to operate prospectively only.
3. **Usury.** Section 5952, Comp. St. 1922, as amended by chapter 178, Laws 1927, *held* not to operate retrospectively.
4. ———: MORTGAGES. "A mortgage which, by its express terms, requires the mortgagor to pay the maximum legal rate of interest on the debt which it secures, and, in addition, to pay the taxes upon the mortgagee's interest in the mortgaged premises, is usurious." *Stuart v. Durland*, 115 Neb. 211.

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

Morrow & Morrow and *Kennedy, Holland, De Lacy & McLaughlin*, for appellants.

William H. Heiss, Jr., contra.

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

GOOD, J.

This is an action for the foreclosure of a real estate mortgage. The defense of usury was interposed and sustained. Decree was entered for plaintiffs for the balance due on the principal of the notes secured by the mortgage. Plaintiffs have appealed.

The notes provided for interest from their date at 10 per cent. per annum, being the maximum legal rate, and the mortgage contained a clause which required the mortgagors to pay, in addition to the interest, all taxes and assessments levied upon the real estate and all other assessments levied upon the mortgage, or the note which the mortgage was given to secure.

In *Stuart v. Durland*, 115 Neb. 211, this court held: "A mortgage which, by its express terms, requires the mortgagor to pay the maximum legal rate of interest on the debt which it secures, and, in addition, to pay the taxes upon the mortgagee's interest in the mortgaged premises, is usurious." The above holding was by this court reaffirmed in *Quesner v. Novotny*, 116 Neb. 84; *Dwyer v. Weyant*, 116 Neb. 485; and *Dawson County State Bank v. Temple*, 116 Neb. 727.

To avoid the effect of these decisions, plaintiffs cite and rely upon section 5952, Comp. St. 1922, as amended by chapter 178, Laws 1927. The title of the latter act is: "An Act to amend section 5952, Compiled Statutes of Nebraska for 1922, relating to revenue, to declare an emergency and to repeal said original section." The original section 5952 of the Compiled Statutes was a part of the revenue law which provides for the assessment of real estate and real estate mortgages, and requiring the interest of the mortgagee in the mortgaged premises to be separately assessed, and also contained the following provision: "When any mortgage contains a condition that the mortgagor shall pay the tax levied upon the mortgage or the debt secured thereby, the mortgage shall not be entered for separate assessment and taxation, but both interests shall be assessed and taxed to the mortgagor or owner of the real estate. An

agreement of this character in the mortgage shall not destroy the negotiability of any note secured thereby. The value of the real estate in excess of any mortgage taxable to and taxed to the mortgagee shall be assessed and taxed to the mortgagor or owner." The only change made in this statute by the amendment of 1927 was to add immediately after the words, "negotiability of any note secured thereby," the following five words: "nor render such note usurious."

Notwithstanding the usury statute (Comp. St. 1922, sec. 2838) provides that if a greater rate of interest than that allowed by law shall be contracted for or received or reserved, plaintiff shall recover only the principal without interest and defendant shall recover his costs, and if the interest shall have been paid, judgment shall be for the principal, deducting the interest, plaintiffs in the instant case contend that section 5952, Comp. St. 1922, as amended, has the effect of destroying the defense of usury, in so far as it relates to obligations secured by real estate mortgages containing the tax clause above quoted, and that the amended statute is applicable to preexisting contracts, as well as to those made subsequent to its enactment.

Defendants contend that in the enactment of chapter 178, Laws 1927, a number of constitutional provisions were violated, and for that reason said chapter is void and can afford no relief to plaintiffs in this action.

It is a well-settled rule that courts will not determine the constitutionality of legislative acts unless such determination is necessary to a proper disposition of the cause before the court. In *Morse v. City of Omaha,* 67 Neb. 426, it is held: "The appellate court will not pronounce a statute unconstitutional and void where a determination of the case does not require that the constitutionality of the statute be determined." In *State v. Fulton, ante* p. 400, it is held: "This court will refuse to pass upon the constitutionality of a statute unless it is necessary to a proper disposition of an action pending in this court."

In 12 C. J. 780, sec. 212, it is said: "It is a well-settled

principle that the constitutionality of a statute will not be determined in any case, unless such determination is absolutely necessary in order to determine the merits of the suit in which the constitutionality of such statute has been drawn in question." The reasons given for the rule are stated in *Ex parte Randolph*, 20 Fed. Cas. 242, No. 11558, in the following languages: "The decision of a question involving the constitutionality of an act of congress is one of the gravest and most delicate of the judicial functions, and while the court will meet the question with firmness, where its decision is indispensable, it is the part of wisdom, and a just respect for the legislature renders it proper, to waive it, if the case in which it arises can be decided on other points." In *Hoover v. Wood*, 9 Ind. 286, the reason for the rule is stated as follows: "While courts cannot shun the discussion of constitutional questions when fairly presented, they will not go out of their way to find such topics. They will not seek to draw in such weighty matters collaterally, nor on trivial occasions. It is both more proper and more respectful to a coordinate department, to discuss constitutional questions only where that is the very *lis mota*." It follows that, if the instant case may be properly decided upon other questions than the constitutionality of the statute, the latter question will not be considered.

A well-recognized rule of statutory construction, and one firmly established in this jurisdiction, is that a statute will be held to operate prospectively and not retrospectively unless the legislative intent or purpose that it should operate retrospectively is clearly disclosed. The following are some of the decisions of this court supporting the rule announced: *Blunk Bros. v. Kelley*, 9 Neb. 441; *State v. City of Kearney*, 49 Neb. 337; *McIntosh v. Johnson*, 51 Neb. 33; *Commercial Bank of St. Louis v. Eastern Banking Co.*, 51 Neb. 766; *Adair v. Miller*, 109 Neb. 295; *State v. Federated Merchants Mutual Ins. Co.*, 117 Neb. 98.

After a careful examination of chapter 178, Laws 1927, we discover nothing to indicate an intent of the legislature that said act should operate other than prospectively. It

follows that if said chapter 178 is valid, which we do not determine, it can operate only prospectively. Since the contracts involved in this action were executed long prior to the passage of chapter 178, it cannot operate to determine whether said contracts are usurious. The decision of this case, therefore, is governed by the rule announced in *Stuart v. Durland, supra,* and the cases reaffirming the doctrine therein announced.

The judgment of the district court is in conformity with the decisions of this court, and is

AFFIRMED.

EBERLY, J., dissenting.

I am unable to agree with the reasons assigned in the majority opinion and dissent from the affirmance of the judgment of the district court pursuant thereto.

In stating this conclusion, as well as in the further observations I shall make, I do so with a just appreciation of the pronouncement to which I except, and the favorable consideration which the undoubted learning of its author, as well as the well-founded reputations of each and all who supported it at its adoption by this court, entitle it to receive. In this spirit, in support of my views, I submit the following for the consideration of this court:

It must be conceded that chapter 178, Laws 1927, under consideration, is not an act complete within itself. We must consider then this chapter for what it actually is, as a part of complete legislative action. The effect of this law of 1927, it must be admitted, was then to amend a single section of a statute comprising a number of sections. If this be true, it seems that the well-settled rule of construction to be applied, to determine the force and effect of the language used, is that all parts of this legislation, of which chapter 178 formed only a part, should be considered together, and not each section by itself. 2 Lewis' Sutherland, Statutory Construction (2d ed.) 659, par. 344. This rule the majority apparently ignore.

It would also seem, in obedience to the many precedents the history of this court discloses, that if we should, on

investigation, determine that the act as an entirety, of which chapter 178 appears as an amendment, possesses the characteristics of what is commonly known as a remedial statute, our investigation would necessarily include, in addition to the complete act of which the amendment under consideration forms only a part, also all laws existing prior thereto relating to the subject-matter, as well as the mischief to be corrected and the remedy to be applied. *Clother v. Maher,* 15 Neb. 1; *Harmon v. City of Omaha,* 17 Neb. 548; *Swearingen v. Roberts,* 12 Neb. 333.

It may also be observed that there is apparently no issue between the members of this court on the question that—"It is clearly within the competence of the legislature to ordain that an amending act shall have a retrospective operation, saving contracts and vested rights in so far as they are protected by the Constitution; and when this intention is explicitly stated or deducible by necessary inference from the terms of the statutes, the courts must give effect to it." *Perry v. Denver,* 27 Colo. 93; *Iowa Savings & Loan Ass'n v. Heidt,* 107 Ia. 297; *Lew v. Bray,* 81 Conn. 213.

Indeed, the rule as stated in the majority opinion implies this conclusion and at least two of the Nebraska cases cited in support thereof proceed on the theory that this right is unquestioned. It follows, therefore, that the controlling question in this case as presented in the majority opinion is not one of legislative power, but what has been actually done by the legislature.

As to the law as it was, and as to the events, and the situation that preceded the original enactment of the legislation now under consideration, it is to be remembered, and the court will take judicial notice of the fact, that prior to 1911 the method by taxation of real estate mortgages in Nebraska then in vogue was by the best minds of our state regarded as highly unsatisfactory. At that time land mortgaged was assessed to the owner thereof without any deduction because of existing liens. The mortgagee thereof, so long as he remained the owner of the mortgage, if a resi-

dent of the state, was also presumably taxed on the full value thereof. On this basis the universal complaint was that of double taxation, all of which the debtor ultimately paid, for the landowner debtor discovered that he was not only required to pay his land tax direct, but that in fact, though not in name, he was also required to pay the tax assessed on his mortgage debt held by his creditors, in the enhanced rate exacted as interest on his loan. The mortgagees, it seems, likewise had troubles with the tax assessor. The state itself was dissatisfied with tax conditions.

To avoid the effects of this situation, there was introduced as a custom of the financial market, the device of incorporating an agreement or condition in the mortgages whereby it was agreed on behalf of the mortgagor that he should and would "pay all taxes and assessments levied upon said (mortgage) premises and all taxes and assessments levied upon the holder of the mortgage for, or on account of, the same." This afforded a measure of relief to the mortgagees, but none whatever to the landowner. It did make his payments patent where, before, the fact was in a measure concealed. However, when this court, in the cases of *Garnett v. Meyers,* 65 Neb. 287, *Consterdine v. Moore,* 65 Neb. 296, and *Allen v. Dunn,* 71 Neb. 831, announced and established the rule that the agreement, or condition, in question inserted in the mortgage, under the laws of this state, operated to destroy the negotiability of the note secured thereby, even that measure of relief was valueless. A non-negotiable note and mortgage is admittedly not a desirable investment in the money markets where such property is bought and sold. To the *bona fide* purchaser thereof there is ever present the shadow of litigation based upon unknown facts that might have entered into the transactions between the immediate parties to the instrument. So it was rediscovered that increased risk has always been reflected in enhanced interest rates. Truly, in view of the course of events that transpired in the commercial life of the state, it could be well said of the debtor, after the developments mentioned, "the last state of that man was worse than the first."

Such, indeed, was the "mischief" that appealed to the legislature of 1911 "for remedy." Their answer was the enactment of chapter 105, Laws 1911. It was entitled "An act to provide for the taxation of mortgages of real property and to prevent double taxation on incumbered property in the state." It consisted of six sections: The first embraced the definition of terms employed in the act. The second declared mortgages of real estate to be an interest in real estate for the purpose of assessment and taxation; provided for the manner of assessment thereof when such mortgage contained no agreement or condition that the taxes assessed should and would be paid by mortgagor; regulated the rights of the parties to this transaction in such a manner as to avoid what has been considered as double taxation. The third section was devoted to the duties of assessing officers; recognized, provided for and validated agreements between mortgagors and mortgagees; that the taxes on the mortgage debt, the mortgage and the real estate should be paid by the mortgagor; and "provided further that such agreement contained in the mortgage will not destroy the negotiability of any note secured thereby." The fourth section provided a method whereby the public record would at all times disclose the actual amount unpaid of the mortgage indebtedness. The fifth and sixth sections were as follows:

"Section 5. This act shall apply to all mortgages filed on and after July 1, 1911. Mortgages on lands in this state filed on and after said date shall not be taxed in any other manner than herein provided. All mortgages on real estate recorded prior to July 1, 1911, shall be taxable as provided by law under provision of law relating thereto, prior to the enactment hereof: Provided that this act shall not apply to corporations, the property of which is now exempt from taxation.

"Section 6. This act shall take effect and be in force on and after its passage and approval according to law.

"Approved April 3d, 1911."

As preliminary to the discussions of the amendatory

effect of chapter 178, Laws 1927, it is to be noted that the peculiar nature and purpose of the legislation of 1911 and of its integral character was recognized and expressed by the codification and compilation of 1913. It here becomes article V, ch. 69, entitled "Revenue." Its chapter sections are numbered as 61-65, inclusive, and in addition for convenience assigned general numbers 6349-6353; but, as evidencing full recognition of this act as legislation complete within itself and made up of interrelated parts, we find these compilers have substituted for the words "this act" (chapter 105, Laws 1911) the words "this article" (article V, ch. 69), almost the same feature characterizing the words of the compilers and revisers of the Compiled Statutes of 1922, wherein chapter 105, Laws 1911, appears as "article XIV, ch. 61," and here again, for convenience only, the sections thereof are numbered 5950-5954, but the unity of the chapter continues to be evidenced by the words "this article (article XIV, ch. 61) shall apply to all mortgages filed on or after July 1, 1911." It would seem beyond dispute that the numbering of the sections under consideration, or the incorporation of the act of 1911 into the subsequent revisions of the statutes as an "article" therein, in no manner affects the scope and interpretation of the act or of the constituent parts thereof.

Preliminary to a discussion of this legislation, it would seem of fundamental importance in this case that the following should be kept in mind: "The act is complete within itself," and, fairly considered, constitutes "original and independent legislation." It is not and cannot be inimical to the provisions of section 14, art. III of the Constitution, and where such an act is repugnant to, or in conflict with, a prior law which is not referred to, nor in express terms repealed by the later act, the earlier statute is repealed by implication. *State v. Hevelone*, 92 Neb. 748; *State v. Ure*, 91 Neb. 31.

This act also relates wholly to the exercise of the sovereign power of the state and rights incident thereto, arising therefrom, or connected therewith. It is to be remembered

that state constitutions are not a grant, but a limitation of the legislative power, that the legislature has plenary power of legislation and may pass any law not forbidden by the Constitution of the state or the United States. Every subject not withdrawn from this authority may be acted on by that body. The sovereign right to tax may not be denied. The existence of the state is dependent on it. Implied therein is the lawful discretion to adopt, prescribe and approve reasonable methods and devices to secure the just exercise of this undoubted power, in a manner which, while efficient to secure the beneficiary the just fruits of lawful exactions, will at the same time operate, not only to conserve the well-being of the state and the resources from which its revenues must be derived, but also to accord full and complete protection to persons and property taxed from all unnecessary injury, loss or damage which might otherwise incidentally ensue not only as between sovereign and subject, but as between subject and subject, due to, or connected with, or arising out of compliance with the mandate of the taxing power. This deduction is involved in the presumption that—"It must have been the intention of those who gave these powers, to insure, as far as human prudence could insure, their beneficial execution. * * * That a power to create implies a power to preserve. * * * The sovereignty of a state extends to everything which exists by its own authority, or is introduced by its permission." *McCulloch v. State of Maryland,* 4 Wheat. (U. S.) *316. Indeed, to judicially approve and permit to coexist a private corporation chartered solely for private gain, created by an act of legislature complete within itself, and lawfully endowed thereby with the power to charge and privileged to exact a compensation for money loaned at variance with the general law (*Livingston Loan & Building Ass'n v. Drummond,* 49 Neb. 200; *Anselme v. American Savings & Loan Ass'n,* 66 Neb. 520), and at the same time judicially deny to the sovereignty (the sole creator of this corporate entity first discussed) the same right, in its own behalf, in the accomplishment of a public purpose, and in promotion of public

good, in the same manner, to confer and exercise upon, through and by its own fiscal creations and devices of taxation the same or similar power and the same or similar privileges when constitutional limitations are not thereby infringed, would involve a judicial solecism unworthy of this court. And so, pursuant to the sovereign powers of state, there was incorporated in this act among the safeguards contained therein an agreement of this kind shall "not destroy the negotiability of any note," etc., and later to which was added, by amendment of 1927, "nor render such note usurious."

The ancient maxim, "The king can do no wrong," has no place in American jurisprudence. But the fair deduction therefrom that the sovereign intends no wrong and wills no unnecessary injury is a principle which applies to the modern state, and in the light of which its statutes are to be read. This statute so enacted, in view of its terms, and the history preceding it, is plainly remedial in nature; not only remedial, but it evidences the efforts of a sovereignty to correct an unintended wrong or injury incidental to the then operations of its taxing law. The court therefore is warranted in giving it a liberal and effective construction under the peculiar circumstances in this case and it should not be strictly construed. *Buckmaster v. McElroy,* 20 Neb. 557; *McIntosh v. Johnson,* 51 Neb. 33; *Omaha Savings Bank v. Rosewater,* 1 Neb. (Unof.) 723. In conforming to the rules of construction heretofore set forth, the several parts of this act are to be construed together in order to ascertain the intention of the legislature. *Follmer v. Nuckolls County,* 6 Neb. 204; *City of Lincoln v. Janesch,* 63 Neb. 707. The court will give this act the meaning which it is apparent from the language used that the legislature had in mind when the act was passed. *State v. Hanson,* 80 Neb. 738.

Applying the principles just enumerated, it is to be seen that sections 5 and 6, ch. 105, Laws 1911, above referred to, are important evidence of legislative intention in relation to the act before us. It will be noted there is an absence of an

emergency clause. The sixth section does not express an emergency. *State v. Pacific Express Co.* 80 Neb. 823. This act, containing no emergency clause, did not become operative under the terms of the Constitution until three calendar months from and after the adjournment of the legislature of 1911. As the time of adjournment of the legislative bodies is a fact which the courts of this state are required to take judicial cognizance of, we judicially know that it took place on April 6, 1911. Chapter 105, Laws 1911, therefore first became constitutionally in effect July 7, 1911, and speaks and operates from the beginning of that date. 1 Lewis' Sutherland, Statutory Construction (2d ed.) 313, par. 175. While this legislation was wholly without power of speech or of command until July 7, 1911, yet the legislative mandate contained in the sixth section thereof expressly required that the provisions of the act as an entirety, as well as each of the component parts thereof, should be applied to "all mortgages filed on and after July 1, 1911." It is also true that under the express terms of the statute, as well as by necessary implication, its provisions were applicable to all mortgages filed on and after July 1, 1911, without reference to the date of execution or the time of the transaction evidenced thereby. As to all mortgages filed from July 1 to July 6, 1911, inclusive, its operation must be deemed wholly retroactive. Likewise, this is true as to mortgages filed on or after July 1, 1911, bearing dates or evidencing transactions consummated prior to July 1, 1911. Indeed, under the terms of this statute, prior to amendment, a mortgage executed forty years ago, but filed for record today, would be within its express terms and subject to the operation of its provisions.

In view of these facts, as well as the language of chapter 105, Laws 1911, construed as an entirety, with due regard to the principles of statutory construction already discussed, the conclusion is inescapable that this chapter evidenced a clear and unmistakable expression in precise terms, as well as by necessary, inevitable implication, of a plain, positive, legislative purpose and intent, at the very

time of its enactment, that all of its provisions were and are retroactive in effect and were and are to be given retrospective operation; that this intent was not only explicitly stated, but is deducible by necessary inference from the terms of the statute itself, and that the courts of this state are bound to give effect to it.

Heretofore the interpretation of this legislation by this court has been consistent with the conclusion just expressed. This act as amended by chapter 138, Laws 1919, "An act to amend sections 6350 and 6351, Revised Statutes of Nebraska for 1913," was sustained as involving the sovereign power of taxation, as retroactive in effect, and the claim that it impaired the obligation of contract and destroyed vested rights was expressly denied. *State v. Rowe,* 108 Neb. 232. In *Peterson v. Kuhn,* 110 Neb. 372, a portion of section 5952, Comp. St. 1922, validating agreements between mortgagors and mortgagees as to all payments of taxes, and particularly that portion of the same providing an agreement of this kind shall "not destroy the negotiability of any note secured thereby," was sustained by a unanimous court, and the clause quoted held to be valid and effective. It is to be noted that the only change effected by the amendment of 1927 adds to the sentence just quoted, and which this court then sustained, the words "nor render such note usurious."

This court is committed to the doctrine "that the simultaneous repeal and reenactment of a statute in terms, or in substance, is a mere reaffirmance of the original act and not a repeal in the strict or constitutional sense of the term." The original legislation reaffirmed by the amendatory act of 1919 and of 1927 thus remains in full force and effect without interruption or change in legal interpretation. *State v. Bemis,* 45 Neb. 724; *Stenberg v. State,* 50 Neb. 127; *Quick v. Modern Woodmen of America,* 91 Neb. 106; *Mulhollan v. Scoggin,* 8 Neb. 202; *Gooch Milling & Elevator Co. v. Chicago, B. & Q. R. Co.,* 109 Neb. 693.

Even if it be conceded in principle that amendments to a section might, as to interrelated parts of that act, of

which the section amended forms a part, operate to repeal by implication, the principle has no application to the amendment of 1927. Repeals by implication are not favored and only occur where there is an unmistakable repugnancy between the later and the earlier act. None exists here. Indeed, to construe "nor render such note usurious" within the scope of the legislative mandate "shall apply to all mortgages filed on and after July 1st" is not only consistent with its legislative history, and the "mischief" its purpose was to remedy, but is imperatively required by the literal terms of the statute and strictly conforms to the public policy evidenced by the act.

The almost universal rule of construction applicable and controlling in the present situation, we find, appears in the history of American jurisprudence as announced in two leading cases, viz., *Farrell v. State*, 54 N. J. Law, 421, and *Conrad v. Nall*, 24 Mich. 275. In the New Jersey case the principle was stated as follows:

"The effect of an amendment of a section of the law is, not to sever it from its relation to other sections of the law, but to give it operation in its new form as if it had been so drawn originally, treating the whole act as an harmonious entirety, with its several sections and parts mutually acting on each other."

And the same rule was in substance announced in *Conrad v. Nall*, 24 Mich. 275. In that case the Michigan court said:

"The act of 1869 (Sess. L. 1869, p. 155) amending § 24, ch. 140, R. S. 1846 (Comp. L. § 5384), was not intended to operate independently of the other provision of the same chapter. The whole chapter in its present form is now to be read as one act, with its several parts and clauses mutually acting on each other as their sense requires."

In the case of *Blair v. Chicago*, 201 U. S. 400, Justice Day, after a comprehensive discussion of the authorities covering this question, frames the rule in the following form:

"As a rule of construction, a statute amended is to be understood in the same sense exactly as if it had read from

the beginning as it does amended." Approved in *Pennsylvania Co. v. United States,* 236 U. S. 351.

Our own court in full accord with the decided weight of authority announces the rule in the following form:

"The section of an act properly amended should be construed precisely as though it had been originally enacted in its amended form." *State v. Hevelone,* 92 Neb. 748.

So it fairly appears that to the authority of this rule there can be no contention; as to the result of its application in the present case, little doubt. Reading the controlling statute before us, as an entirety, together with the amendment of 1927, "precisely as though it had been originally enacted in its amended form," "with its several sections and parts mutually acting upon each other," the words of the amendment "nor cause such note to be usurious" inevitably and inescapably would apply to all mortgages filed on or after July 1, 1911, and would therefore necessarily apply to the contracts in suit here. It would likewise involve, we respectfully submit, an unconditional negation of the premises on which the majority decision is based, viz.: "We discover nothing to indicate an intent of the legislature that (this legislation) it should operate other than prospectively." If this is true, and the provision now construed is valid, it will operate retrospectively to cut off all defenses of usury for the future even in actions upon contracts previously made. *Gibson v. Sherman County,* 97 Neb. 79. In the *Gibson* case this court substantially without reservation quoted, approved, applied, and in applying adopted the doctrine on the subject of usury announced by the supreme court of the United States in *Ewell v. Daggs,* 108 U. S. 143. The following excerpt will disclose the tenor of our then decision:

"Independent of the nature of the forfeiture as a penalty (for usury), which is taken away by a repeal of the act, the more general and deeper principle on which they are to be supported is, that the right of a defendant to avoid his contract is given to him by statute, for purposes of its own, and not because it affects the merits of his obligation; and that

whatever the statute gives, under such circumstances, as long as it remains *in fieri*, and not realized by having passed into a completed transaction, may, by a subsequent statute, be taken away. It is a privilege that belongs to the remedy, and forms no element in the rights that inhere in the contract. The benefit which he has received as the consideration of the contract, which, contrary to law, he actually made, is just ground for imposing upon him, by subsequent legislation, the liability which he intended to incur. That principle has been repeatedly announced and acted upon by this court."

If this authority be finally adhered to, the judgment of the district court in this case must be reversed, with directions to enter decree in accordance with plaintiffs' petition. On the other hand, if the principles announced in the case be disapproved and the contention of appellees on these points be accepted by the majority, the result will be to approve the decree entered in the district court. But at least the merits of the case should be determined and the parties to mortgages advised as to their rights and the state notified as to the actual condition of this potential source of revenue, for, though not a technical party to this litigation, it will nevertheless be affected by the results.

To determine the validity of the provision we have discussed, "nor render such note usurious," I conceive to be an imperative duty imposed by the record on this court, and because of the failure of the majority so to do, I am constrained to dissent.

JOHN A. NELSON V. STATE OF NEBRASKA.

FILED JULY 19, 1929. No. 26778.

1. **Jury.** Evidence in support of defendant's challenge to array examined, and *held* insufficient to sustain the same.
2. **Criminal Law: INSTRUCTION.** Under the facts in the present record, the instruction requested by the defendant relating to the necessity of the jury scrutinizing the testimony of detectives, etc., was, in view of the principles announced in *Flanagan v. State*,

117 Neb. 531, and *Trimble v. State, ante*, p. 267, properly refused.

3. **Evidence** examined, and *held* to support the verdict and sentence.

ERROR to the district court for Harlan county: J. W. JAMES, JUDGE. *Affirmed.*

James G. Thompson and *Tibbets, Lambe & Hewitt*, for plaintiff in error.

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

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

EBERLY, J.

In this case the information in approved form charged that "John A. Nelson and another * * * on the 14th day of January, 1928, did * * * have possession of and permit intoxicating liquor to be in and about the farm and barn occupied by defendants with the purpose * * * of unlawful use or disposition of intoxicating liquor," and also charging the same as "constituting a third and subsequent offense."

A trial to jury resulted in a verdict of "guilty" as charged in the information, to which were added special findings by the jury determining that defendant, "John A. Nelson, had been twice previously convicted of violation of the liquor laws of this state." Motion for new trial was overruled and the defendant sentenced to serve one year and six months in the penitentiary of the state of Nebraska. From this conviction and sentence he prosecutes error.

The defendant and his brother "owned," occupied and operated a farm in Harlan county. One Fred Morton with his wife lived with them. His duties apparently were that of "farm help, doing chores, shucking corn." The evidence is uncontradicted that on this farm on the date fixed in the information eleven gallons of intoxicating liquor (distilled moonshine) were actually sold and delivered in consideration of the sum of $121 actually paid in cash therefor. The evidence of the state establishes the defendant's actual

knowledge, approval and active participation in this transaction. The evidence offered and received in behalf of the defendant, if believed, would indicate that the entire transaction was monopolized by Morton, the hired man, and was without the knowledge of the defendant. However, the jury believed the evidence offered in behalf of the state and disbelieved the defendant's witnesses. As a reviewing court we find there is ample evidence in the record of the court to support the jury's conclusion and verdict.

The questions still remaining are: Was the defendant accorded his right of a fair trial? In this connection we find it necessary, in view of the record before us, to discuss but two contentions of the defendant, first, the overruling by the trial court of the defendant's challenge to the jury panel "or array."

With reference to the refusal of the court to give instruction No. 2 requested by the defendant which relates to the necessity of scrutinizing the testimony of detectives, etc., it would seem that, in view of the fact that all witnesses to which this instruction would refer were, as disclosed by the record, county sheriffs and their respective deputies, the principles announced in the case of *Flanagan v. State*, 117 Neb. 531, and *Trimble v. State, ante*, p. 267, are controlling and render further discussion of this subject unnecessary.

So far as the merits of the defendant's claim that the jury panel of sixty was improperly selected, because not apportioned as required by law, and because selected and drawn by officers disqualified to act in their several capacities, we find the evidence in the record does not sustain the contention of the defendant. It affirmatively appears that the members of the board of supervisors of Harlan county, whose disqualification is asserted, in no manner personally participated in the selection of this jury panel of sixty, suggested no names therefor, nor influenced, in any manner, the selection of the names which finally constituted the panel of sixty.

The sheriff, so far as disclosed by the record, was in no

manner disqualified to perform the duties of his office in connection with the trial of this case, and it further appears that the district court, out of abundance of caution, relieved him of performance of any of his duty in connection with the trial so far as the selection of jurors was concerned, by designating another who acted in his place. *Noonan v. State,* 117 Neb. 520.

It is to be remembered that in a selection by the county board of jury panels apportionment is required by law between the several precincts or townships of the county. But "A particular enumeration evidently was not contemplated by the legislature, or provision would have been made for it. They are left to act upon the means at hand, and so long as those adopted are fair, and result in a reasonable approximation to the ratio named, it is all that could have been intended, and all that is required." *Polin v State,* 14 Neb. 540.

In support of the motion offered in behalf of the defendant to quash the jury panel in this case for want of a required apportionment between the several precincts or townships of the county, the affidavits disclosed a list of votes cast in the several precincts, but there was no allegation that those voting were all the persons therein qualified to serve as jurors.

In fact, in view of the present statutory provisions limiting the competency of jurors to "all males residing in any of the counties of this state, having the qualifications of electors, over the age of twenty-five years, and of sound mind and discretion and not being judges of the supreme court, or district court, clerks of the supreme or district courts, sheriffs or jailers, or subject to any bodily infirmity amounting to a disability," etc. (Comp. St. 1922, sec. 9071), the instant case presents a situation of fact quite different from that upon which the determination made by this court in *Clark v. Saline County,* 9 Neb. 516, was based.

At the time that decision was announced, all males residing in any county in this state having the qualification of

electors and being over the age of twenty-one years were competent jurors. There was therefore a definite relation between competency as a juror and competency as an elector. Female suffrage and the restriction of the elective franchise to citizens of the state, as well as raising the age of competency of jurors from twenty-one to twenty-five years, has created a new condition which was not, and could not have been, within the contemplation of this court when *Clark v. Saline County*, 9 Neb. 516, was announced. The requirement of section 9073, Comp. St. 1922, that the county board "shall * * * meet, and select sixty persons * * * as nearly as may be, a proportionate number from each precinct in the county," is concerned wholly with persons having the legal qualification of jurors and at the present time has no relation whatever to qualified electors of less than twenty-five years of age. Legal voters and persons having the legal qualification of jurors are not now identical. Indeed, the number of votes cast at any election in any precinct of any county, in view of the changed statutory situation, furnishes no basis whatever for a definite inference as to the number of persons possessing the qualification of jurors in such precinct.

Yet, even under the conditions that obtained when *Clark v. Saline County*, 9 Neb. 516, was determined, this court made use of the following language:

"The affidavit filed in this case, however, fails to state the whole number of persons competent to serve on grand and petit juries in the several precincts of the county, and is therefore insufficient. The list of votes cast in the several precincts, without an allegation that those voting were all the persons therein competent to serve as jurors, is not sufficient to justify the court in setting aside the panel. It must affirmatively appear that the apportionment was not properly made."

In view of the changed situation, the rule just quoted applies with still stronger force to the facts disclosed in the record before us and renders the conclusion inevitable that

the facts upon which the defendant relies to sustain his challenge to the array are wholly insufficient for that purpose.

It may be further observed that the jury panel of sixty is not defective if all its members possess the qualifications prescribed in section 9071, Comp. St. 1922, even though some of the members of the panel may be disqualified for other causes from rendering jury service at the particular term or in a particular case. *Northeastern N. R. Co. v. Frazier*, 25 Neb. 42; *Kerr v. State*, 63 Neb. 115. Defendant's challenge to the array was properly overruled.

In conclusion, from a careful examination of the record in this case, we are convinced that the accused has been accorded a fair trial, and that his rights to the same have been properly safeguarded by the trial court, and the conviction and sentence are therefore

AFFIRMED.

J. J. SHAMBAUGH, COUNTY TREASURER OF BUFFALO COUNTY, APPELLANT, V. CITY BANK OF ELM CREEK, APPELLEE.

FILED JULY 19, 1929. No. 26829.

1. **Customs:** PLEADING AND PROOF. It is ordinarily incumbent on one relying on a special custom as a basis of recovery or defense, not only to allege and prove such custom, but to prove that the person sought to be bound thereby had actual knowledge thereof and contracted with reference thereto.
2. **Officers:** PERFORMANCE OF DUTIES. Where an officer's duties are prescribed by statute, usage will not excuse their discharge in a different manner; so proof of custom is not permissible to enlarge the powers of an officer whose authority is defined by statute, for a custom or usage repugnant to the commands of a statute will not prevail against the same.
3. **Counties and County Officers:** COUNTY TREASURERS: DEPOSIT OF PUBLIC FUNDS. A county treasurer's sole authority for the deposit of public moneys in banks is to be found in sections 6191-6196, Comp. St. 1922, and the directions, limitations and public policy evidenced thereby must be complied with by such officer and all who deal with him with reference to such public funds.
4. ———: ———: ———. Under the terms of the statutes referred to, general deposits alone are authorized to be made in

county depositories by county treasurers, and such, the evidence discloses, were made in the instant case.

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

E. G. Reed, for appellant.

John A. Miller and *E. L. Randall, contra.*

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

EBERLY, J.

This is an action at law instituted by the county treasurer of Buffalo county against the City Bank of Elm Creek. It appears conceded in the record that the City Bank of Elm Creek was a county depository of Buffalo county, duly designated as such, and had given the bond as provided by law to secure the deposit of public funds. Issues were joined, a jury waived, and trial to the court on an agreed stipulation of facts. The district court found for defendant and dismissed plaintiff's action. Plaintiff appeals.

The basis of the action was a deposit of public funds made by the plaintiff in his official capacity on the 11th day of May, 1927, which was represented by a check of $5,000 drawn by the plaintiff in favor of the defendant and upon the Farmers State Bank of Kearney, likewise a county depository of Buffalo county, and in which public funds were then on deposit, more than sufficient to cover the aforesaid check. The correct statement of facts upon which, in connection with the pleadings in the case, the cause was determined in the court below is as follows:

"It is stipulated and agreed that the only item in dispute in this case is the item of May 11, 1927, of $5,000; that if the same is recovered the rate of interest is two per cent. from May 11, 1927.

"That on May 11, 1927, the plaintiff drew a check on the Farmers State Bank of Kearney, Nebraska, for $5,000 and sent the same by mail to the defendant for credit as a de-

posit of public funds belonging to Buffalo county; that plaintiff had sufficient funds in the Farmers State Bank to pay the same, and said bank was a solvent bank; that the same was received at Elm Creek in the afternoon of said day by the defendant, and as a receipt the defendant issued a duplicate deposit ticket, a copy of which is set out in full in the reply of the plaintiff filed in this case, which duplicate deposit ticket was received by the plaintiff on May 12, 1927, and retained by him in the files of his office, he making no reply thereto; that copy of this duplicate deposit ticket is as follows:

"Deposited in Old City Bank of Elm Creek, Acc't, County Treasurer, J. J. Shambaugh.

"Checks and cash items are credited only subject to payment. This bank in making collections received from its customers, whether same be placed to their credit or not, acts only as their agent, and assumes no responsibility except to exercise the same diligence it uses in making collections of its own.

"Elm Creek, Nebraska, May 11, 1927.

"Currency

"Silver

"Checks Far. State Kearney $5,000.00.

"By mail Thank you. L. M. Bliss

"Bliss Total deposit ————."

That a copy of the check is set forth in the reply filed in this case and is as follows:

"Farmers State Bank No. 126

"J. J. Shambaugh, Treasurer Buffalo County, Neb.

"Kearney, Neb., May 11, 1927.

"Pay to the order of City Bank, Elm Creek.....$5,000.00

Exactly Five Thousand Dollars, Exactly, Exactly, Exactly, Exactly. Deposits of this bank are protected by the depositors' guaranty fund of the state of Nebraska.

"To Farmers State Bank, Kearney, Neb., 76-41

"J. J. Shambaugh, Treasurer, By.....,

"Deputy Treasurer."

That said check bears the following indorsements thereon, to wit:

"Farmers State Bank—Paid May 13, 1927, Kearney, Nebraska.

"Pay to the order of any Bank or Trust Co. All prior indorsements guaranteed. The City Bank of Elm Creek, Nebraska—76-878, Earl E. Bliss, Cashier.

"The City National Bank, Teller 1, May 13, 1927, Kearney, Nebraska.

"Pay any bank or banker. All prior indorsements guaranteed. May 12, 1927. Stock Yards Nat'l Bank, 27-6 South Omaha, Nebr. 27-6. W. H. Dressler, Cash."

"That the defendant bank in this case had for many years prior thereto, and then had, for its correspondent the Stock Yards National Bank of Omaha, Nebraska, and on the 11th day of May, 1927, together with other items of exchange mailed said check to the Stock Yards National Bank of Omaha for collection and credit; that the same was received by the Stock Yards National Bank on the 12th of May, 1927; that on the same day the Stock Yards National Bank sent this check with another item to City National Bank in Kearney for collection and remittance; that on the 13th day of May, 1927, the City National Bank in Kearney took the check of $5,000 in dispute, together with other checks it held drawn upon the Farmers State Bank of Kearney, and met with the Farmers State Bank of Kearney to make a clearing, that is, an exchange of checks, and delivered to the Farmers State Bank of Kearney all the checks it then had on the Farmers State Bank of Kearney, and received from the Farmers State Bank what checks the Farmers State Bank had on the City National Bank, and was then indebted to the Farmers State Bank for which difference the City National Bank then gave the Farmers State Bank a draft on Omaha; that after making the clearing the City National Bank in Kearney on May 13, 1927, drew a draft on the Omaha National Bank of Omaha in favor of the Stock Yards National Bank of Omaha for the total amount of the items included in the remittance letter

of May 12, 1927, above referred to, and mailed the same to said bank; that the draft was received by the Stock Yards National Bank at Omaha on May 14, 1927, and presented by said bank at the Omaha clearing house on May 14, 1927, and payment refused.

"That the City National Bank in Kearney has suspended business and was taken possession of by a national bank examiner under the direction of the comptroller of the currency at about 8 o'clock a. m. on May 14, 1927, and on said day a receiver was appointed and has ever since been in the possession of a receiver appointed by the comptroller, and then was and is now insolvent; that on the morning of May 14, 1927, and before the opening hours for banks in Omaha, the Omaha National Bank was notified by the receiver to pay no drafts drawn on it by the City National Bank in Kearney, and the payment of said draft drawn by City National Bank in Kearney was by the Omaha National Bank refused and is still unpaid. That on May 13, 1927, when the City National Bank in Kearney issued its draft of $5,025 to the Stock Yards National Bank of Omaha upon the Omaha National Bank it then had on deposit in the Omaha National Bank $7,494.18; and the Omaha National Bank when notified by the receiver to pay no drafts refused to pay said draft of $5,025 and at once offset said balance of $7,494.18 against bills payable of City National Bank in Kearney, which it, the Omaha National Bank, then held against the City National Bank in Kearney, and the Stock Yards National Bank at once notified the City Bank of Elm Creek that no funds had been received by it on account of said $5,000 check and that it had no credit for the same. That upon receipt of said notice the City Bank of Elm Creek at once notified the plaintiff that it had been unable to make collection of said check, and that the amount was charged back to his account, and that the books of the City Bank of Elm Creek show nothing due to plaintiff. That on the books of plaintiff he is carrying said amount as being a deposit in City Bank of Elm Creek. That on

the 13th of May, 1927, when the Farmers State Bank of Kearney received said check of plaintiff from City National Bank in Kearney it charged the same to the account of plaintiff, so that the credit of plaintiff in the Farmers State Bank of Kearney was reduced in the sum of $5,000.

"That the Stock Yards National Bank of Omaha used proper care in handling said item. That the plaintiff in this action was a depositor in the City Bank of Elm Creek from the time he began his term of office in January, 1927, up and until the time of the matters involved in this action, and that all items deposited as set forth in his petition except this item of $5,000 were by plaintiff checked out of said defendant bank before this suit was begun. That the plaintiff made demand on defendant for said item of $5,000 in proper form before bringing this suit and payment thereof was refused by defendant. That this suit is begun by direction of the board of supervisors of Buffalo county, Nebraska.

"That in the month of May, 1927, and long prior thereto and up to the present time there had existed a custom with the defendant and with other banks generally through Buffalo county and this part of the state of Nebraska, when they received checks on banks outside of the town in which said bank is located, to send such items to their Omaha correspondent for collection and credit as defendant did in this case, and that such items as are not collected are charged back to the customer, but that this plaintiff has never had an item of this character charged back to his account except this item in dispute in this case. That the banks do not accept business except on this basis, but that no discussion of this matter was had between the plaintiff and the defendant. That prior to the 11th of May, 1927, the plaintiff had issued other checks on Kearney banks, including the Farmers State Bank in Kearney, which had been collected through the defendant bank in the same manner as this check was collected and indorsed in the same manner, and charged to his account at the Kearney banks,

but that at the time of drawing said check of $5,000 plaintiff did not think of such fact, and probably when the prior paid checks had been returned from his Kearney bankers did not personally examine the indorsements of them and did not know the manner in which they had been collected.

"That neither the plaintiff nor the defendant, nor the Farmers State Bank of Kearney, nor the Stock Yards National Bank of Omaha, knew of the failing condition of the City National Bank in Kearney, nor had reason to believe it was insolvent and likely to close.

"It is further stipulated that the city of Elm Creek in which the defendant bank is located is situated a distance of approximately sixteen miles west from the city of Kearney in which the Farmers State Bank (the bank on which the check in dispute was drawn) is located; that both cities are on the main line of the Union Pacific Railroad Company; that they are both on the Lincoln Highway, a main highway passing through the state of Nebraska; that several trains carrying mail, express and passengers pass between the two cities daily; that the county treasurer of Buffalo county, Nebraska, the plaintiff in the above entitled matter, could have transferred the deposit to the defendant bank in cash or currency by the modern means of conveyance between the two points within the period of one hour's time, or the defendant bank upon receipt of the plaintiff's check in controversy could have made presentment on the same direct to the bank in Kearney upon which it was drawn and it would have been paid, in like time."

The defense of the Elm Creek bank which was sustained in the district court and relied upon here is buttressed upon the proposition that "A custom which is uniform, long established, and generally acquiesced in, and so widely and generally known as to induce the belief that the parties contracted with reference to it, is binding without proof of actual notice thereof to the parties." *Union Stock Yards Co. v. Westcott*, 47 Neb. 300; *Miller v. Great Western Commission Co.*, 98 Neb. 392. And, also, that custom and usage

of the bank in the manner of making collections and doing business will bind persons dealing with it whether the usage and custom is known to them or not. And that by "custom of banks" checks were not receivable as a general deposit but exclusively as a "collection and credit" transaction.

As applied to the facts in the present case, the force of the precedents cited may justly be said to be doubtful. In the *Westcott* case this court announced the principle that "Proof of knowledge is required to give effect to a custom, unless it is so widely and generally known, and so well established, as that knowledge thereof may well be presumed."

A stipulation heretofore quoted conceded that the county treasurer had no actual knowledge of the claim of "custom," and it is very doubtful whether it contains facts sufficient to justify the conclusion that the "custom" relied on was so widely and generally known "that knowledge" of such custom "may be presumed." The last pronouncement of this court on this subject of "customs of banking" appears in *Harrison State Bank v. First Nat. Bank,* 116 Neb. 456. In this case the rule announced by Thompson, J., in behalf of a unanimous court is: "It is incumbent upon one relying on a special custom as a basis for recovery, not only to allege and prove such custom, but also to prove that the person sought to be bound thereby had knowledge thereof and contracted in reference thereto."

The case of *Miller v. Great Western Commission Co.,* 98 Neb. 392, also relied upon by the bank, can have no application to the present case. Here we have as parties to the proceeding a county treasurer and a county depository; their respective obligations and duties imposed by virtue of statutory and express contractual provision pursuant thereto rendering controlling the following principles:

"Where an officer's duties are prescribed by statute, usage will not excuse their discharge in a different manner. So proof of a custom is not permissible to enlarge the powers.

of officers whose authority is defined by statute." 17 C. J. 476, sec. 37.

The principle thus generally announced was as applicable to a city treasurer (an analogous relation) expressed by this court as follows: "A custom or usage repugnant to the commands of a statute will not prevail against such statute." *Bolln v. State*, 51 Neb. 581.

The county treasurer is a creature of statute and the source of his powers are limited thereto. With reference to public funds, the powers and duties of this official, as well as the public policy which controls with respect to the custody of public funds, are reasonably definite and certain. By section 4964, Comp. St. 1922, it is provided:

"It shall be the duty of the county treasurer to receive all money belonging to the county, from whatsoever source derived, and all other money which is by law directed to be paid to him. All money received by him for the use of the county shall be paid out by him only on the warrants issued by the county board according to law, except where special provision for the payment thereof is or shall be otherwise made by law."

His sole authority for deposit of public moneys in banks is to be found in sections 6191 to 6196, Comp. St. 1922. It is to be noted by section 6194: "The removal by the county treasurer or by his consent of such money or a part thereof out of the vault of the treasurer's department or any legal depository of the same, except for the payment of warrants legally drawn or for the purpose of depositing the same in the banks selected as depositories under the provisions of this article shall be deemed a felony."

These sections further require the depository bank "to give bonds for" such deposits and accretions thereof, and also provide that "No treasurer shall be liable on his bond for money on deposit in bank under and by direction of the proper legal authority if the bank has given a bond." Section 6196.

Summarizing, it may be said that the public policy evi-

denced by the legislation last referred to is to the effect that the county treasurer is strictly enjoined to keep public funds in his possession either in the vaults of his office or in a legal depository. Under the terms of the statute referred to there can be no other lawful custodian, and the provisions thereof definitely contemplate that the deposits thus made with the official depository shall be in the form of general deposits. It is true that a deposit in a bank made in the ordinary course of business is presumed to be a general deposit. "When money is so deposited, it ceases to be the money of the depositor, and becomes the money of the bank, and the depositor becomes a creditor of the bank to the extent of such deposit." *Harrison State Bank v. First Nat. Bank, supra.* And this conclusion is necessary in order that the returns of interest to which the county was entitled should be received.

In addition to this, the transaction before us was not one which is made in the ordinary course of banking, but it is one authorized solely by the provisions of the statute under consideration.

"A county treasurer is the custodian of the funds of his office and it is for him, within the provisions and restrictions of the depository act, to deposit and withdraw, as the requirements in the discharge of his official duties shall make necessary, all the funds coming into his custody as such treasurer." *State v. Whipple,* 60 Neb. 650.

In discharging his duties under the depository law it is "The duty of each county treasurer to keep at all times on deposit in each of the depository banks of his county such a proportionate share of the public money subject to deposit as the amount of the paid-up capital stock of each bank bears to the whole amount of paid-up capital stock of all of such bank," and "mandamus will lie to compel such officer to perform his duty, and comply with the provisions of said law." *State v. Cronin,* 72 Neb. 636.

For this purpose, in the instant case, the plaintiff treasurer admittedly tendered for general deposit a check, copy

of which appears in the stipulation. It was wholly for the benefit of the defendant, and it was a transaction in strict compliance with the depository act and having no other source of authority. Being wholly statutory, general customs of banks, under the decisions already cited, could have no application to the transaction whatever. The rights of the public represented by the county, and the rights of the bank as a public depository of public funds are defined and enumerated in the public statutes, and were not subject to modification either by the force of general customs of banking, or by parole modification, as attempted on part of the bank by the return of a duplicate deposit slip containing terms not contemplated by and repugnant to the controlling statute. This act on part of the bank was wholly unavailing, not only because of failure of proof of actual knowledge on part of the county treasurer of the custom involved, because of his lack of consent thereto, but because of lack of inherent power in the parties concerned to circumvent the public policy evidenced by the provisions of the depository act.

It follows, therefore, that the deposit in question was a general deposit; the ownership of the check was vested in the Elm Creek bank; and it was not a collection and credit transaction in any sense of the term; and the subsequent loss of the proceeds thereof was the loss of the bank, and not of the county of Buffalo.

The district court erred in finding to the contrary and in entering a judgment in favor of the bank. It follows, therefore, that the action of the district court in sustaining the defenses of the bank and entering judgment in its behalf is erroneous and is reversed, and the cause is remanded for further proceedings consistent with this opinion.

REVERSED.

Note—See Customs and Usages, 17 C. J. 476 n. 90, 91, 517 n. 96, 518 n. 9.

LEN J. DAVIS, V. STATE OF NEBRASKA.

FILED JULY 19, 1929. No. 26815.

1. **Indictment and Information: EMBEZZLEMENT.** In a prosecution for embezzlement of notes or credits, the state must charge in the information the particular property embezzled with sufficient certainty to apprise the defendant of the facts upon which it relies for conviction.
2. **Criminal Law: EMBEZZLEMENT: INTENT.** In a prosecution for embezzlement, the criminal intent is a necessary element of the crime, which must be established as any other fact on the part of the state beyond a reasonable doubt, and a refusal of the trial court to permit the defendant to offer evidence from which the jury might draw the conclusion that the element of criminal intent is absent constitutes reversible error.

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

George F. Corcoran and *Waring & Waring*, for plaintiff in error.

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

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

CHASE, District Judge.

In this case Len J. Davis was convicted of the crime of embezzlement. He prosecutes error to this court for reversal of the conviction. For all purposes herein Len J. Davis will be referred to as the defendant.

The defendant relies upon twelve separate assignments of error for a reversal of the conviction. After careful examination of the record, we are convinced that his conviction cannot be affirmed, therefore, we will not discuss all the assignments of error upon which a reversal is sought.

There does not seem to be any serious dispute upon the facts. Len J. Davis for a number of years previous to the trial had been vice-president of the Citizens State Bank of Geneva, Nebraska, and was such on the 8th day of July,

1927, being the date on which he is charged with the commission of the crime. A short time prior to July 8, 1927, Roy and Joe Davis, brothers of defendant, appear to have been indebted to the Citizens State Bank of Geneva in the amount of approximately $7,900. The bank, about this time, was in serious financial difficulties. The defendant had a meeting with the directors of the bank in which the Davis brothers' loan was discussed. At this meeting the directors, along with the defendant, decided that it was necessary for the preservation of the bank to take this paper out of the bank. The defendant, on and previous to this time, was also trustee of the estate of one John Archer, deceased. This estate had among its assets a note signed by one Koehler in the sum of $7,500 secured by a first mortgage on real estate. At this directors' meeting the defendant offered, and the directors consented, to assign the Koehler note, belonging to the Archer estate, to the bank as an asset, and the bank to assign the Davis brothers' notes to the Archer estate. This was done for the purpose of building up the reserve of the bank. Whereupon the defendant made the assignment in accordance with this arrangement. The Koehler note was then sold by the bank, and for aught this record discloses the proceeds of the sale went into the assets of the bank. It is not clear just how much money was realized from the sale of the Koehler note. It also appears from the offer made by the defendant that it was agreed between him and the directors that at any later time, or when the bank reestablished its financial equilibrium, the defendant would have authority to take the Davis brothers' notes from the Archer estate and put into the Archer estate notes or money equivalent in value to the Koehler note which had been sold to the bank. The bank continued to grow financially weaker, and when it was evident that it would have to close its doors the defendant, claiming to have done so under the previous arrangement with the board of directors, assigned 41 notes, assets of the bank, to the Archer estate in lieu of the Koehler note. At this

time he put back into the bank the indebtedness of Davis brothers which was being carried as an asset of the Archer estate. The Davis brothers' paper is admitted to have been practically valueless at the time it was transferred to the Archer estate, and was still valueless at the time it was taken back into the bank when the 41 notes were assigned to the Archer estate. The assignment of these 41 notes to the Archer estate is the act of embezzlement upon which the state relies to support its conviction.

The information in which the defendant was charged with the crime of embezzlement at first contained two counts, but upon motion duly made by defendant, and sustained by the court, the state was required to elect upon which count it should stand, and it therefore elected to stand upon the first count of the information. The information, so far as material to our consideration, after alleging the relationship of the defendant to the Citizens State Bank of Geneva, is in the following words:

"That on or about the said 8th day of July, 1927, the said Len J. Davis, in said county and state aforesaid, did fraudulently, unlawfully and feloniously abstract, convert to his own use, and embezzle certain moneys, funds and credits, the property of said bank, in the sum of $8,101.46, said property being in his possession as such vice-president of said bank, without authority of the directors of said bank, and with the intent on the part of the said Len J. Davis to injure and defraud said Citizens State Bank of Geneva, Nebraska."

One of the chief assignments of error upon which the defendant relies for reversal of the conviction is that in substance the information charges the defendant with the embezzlement of the sum of $8,101.46 in money; that the state made no effort to establish this charge, but undertook to prove, and did prove to the satisfaction of the jury, that the defendant did not embezzle any money, but abstracted from the bank 41 separate promissory notes and converted the same to his own use. The defendant contends that the state,

if it relied upon such evidence for a conviction, under the law, would be required to charge in the information that the defendant abstracted certain promissory notes from the bank and set forth said notes in detail in order that the defendant may have notice of the charge which he is required to meet.

This court construed section 9638, Comp. St. 1922, in *Winkelmann v. State,* 114 Neb. 1, in which it held that, where it was charged that a person did wilfully and feloniously embezzle, abstract and misapply the sum of $1,000, being money, funds and credits, the charge referred to a single transaction. "Where, under section 9638, Comp. St. 1922, a bank cashier is charged in one count of an information with embezzling, abstracting and misapplying $1,000 of the bank's funds, and all the acts charged relate to a single transaction, only one offense is charged." *Winkelmann v. State,* 114 Neb. 1. The question of any variance between the charge and the proof was not present in that case. Here the precise question is not whether the information charges a single crime, but whether the state must specifically set forth the exact facts upon which it relies for a conviction in order that the defendant may be apprised of what evidence he will be required to secure as a defense to the charge. This question was not involved in the case of *Winkelmann v. State, supra.*

This court has recently held in *Stowe v. State,* 117 Neb. 440, that accused is entitled to know what facts the state relies on to support a conviction, citing section 11, art. I, of the Constitution: "In all criminal prosecutions the accused shall have the right to appear in person or by counsel, to demand the nature and cause of the accusation, and to have a copy thereof." The information should show "the property alleged to have been embezzled with such certainty as to identify it." Wharton, Criminal Procedure (10th ed.) p. 751. It is fundamental under our criminal procedure that the defendant has a right to have the indictment so framed that acquittal thereunder could be pleaded in bar of a subsequent prosecution for

the same act. Unless the charge in the information is set forth with sufficient particularity that it can be properly identified in a subsequent proceeding, it could not operate to support the plea of *autrefois acquit.*

In this case from any reasonable interpretation of the charges in the information the same go no further than to charge the defendant with having abstracted, converted and embezzled certain moneys in the sum of $8,101.46. The words "funds and credits" refer doubtless to something different from moneys. Moneys would be funds and credits, but the converse would not be true, that funds and credits are necessarily moneys. Credits include choses in action or any other obligation due or to become due under which the relationship of debtor and creditor might arise. The word "fund" is defined by Webster to be "stock or capital; a sum of money appropriated as a foundation for commercial or other operations undertaken with a view to profit and by means of which expenses and credits are supported." "Funds include moneys, and much more such as notes, bills, checks, drafts, stocks, and bonds." *United States v. Greve,* 65 Fed. 488.

Therefore, if the state intended to rely for a conviction in this case upon an abstraction or conversion of funds or credits, then it should have described with sufficient particularity the funds or credits so embezzled in order that the defendant might know upon which particular act of his the state relies for conviction. This was not done. We think the record on this point clearly shows an invasion of the defendant's constitutional rights in not giving him proper and legal notice of the state's demands or the nature and cause of the accusation.

In an indictment which described the property converted to be "goods, wares, and merchandise, personal property of value," it was held in *Clary v. Commonwealth,* 163 Ky. 48, that the indictment was fatally defective for want of proper description. The only exception there seems to be to this rule is where money is alleged to have

been embezzled. It is then sufficient to charge the embezzlement of a certain sum of money, setting forth the amount in dollars and cents. In every other case, so far as we are able to ascertain, the courts hold almost uniformly that, where personal property, funds or credits are charged to have been embezzled, it is necessary to set forth the exact property embezzled with sufficient precision to inform the defendant of the facts upon which the state relies to support his conviction.

As to a prosecution for larceny, it was held in *Korab v. State*, 93 Neb. 66:

"In an indictment or information for larceny the property alleged to have been stolen should be described with sufficient particularity to enable the court to determine that such property is the subject of larceny; to advise the accused with reasonable certainty of the property meant, and enable him to make the needful preparations to meet such charge at the trial."

The same rule was announced in *Barnes v. State*, 40 Neb. 545. This rule seems to be the one without many exceptions in all state and federal jurisdictions. It follows from this reasoning that there is a fatal variance between the charge in the information and the proof offered at the trial which was highly prejudicial to the rights of the defendant.

The other assignment of error which will be discussed herein is the action of the trial court in refusing to allow the defendant to show, over the objection of the state, that his acts, concerning the assignment of the 41 notes alleged to have been embezzled, were with the approval of the board of directors of the Citizens State Bank of Geneva. Every crime known to the law contains two essential elements, namely, an unlawful act, coupled with criminal intent. The criminal intent is as much a part of the act constituting the crime as is the unlawful act. We might state at the outset that it appears that, if the conduct of the defendant with reference to the assignment and abstraction of the paper alleged to have been

embezzled was with the approval of his board of directors, it goes directly to his intent to commit the offense of embezzlement, and it was reversible error to refuse the defendant the right to submit to the jury facts indicating the absence of any criminal intent. The undisputed facts, as disclosed by this record, are that the defendant wrongfully took out of the Archer estate the Koehler note secured by a first mortgage, which was a liquid asset. That note was turned over to the bank with the approval of the bank's directors for the purpose of raising money in an effort to keep up the bank's reserve at a time when it was suffering from financial debility. Under such circumstances the bank could not acquire good title to this paper, but it accepted the same, used it for its own profit, and the defendant offered to prove, which offer was rejected by the trial court, that the board of directors knew and understood what was to be done and approved it and agreed with the defendant that he might at a later date take back into the Archer estate any funds of the bank to prevent the Archer estate from suffering any loss through this transaction. If this were true, it was an act of the corporation itself. Corporations are inanimate things or artificial persons created by law which neither have animation nor intellectuality. They necessarily perform their functions through the medium of natural persons elected for that purpose, and when the board of directors, the managing officers of the bank, consented to the act herein in which the defendant is charged with embezzlement, while the act of the directors may not have been entirely lawful, yet, in connection with a criminal prosecution in which the liberty of the defendant is in jeopardy, it may be sufficient to relieve him of any criminal or wrongful intent in making the assignment of the alleged 41 notes. We find no competent evidence in the record that establishes the real value of the 41 notes assigned. It is quite clear from the record that the bank was unjustly enriched at the expense of the Archer estate in the sum of $7,500. While it is not clear just what

the bank received from the discount of this note, the record being silent we may be justified in presuming that it received value. The witness Stanard attempted to fix the value of the 41 notes remaining uncollected, alleged to have been embezzled, but upon cross-examination he admitted that in the main he knew nothing of the financial worth of the makers thereof, and the evidence was wholly incompetent to satisfy the rule as to proof of value. Therefore, for aught the record discloses, the Citizens State Bank of Geneva may have profited by this transaction rather than suffered any loss, and if no loss was entailed there could not have been any intention on the part of the defendant to injure or defraud the bank, which is a necessary element of the crime of embezzlement.

The action of the trial court in refusing to permit the defendant to show that in taking the 41 notes out of the assets of the bank and placing them to the credit of the Archer estate, if in accordance with a previous arrangement which he had with his board of directors, and agreeable to them, had the effect of depriving the defendant of the right to have this fact submitted to the jury as affecting his intent to commit the crime of embezzlement; being highly prejudicial to his rights, the ruling of the district court constitutes reversible error.

For reasons heretofore stated, we therefore reach the conclusion that the judgment of the district court should be and is

REVERSED.

Note—See Indictments and Informations, 31 C. J. 661 n. 95; 731 n. 82; 9 R. C. L. 1287; R. C. L. Perm. Supp. 2631.

EDWARD M. SEARLE, JR., APPELLANT, V. HARDIN YENSEN ET AL., APPELLEES.

FILED JULY 19, 1929. No. 26755.

1. **Constitutional Law:** DIVISION OF GOVERNMENTAL POWERS. Under section 1, art. II, of the Constitution of this state, dividing the

powers of government into three departments, legislative, executive and judicial, and prohibiting any one department from the exercise of the powers of either of the others, the legislature may not impose upon the courts the performance of nonjudicial duties, nor delegate to them any legislative power.

2. ———: DELEGATION OF POWERS. The legislature may delegate a part of its power over local subjects to municipal corporations, county boards and other public bodies within the legislative classification of departments, but not to either of the other departments.

3. ———: ———. Questions of public policy, convenience and public welfare, as related to the organization, incorporation, boundaries, powers and government of electric light, heat and power districts, are, in the first instance, of purely legislative cognizance, and may not be referred to the courts for determination.

4. ———: ———: LEGISLATIVE AND JUDICIAL FUNCTIONS. The legislature, having declared its policy and determined the facts and conditions which must form the basis for the organization, incorporation, powers and government of an electric light, heat and power district, or other public body, may vest authority in the courts to determine whether or not the law has been complied with, as a condition upon which such organization shall come into being. In such case the court does not adjudicate upon the necessity or political propriety of forming the corporation, and hence does not exercise any political function.

5. ———: UNCONSTITUTIONAL STATUTE. Sections 3 and 4, ch. 108, Laws 1927, are unconstitutional, as an attempt to impose upon the courts the performance of nonjudicial duties, and an unlawful delegation of legislative power; and such sections being a part of the inducement for the enactment, the entire act must fall.

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

Mothersead & York, for appellant.

White & Lyda and *Perry, Van Pelt & Marti, contra.*

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

REDICK, District Judge.

This is a suit in equity to enjoin the issuance by the

Gering Valley Hydro-Electric Light and Power District of bonds for the construction or purchase of main transmission lines or distribution lines for the purpose of furnishing electrical energy for light, heat and power to the residents of the district. The district is composed of a compact group of lands in Scotts Bluff county surrounding the city of Gering, and plaintiff, a resident of Douglas county, is the owner of a tract of land within the boundaries of the proposed district. The district court granted a temporary injunction, but afterwards dissolved the same, and upon final hearing rendered decree for the defendants, who were the board of directors of the district, and plaintiff appeals.

The district was organized under chapter 108, Laws 1927, which is an act complete in itself, and purports to authorize the organization of such districts upon petition of 25 per cent. of the electors of such district, 15 per cent. of whom shall be freeholders therein. The provisions of that act may be summarized as follows: Section 2 provides that the district shall consist of one or more units, either "urban" or "rural," or both; that a petition signed by 25 per cent. or more of the electors of the proposed district shall be filed with the clerk of the district court of the county, suggesting the boundaries of the district and the units therein, accompanied by suitable maps, and asking that the proposed district be declared a body corporate, and that the district court hold a hearing upon notice and fix the boundaries of the district and units respectively, provided that any proposed unit where the petition was not signed by 15 per cent. of the resident freeholders shall be excluded from the district; provided for the giving by the petitioners of a bond conditioned to pay all expenses if the district was not formed, and provided for the spreading of the proceedings upon the records of the court. Section 3 provides for a hearing by the district court after certain published notice. Section 4 defines the powers of the court. Section 5, upon the entering by the court of an order incorporating the

district, requires the findings and orders of the court to be submitted to the resident freeholders of the district for approval upon publication of notice thereof.

Then follow several sections covering the manner of holding the election, powers of the district, election of board of directors, the powers of the board, etc.

Section 16 authorizes the district to issue bonds for the purchase of electricity and the transmission and sale thereof, for the construction or purchase of a main existing line, or the construction of a main plant, upon the submission of the question at a general or special election, provided 60 per cent. of the electors voting shall approve the same, and authorizing the levy of a tax upon the real and personal property within the district to pay the principal and interest of said bonds. Section 17 divides the funds of the district into general and special. Section 18 provides for the letting of contracts for the construction of plants, transmission or distribution lines. Section 19 provides for the incorporation, on the order of the district court, of each of the hydro-electric units comprising the district, and authorizes them to issue bonds and collect taxes to meet the same, the proceeds to be used for purchasing transmission or distribution lines, which are declared to be works of internal improvement. Section 22 provides for an appeal by any person owning property within the district from the final order of the district court incorporating the district, and for the payment under protest of any taxes levied, and the bringing of an action to recover the same.

A large number of objections are made to the act raising the question of its constitutionality. The most serious one, in our view, and the only one which we deem it necessary to discuss, relates to sections 3 and 4 of the act, by which it is contended that the legislature has attempted to impose upon the district court the performance of non-judicial duties and to delegate to such court a part of its legislative power. This requires a construction of the sec-

tions attacked, and for a better understanding of the question they are set out in full.

"Section 3. Upon the filing of said petition, maps, plats, and bonds, the district court shall set a time and place for a hearing on said petition; and shall cause the petitioners to publish a notice within each of the counties where said units are located and within which the proposed district or any part of it will lie, of the time and place of such hearing, which notice shall state the date of filing the petitions; the names of the petitioners; description of the units mentioned in said petition as constituting the proposed district; the boundaries of said proposed district; and the prayer of the petition, which shall be published once a week for at least four consecutive times in each of said newspapers, and any freeholder within said proposed district may file objections to said petition and the prayer thereof on or before the third Monday after the last publication of said notice."

"Section 4. From the testimony adduced at such hearing the district court shall within ten (10) days after the completion of such hearing determine whether or not the district should be incorporated; and whether the suggested boundaries are reasonable and proper for the public convenience and welfare. And the court may change, alter and fix the boundary lines of such district with the end in view of promoting the interest of said power district, its units, 'rural' or 'urban,' provided that lands not included in the original petition and maps shall not upon such hearing be included in the boundaries as fixed and determined by the district court, if said boundaries be altered or changed as aforesaid, unless the owner or owners of the land or lands to be added thereto shall petition the court in writing so to do on or before said answer day. As a part of the evidence offered at said hearing the petitioners shall exhibit a certified copy of the individual and aggregate assessed valuation of all the units proposed to be included in said district and the court shall make a finding thereof in its order. If a district is formed by the court, there

shall also be included in said order and submitted in the proposition to the electors a proposal for a tax sufficient to pay the preliminary expense of organization and the expense of the election."

The act in question was doubtless inspired as a consequence of our holding unconstitutional a former act upon the same subject (Comp. St. 1922, secs. 7147 to 7154, as amended by chapter 169, Laws 1923) in the case of *Elliott v. Wille*, 112 Neb. 86. That act was there held invalid as a delegation of legislative power to a group of nonofficial individuals, as it made it the duty of the county board, upon the filing of a petition by certain freeholders, to submit to the electorate of the proposed district the question of its organization. The boundaries of the district were first determined by a certain number of freeholders, and then, "without any provision for determination by a competent tribunal whether the creation of the district and the construction of the improvement will promote public health, convenience or welfare, and without any provision for determination whether the owner's property has been arbitrarily or unjustly included in the district, or whether his property will receive any benefit from the proposed improvement," the proposition was to be submitted to the electors, who were required to vote either for or against the formation of the corporation. It was held that by such proceeding the taking of private property was authorized without compensation and without due process of law. To meet these objections, it is apparent that, by the act under consideration, the legislature has provided for the submission, after due notice, of the question whether or not the district shall be organized as a corporation, whether such organization will be for the public convenience and welfare, and the question of the boundaries of such district, to the judgment of the district court of the county in which some or all of the lands are located. Is this such a delegation of power as the legislature may constitutionally make? Or is the district court a competent tribunal for the determination of those questions?

The division of governmental powers into executive, legislative and judicial in this country is a subject familiar, not only to lawyers and students, but is a part of the common knowledge of the citizen. It represents, probably, the most important principle of government declaring and guaranteeing the liberties of the people, and has been so considered, at least, since the famous declaration of Montesquieu that—"There can be no liberty * * * if the power of judging be not separated from the legislative and executive powers. * * * Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would be the legislator: Were it joined to the executive power, the judge might behave with all the violence of an oppressor." In fact, the above proposition is declared in direct language by section 1, art. II, of our Constitution:

"The powers of the government of this state are divided into three distinct departments, the legislative, the executive and judicial, and no person or collection of persons being one of these departments, shall exercise any power properly belonging to either of the others except as herein expressly directed or permitted."

The question submitted, therefore, is of supreme importance and requires our most serious consideration, notwithstanding the strongest presumptions of validity to which a legislative act is entitled, and the extreme disinclination on the part of one of such departments to criticise or interfere with the acts of another. As the Constitutions of the respective states are the supreme law within their respective jurisdictions and are limitations of power, it is necessary that authority exist somewhere to determine whether or not the limitations have been exceeded. From the early history of this country and after much clash of opinion and sometimes bitter argument, the doctrine is now firmly established that this delicate duty devolves upon the judiciary. We, therefore, approach the question with an earnest desire to sustain the validity of the act, but with a profound sense of our duty to preserve the supremacy of the Constitution.

The power of the legislature to delegate a part of its legislative functions to municipal corporations or other governmental subdivisions, boards, commissions, and tribunals, to be exercised within their respective jurisdictions, cannot be denied; but the recipient of such powers must be members of the same governmental department as that of the grantor. Otherwise a confusion and duplication of powers would result, against which the section of the Constitution above quoted is directed. The legislature may not impose upon the judiciary or the executive the performance of acts or duties not properly belonging to those departments respectively. *People v. Nussbaum*, 55 App. Div. (N. Y.) 245. The above considerations are not to be deemed as prohibiting the legislature from imposing upon the other departments the performance of new and additional duties, but the duties so imposed upon either must be of the character and quality which such departments, respectively, are authorized or may be required to perform.

Let us then inquire of the nature of some of the duties imposed upon the district court by the sections under attack. They are set forth in section 4 and are as follows: (1) To determine from the testimony adduced at the hearing whether or not the district should be incorporated; (2) whether the suggested boundaries are reasonable and proper for the public convenience and welfare; (3) change, alter and fix the boundary lines of such district with the end in view of promoting the interest thereof and its units; and (4) to submit to the electors a proposal for a tax sufficient to pay the expenses of organization and election.

These questions are all political and legislative in their nature. The duty of courts is to declare the law as established by the legislature, not to make it. That the legislature may condition the operation of the law upon the existence of certain facts, and may submit to the courts the determination of those facts, is well established. *Barnes v. Minor*, 80 Neb. 189.

As was said in *Locke's Appeal*, 72 Pa. St. 491, 498: "The legislature cannot delegate its power to make a law, but it

can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend."

"The true distinction, therefore, is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done. To the latter no valid objection can be made." Ranney, J., in *Cincinnati W. & Z. R. Co. v. Clinton County,* 1 Ohio St. 77, 88.

In *In re Incorporation of Village of North Milwaukee,* 93 Wis. 616, a statute authorizing territory of a town containing certain area and population to be incorporated as a town on certain steps being taken, and on certain determinations by the court and subsequent vote of the inhabitants in favor thereof, was declared void as a delegation of legislative power. By the statute in question the court was authorized to determine whether the lands embraced in the petition "ought justly" to be included in the village, and whether the interests of the inhabitants will be promoted by such incorporation, and to enlarge or diminish the boundaries of the proposed village "as justice may require." The question was said to be: "Does the law before us go into operation upon the happening of a certain state of facts to be determined by the circuit court, or does it authorize and require the court to go further, and not only determine facts, but pass its judgment upon questions of legislative discretion?" "Such questions as whether the survey is correct, whether the census is correct, whether the population is as large as the statute requires in proportion to the area, and whether the statutory requirements have been complied with, are all questions of fact; and no reason is perceived why the court may not properly be authorized to inquire into and determine these facts, nor why it may not order an election and appoint inspectors. But the other questions upon which the court is required to pass are of a different nature, and we see no escape from the conclusion

that in passing upon and deciding them the circuit court determines legislative or political questions. These questions are (1) whether the lands embraced in the petition ought justly to be included in the village, and (2) whether the interest of the inhabitants will be promoted by such incorporation. Furthermore, the provision authorizing the court to enlarge or diminish the boundaries of the village as justice may require seems to us equally an exercise of legislative power. It is vigorously claimed by the respondents that these last-named questions are in truth questions of fact only, but it seems to us that this claim is utterly untenable. There is no proper sense in which they can be said to be questions of fact. They are rather ultimate conclusions from all the facts. Given all the facts which the legislature require—the area, the population, the census, the map, the notices—and does the order calling an election follow? By no means. The circuit court, in addition to determining these facts, must then say whether, in its judgment, it is best that there should be a village." "The sum and substance of the law is this: Villages may be incorporated if the circuit court thinks best. This amounts to nothing more nor less than the vesting in the circuit court of the powers of a third house of the legislature, which must be exercised in the affirmative before a village can exist. The legislature has passed the law, the governor has signed it, and it has gone on the statute book, but the circuit judge in every case must add his concurrence before it is operative. The question as to whether incorporation is for the best interest of the community in any case is emphatically a question of public policy and statecraft, not in any sense a judicial question; and in attempting to submit that question to the decision of the circuit court the legislature has undoubtedly done that which the Constitution forbids. If the decision of that question is to be delegated to any officer or body, it must certainly be to the county board of supervisors. That part of the section, also, which places the whole question of the boundaries of the proposed village under the control of the court is equally objectionable."

This language is specifically applicable to the act under consideration. The legislature has provided that certain steps shall be taken and the entire matter submitted to the district court, which is then required to determine whether the proper steps have been taken and the facts necessary to be shown before a corporation may be formed; but, in addition, assuming all matters required by the law exist, the court is still authorized and required to determine (1) "whether or not the district should be incorporated," (2) whether the "boundaries are reasonable and proper for the public convenience and welfare," and (3) "to fix the boundary lines of such district with the end in view of promoting the interest" of such district. These questions are of purely legislative cognizance, and must be determined by the legislature or some body having legislative or administrative powers to which their determination is delegated. As was suggested in the case just cited, if the decision of those questions is to be delegated to any officer or body it must certainly be to the county boards.

In *Dowling v. Lancashire Ins. Co.*, 92 Wis. 63, it was held that a law empowering the insurance commissioner to adopt a printed form, in blank, of a policy of fire insurance, together with such conditions as may be indorsed thereon, which, as near as can be made applicable, shall conform to the type and form of policy adopted by another state, is unconstitutional, as a delegation of legislative power to an executive officer.

In *North v. Board of Education*, 313 Ill. 422, an act was declared unconstitutional which attempted to authorize the circuit court, or judge thereof in vacation, to lay out school districts and determine their boundaries, Thompson, J., saying at page 425:

"Courts may determine what are the corporate limits already established, and they may inquire whether a municipal corporation has been created in accordance with the authority granted by the legislature. The power of the courts to perform these functions implies an existing law applicable to the existing subject, and the inquiry is, what is

the law and has it been violated or obeyed? The inquiry in the instant case, however, is, what territory shall be included in the corporate limits of a municipal corporation? We are unable to perceive how any one can contend that this is a judicial function, to be performed by a court."

In *Funkhouser v. Randolph,* 287 Ill. 94, it was held: "Whether a special drainage district should be organized and what lands should be included in such district for drainage purposes are legislative questions, the determination of which cannot be delegated to a court."

The same general principles have been announced and applied in a number of Nebraska cases. In *Dodge County v. Acom,* 61 Neb. 376, where the authority to establish a drainage ditch was conferred upon the county board, it was said at page 390: "The finding and conclusions of the board, to whom the legislature has given authority to act in the manner prescribed, are final and conclusive as to the necessity of the proposed ditch, and that the public health, convenience or welfare will be promoted thereby, and cannot thereafter be made the subject of a controversy as to whether correct and well founded or not. It is the exercise of a delegated power, political or administrative in character, conferred upon the county board by the sovereign authority of the state acting through its legislative branch of government."

In *Tyson v. Washington County,* 78 Neb. 211, it was held: "Whether a drainage ditch proposed to be constructed * * * will be conducive to the public health, convenience or welfare, or whether the route thereof is practicable, are questions of governmental or administrative policy, and are not of judicial cognizance, and jurisdiction over them by appeal or otherwise cannot be conferred upon the courts by statute."

In *Winkler v. Hastings,* 85 Neb. 212, it was held: "Where legislative power to detach territory from a city has been delegated by statute to the mayor and council, an appeal from the action of that body in refusing to disconnect par-

ticular tracts cannot be made the means of transferring such power to the district court."

In *Elliott v. Wille,* 112 Neb. 86, it was held: "The legislature may not delegate to private individuals either legislative or judicial functions." And at page 89, it was said: "The fixing of boundaries of a political subdivision of a state into counties or districts for public purposes is a legislative function. The legislature may authorize the organization of districts for public purposes by other governmental bodies, and the proceeding may be proposed or initiated by private individuals. Where the latter course is pursued, there must be some provision for determining whether the particular district is for the public health, convenience or welfare, and a means by which an aggrieved property owner, whose property is injuriously affected, may have his rights judicially determined. The legislature may not delegate to private individuals either legislative or judicial functions."

The decisions in the following cases do not militate against our conclusions herein. The case of *City of Wahoo v. Dickinson,* 23 Neb. 426, involved a statute authorizing the city council to adopt a resolution to annex to said city certain contiguous territory, and thereupon the city filed a petition in the district court of the county praying for the annexation of such territory, setting forth the facts regarding the same. Upon objection being made that the power conferred on the district court was legislative, and not judicial, it was held: "That as a condition of such annexation the court was required to find the allegations of the petition to be true, and that such territory or a part thereof would receive material benefit from its annexation to such city, or that justice and equity required such annexation, and to enter a decree accordingly. The questions, therefore, are so far of a judicial character that the courts may be invested with jurisdiction to determine them." And the court said: "We do not understand the statute, however, as clothing the courts with the power to legislate in the premises—that is, to determine in the first instance what

territory should be annexed. This power is bestowed upon the city council."

Barnes v. Minor, 80 Neb. 189, involved the organization of a drainage district by petition filed with the clerk of the district court of the county, and the contention was made that the act was unconstitutional because attempting to confer upon the district court duties and powers not judicial in their character, citing *Dodge County v. Acom*, and *Tyson v. Washington County, supra*. These cases were distinguished on the ground that the power to determine the question whether the proposed drainage improvement would be conducive to the public health and welfare was conferred upon the county board, and upheld the act for the reason that the questions submitted to the court were as to the existence of those facts which the legislature had determined as essential to the right to form such district. The decision is in line with those cases holding that, while authority may not be delegated to the courts to decide what facts shall exist in order that the law may become operative, that when the facts are determined by the legislature, the court may be authorized to inquire whether or not such facts exist and render judgment accordingly.

Bisenius v. City of Randolph, 82 Neb. 520, involved a statute authorizing the district court upon petition to disconnect territory from a municipal corporation, and the act was upheld because "The legislature dictates the facts upon which the change shall be made; and the court adjudges whether those facts exist in the particular case."

In the following cases powers similar to those sought to be conferred upon the court by the act in question were delegated to the county board. *State v. Dimond*, 44 Neb. 154; *Dodge County v. Acom*, 61 Neb. 376; *City of Wahoo v. Dickinson*, 23 Neb. 426; *Tyson v. Washington County*, 78 Neb. 211.

From an examination of the above and many other cases the following propositions seem well established:

The facts upon which the operation of the law is to depend must be declared by the legislature; to authorize the

court to determine what facts should form the basis for the operation of the law is nothing more than to require them to legislate upon the question as to what the law should be upon a certain state of facts. Neither by section 4, nor by any other section of the act, are the facts upon the existence of which the law is to become operative stated therein, but the entire question of the boundaries of the district and whether the formation of the corporation will be for the public convenience and welfare is submitted to the discretion of the court without any guidance from the legislature. The act provides that a petition shall be filed signed by 25 per cent. of electors of which 15 per cent. shall be freeholders, with plats suggesting the boundaries of the district, and proposing the members of the board. It does not require the court, upon compliance with these conditions, to declare the district a corporation, but leaves that question to the discretion of the court, exercised in accordance with its view upon the four political and legislative questions above enumerated. The fact that the court is required to submit the question to the final arbitrament of the electorate will not save the act, for the legislature is equally powerless to delegate its power to any individual or group of individuals. *Elliott v. Wille*, 112 Neb. 86. Questions of public health, convenience and welfare, as a basis for the enactment of a law or the formation of a public corporation, are in the first instance exclusively for the determination of the legislature, and may not be delegated to another department of government. After the enactment of a law, it is proper for the courts to enter upon those questions for the purpose of determining the existence of some reason which the legislature might logically accept as a basis for the enactment, all presumptions being in favor of its validity. In the present act no good reason is apparent why the duties thereby imposed, if it could lawfully be done, should be placed upon the courts.

By chapter 89, Laws 1925, a curative or validating act was passed attempting to correct the deficiencies of sections 7147 to 7154, Comp. St. 1922, as amended, by conferring au-

thority upon the board of county commissioners to determine the propriety of the incorporation of electric light, heat and power districts as consonant with public convenience and welfare. We have no doubt of the propriety of such a delegation of power to an official board constituting the legislative body of the county, but the act was declared invalid because it attempted, by reference only, to incorporate therein the provisions of the prior act, which had been held unconstitutional, as above stated. *Swanson v. Dolezal,* 114 Neb. 540. It is at least unfortunate that the provisions of the act of 1925, just referred to, were not inserted in the act of 1927 in substitution for sections 3 and 4, in which event the objection now urged would have been of no avail. The court might then have been authorized to determine whether the facts required by the legislature as a basis for the formation of the district existed, and whether the law had been complied with, which are proper subjects of judicial inquiry. As the statute now stands, the court is required to determine what facts shall exist as a basis for the organization of the district, a purely legislative function and must be held invalid as an attempt to impose upon the courts the performance of nonjudicial duties, and an unauthorized delegation of legislative power.

It follows that the judgment of the district court is reversed and cause remanded, with instructions to enter a decree for plaintiff as prayed.

REVERSED.

Note—See Constitutional Law, 12 C. J. 810 n. 4, 853 n. 15, 854 n. 20, 22, 855 n. 47, 857 n. 93.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

SEPTEMBER TERM, 1929

STATE, EX REL. C. A. SORENSEN, ATTORNEY GENERAL, PLAINTIFF, V. AK-SAR-BEN EXPOSITION COMPANY, DEFENDANT.

FILED SEPTEMBER 26, 1929. No. 27083.

1. **Injunction:** REPEATED VIOLATIONS OF PENAL STATUTES. A wrong arising out of repeated violations of a penal statute and harmfully affecting the rights and interests of people generally throughout the state, when committed by a corporation engaged in the public service, is a public wrong which may be enjoined by the supreme court in an original suit in equity wherein the state is plaintiff.
2. **Lotteries.** Under the Constitution of Nebraska, the legislature is without power to authorize a lottery.
3. ———. A lottery or scheme of chance of any kind or description, by whatever name, style or title, is unlawful.
4. ———. Gambling or betting in the form and substance of a lottery is unlawful and punishable as a lottery.
5. **Gaming.** The statute creating the state racing commission does not authorize the *pari-mutuel* system of betting in connection with horse races.
6. ———. The state racing commission is without power to permit betting or gambling at horse races.
7. ———. The *pari-mutuel* system of betting on horse races, when in actual operation, is a game of chance, a lottery, likewise gambling, and is unlawful.

Original suit to enjoin defendant from conducting an unlawful betting scheme. Motions to vacate restraining order. *Motions overruled and preliminary injunction granted.*

C. A. Sorensen, Attorney General, Irvin A. Stalmaster and *E. B. Perry,* for plaintiff.

Mullen & Morrissey, Herman Aye and *Gaines, McGilton, Van Orsdel & Gaines,* for defendant.

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

ROSE, J.

This is a suit in equity brought originally in the supreme court by the state of Nebraska on the relation of the attorney general, plaintiff, for an injunction preventing the Ak-Sar-Ben Exposition Company, defendant, its agents, officers, servants and employees from conducting a game of chance, a lottery and an unlawful betting scheme by means of the *pari-mutuel* system, or otherwise, in connection with horse racing at the Ak-Sar-Ben race track in Omaha, Douglas county.

The petition, in substance, contains pleas that defendant, among other things, was incorporated to promote and conduct expositions, stock shows, fairs, horse races and other forms of public entertainment, without private gain, the races being under the supervision of the state racing commission; that defendant is advertising and unlawfully operating in Douglas county in connection with horse racing the game of chance and the gambling scheme known as the *"pari-mutuel"* system; that in so doing defendant has violated its charter and the Constitution and statutes of Nebraska and induced thousands of persons throughout the state to attend defendant's races and risk large amounts of money in betting and gambling, thus maintaining a public nuisance and causing the participants in those offenses to violate the law; that minors are permitted by defendant to engage in the betting and gambling and actually participate therein; that thousands of persons throughout the state who cannot afford it are induced and encouraged by defendant to play the game of chance involved in the *pari-mutuel* system operated by defendant and thereby lose large sums of money; that participation therein tends to demoralize the winners and to impoverish the losers; that indi-

vidual prosecutions would involve the state in a multiplicity of suits and would not prevent the lawlessness and nuisance described; that the state is without any adequate remedy at law. The *pari-mutuel* system operated by defendant is described in the petition as follows:

"That the said *pari-mutuel* system is an illegal and unlawful betting and gaming scheme, and by the said defendant used for that purpose, and in the use thereof, the said defendant receives money from patrons at its races, who pay the same to the defendant and the defendant receives said money in the purchase of tickets issued through said *pari-mutuel* machine designating specific horses taking part in such race meets, and the holder of such ticket receives after the conclusion of the race bet upon a sum of money evidenced by such ticket which depends entirely upon the result of such race between the horses entered in said race; that after issuing to the party purchasing such a ticket and registering the same, the defendant after the race, pays out an amount of money for said ticket to the purchaser thereof depending on the result of such race between the horses entered in said meet; that during the race meet now being conducted by the defendant, large amounts of money, the exact sum being at this time unknown to the plaintiff, have been bet, gambled, hazarded and lost as the result of the races between said horses carried on through the system of the *pari-mutuel* machine; that said *pari-mutuel* machine is a system of betting, wagering and gambling under which all of the money received by the defendant and bet upon the races as aforesaid is thrown into a common pool and is distributed at the conclusion of each race among the bettors backing the winning or victorious horse; that under said *pari-mutuel* system bettors purchase tickets at booths upon the premises of the defendant and elsewhere which tickets are registered not only as to the total number sold but also as to the total number sold on the particular race for which such ticket is issued; that under this system the bettors make the odds which vary according to the amount of money in the pool thus created and the number of tickets sold on

the winning horse; thus the greater the pool and the smaller the number of tickets sold on the winning horse, the larger are the winnings of the bettors; that all losses or winnings under said system are dependent wholly and solely upon chance—outcome of the horses participating in said races and the number of persons betting on the winning horse."

The petition contains the further plea that the law under which defendant claims the right to conduct the *pari-mutuel* system of betting and gambling is embodied in the act of 1921 creating the state racing commission and containing the following provisions:

"Any association or corporation, person or persons, or the owners of the horses engaged in such races, or others may contribute to purses or funds that shall be distributed on the basis of the result of the races, or prizes or stakes that are to be contested for, subject to the rules and regulations as fixed by the commission governing such contests. The intent and purpose of this act is that all horse racing held in the state shall be subject to the rules, regulations and control of said state racing commission." Laws 1921, ch. 159, sec. 3; Comp. St. 1922, sec. 194.

The petition is positively verified. In addition there are two affidavits describing the practical operation of the *pari-mutuel* system as conducted by defendant and as pleaded by the state. One of the affiants stated in substance that, pursuant to invitation under the system, he purchased for $2 from an agent of defendant, on its premises, a ticket representing a race horse and received in return after the race $122.50, and that he saw several hundred people, among them young men and young women under 20 years of age, purchasing similar tickets.

On the petition and the additional showing outlined the state applied to the supreme court for a restraining order which was allowed June 10, 1929. Defendant and the state racing commission promptly attacked the restraining order by motions to dissolve it. These motions were argued in open court at great length June 17, 1929. Should they be sustained? This was the question for determination.

The original jurisdiction of the supreme court is invoked by the state under the principle that a wrong arising out of repeated violations of a penal statute and harmfully affecting the rights and interests of the people generally throughout the state, when committed by a corporation engaged in public service, is a public wrong which may be enjoined by the supreme court in an original suit in equity, wherein the state is plaintiff. Const. art. V, sec. 2; *State v. Pacific Express Co.*, 80 Neb. 823; *State v. Adams Express Co.*, 85 Neb. 25; *State v. Chicago, B. & Q. R. Co.*, 88 Neb. 669.

At the hearing on the motions to dissolve the restraining order defendant did not deny the charge that it conducted the *pari-mutuel* system of betting at its races but on the merits of the controversy boldly advocated the propositions that it is authorized by statute to do so, and that there is no law of Nebraska to the contrary. The solution of the problems submitted requires an interpretation of the statute creating the state racing commission and the laws relating to lotteries and gambling.

The public policy of the state as declared by the people in constitutional and legislative provisions throws light on the purpose and meaning of statutes relating to lotteries and gambling. There was a time when lotteries were tolerated as a means of raising public revenue, and when they were conductd for private gain, but in Nebraska the demoralizing influence of those evils was deemed to be of such magnitude as to call for the following constitutional prohibition:

"The legislature shall not authorize any games of chance, lottery, or gift enterprise under a pretense, or for any purpose whatever." Const. art. III, sec. 24.

The statute relating to the same subject is in the following language:

"Whoever opens, sets on foot, carries on, promotes, makes or draws, publicly or privately, any lottery or scheme of chance, of any kind or description, by whatever name, style or title the same may be denominated or known; or by such ways and means exposes or sets to sale any house or houses,

lands or real estate, or any goods or chattels, cash or written evidences of debt, or certificates of claims or any thing or things of value whatever, shall be fined in any sum not exceeding five hundred dollars." Comp. St. 1922, sec. 9818.

Gambling is in the same category. It attracts young and old to places of idleness, where valuable time and fruits of honest endeavor are lost. It deprives legitimate industry of profitable service and lessens individual rewards therefor. The lure of profits that are out of all proportion to investment or service impairs the initiative essential to the highest development of ideal citizenship. It tends toward crime and increases the burdens of law enforcement—burdens that fall on the people generally throughout the state.

The legislature understood the evils and the public and private wrongs and injuries resulting from gambling and enacted laws to avert them. Statutes providing penalties are directed against playing at games; betting; gambling on private premises; gaming at public houses; gambling generally; keeping gambling fixtures; keeping gambling room; common gambler; enticing minors to gamble; keepers of public house or nine-pin alley; betting on elections; three-card monte; bucket-shops; gambling contracts. Comp. St. 1922, secs. 9799-9817.

In operating the *pari-mutuel* system in connection with the races is defendant amenable to the statutes against lotteries and gambling? It is argued that the statute creating the state racing commission authorizes the course pursued by defendant. That part of the statute authorizing contributions to funds to be distributed on the basis of the result of the races is pleaded in the petition and is as follows:

"Any association or corporation, person or persons, or the owners of the horses engaged in such races, or others may contribute to purses or funds that shall be distributed on the basis of the result of the races, or prizes or stakes that are to be contested for, subject to the rules and regulations as fixed by the commission governing such contests." Laws 1921, ch. 159, sec. 3; Comp. St. 1922, sec. 194.

Defendant's interpretation under the rules of the state

racing commission permits distributions of the fund in the pool to the winning holders of two-dollar tickets or certificates, less a percentage retained by defendant to pay prizes awarded to the owners of horses that win the races. In this connection it was stated in open court that the races could not be continued without the money so retained. Defendant's construction of the statute is untenable. Though distribution is authorized "on the basis of the result of the races, or prizes or stakes that are to be contested for," the statute does not say that funds in the pool shall be distributed among contributors who win bets on the races. So construed, the language used by the legislature would sanction the *pari-mutuel* system which, in practical operation, as hereinafter explained, is both a lottery and a method of gambling in public on an extensive scale. Such a purpose should not be imputed to the lawmakers by the construction of language not so providing. The better interpretation is that the funds to be raised and distributed for prizes or stakes are intended as rewards for the owners of horses that win and not for the winners of bets on the races. In this view the act is valid instead of unconstitutional, as it would be if the interpretation of defendant were adopted. The spirit and the purpose of the enactment, when considered as a whole, are at variance with lotteries and gambling. The purpose of the act is disclosed by the first section, which follows:

"That for the purpose of promoting the breeding of horses in the state of Nebraska, any association or corporation having for its purpose an improved breed of horses, or that is incorporated for the purpose of holding annual fairs or exhibits of agriculture and industrial products, and live stock, shall have the power and the right, subject to the provisions of this act, to hold one or more race meetings in each year, or to maintain and conduct trotting, running, pacing and walking races at such meetings." Comp. St. 1922, sec. 192.

The words "prizes" and "stakes," as they appear in the statute, were not used in the sense in which they are ele-

ments of lotteries and gaming. In the law creating the state racing commission they mean the prizes or awards honestly and lawfully won by exhibitors, contestants and owners of horses at fairs, expositions and stock shows generally. The legislature had in mind lawful methods of raising funds for legitimate prizes. A percentage of the proceeds of lotteries and gambling for unlawful purposes was not authorized. Horse racing, having been legalized in Nebraska, is not now of itself a game or gaming within the meaning of the laws relating to lotteries and gambling, as held by courts in many jurisdictions. The right of defendant to conduct the races themselves is not questioned by the state. The injunction sought is aimed at the *pari-mutuel* system in connection with the races.

It is the unanimous opinion that the statute upon which defendant relies does not authorize the *pari-mutuel* system or any other form of unlawful gaming, lottery or gambling.

Is the position that defendant is not violating any law of Nebraska well taken? The term *"pari-mutuel"* is rapidly acquiring a definite meaning in common parlance, in criminal law and in judicial opinions. It has been defined by lexicographers and law text-writers as a system of gambling, other names for the same thing being "French Pool" and "Paris Mutual." 27 C. J. 987, sec. 99, notes 13-15.

The *pari-mutuel* system operated by defendant, as disclosed by the petition of the state, was recently described in a notable case as follows:

"When a group of persons, each of whom has contributed money to a common fund and received a ticket or certificate representing such contribution, adopt a horse race, the result of which is uncertain, as a means of determining, by chance, which members of the group have won and which have lost upon a redivision of that fund, each contributor having selected a stated horse to win such race, the redeemable value of the certificates so obtained and held by the contributors to such fund being varied or affected by the result of such race, so that the value of some is enhanced, while that of others is reduced or destroyed, the

original purchase price of all having been the same, those who chose the winning horse being paid, from the fund so accumulated, more than they contributed thereto, by dividing amongst them the money contributed by those who chose losing horses and who therefore receive nothing, that process constitutes a 'game of chance;' and those who buy, sell, or redeem such certificates, for the purposes and in the manner stated, are 'engaged' in such game within the contemplation of sec. 5639, Rev. Gen. Stat. 1920. The acts just outlined also constitute 'gambling' as defined and prohibited by sec. 5514, Rev. Gen. Stat. 1920." *Pompano Horse Club v. State,* 93 Fla. 415, 52 A. L. R. 51.

A skillful annotator, commenting on that decision, said:

"That the conducting of the sale of certificates under the *'pari-mutuel'* betting plan, as described therein, constituted engaging in a game of chance, and likewise gambling, is in accord with the weight of authority on this precise point."

The cases so holding are collected and analyzed in the annotation. *Pompano Horse Club v. State,* 52 A. L. R. 74, 75.

In the Constitution and statute the word "lottery" is used in its popular sense. A definition in the language of the law reads thus:

"Where not otherwise defined by statute the word 'lottery,' whether coming up for construction in a criminal prosecution or in a civil proceeding, cannot be regarded as having any technical legal signification different from the popular one, and it is, therefore, a species of gaming, which may be defined as a scheme for the distribution of prizes or things of value by lot or chance among persons who have paid, or agreed to pay, a valuable consideration for the chance to obtain a prize." 38 C. J. 286, and cases cited.

In *State v. Nebraska Home Co.,* 66 Neb. 349, a lottery was defined as follows:

"A scheme whereby a common fund is to be produced by the contributions of various parties, and afterwards distributed among the parties contributing thereto, and a valuable preference or privilege in the distribution thereof is made

to depend upon chance, is a lottery within the meaning of our statute prohibiting lotteries."

A machine or mechanical device for distribution of prizes, funds or property is not a necessary part of a criminal lottery and the prize may be anything of value. It need not be a definite amount of money. *State v. Nebraska Home Co.*, 66 Neb. 349. In *pari-mutuel* betting a loser pays for a ticket the same as the winners, but gets nothing from the pool to which he contributed, while the winners take the entire fund, less the percentage retained by defendant. The ticket serves no purpose as a means of admission to the race track. Discussing the element of chance in a lottery, Judge Wellborn once said:

"No man * * * would ever devise or promote a scheme whereby persons are invited to raise, by voluntary contributions, a fund solely for the purpose of redistribution among themselves, unless to each there was offered a chance of getting back something more than he contributed." *United States v. Fulkerson*, 74 Fed. 619, 628.

The supreme court of the United States quoted with approval the Century Dictionary's legal definition of lottery as follows:

"In law the term 'lottery' embraces all schemes for the distribution of prizes by chance, such as policy-playing, gift-exhibitions, prize-concerts, raffles at fairs, etc., and includes various forms of gambling." *Horner v. United States*, 147 U. S. 449, 458.

That a criminal lottery includes *pari-mutuel* gambling is shown by the constitutional and statutory provisions quoted as well as by the great weight of authority. *Pompano Horse Club v. State*, 93 Fla. 415, and cases collected by the annotator in a note following the report of that case in 52 A. L. R. 74.

The *pari-mutuel* system of betting and gambling on horse races, as operated by defendant and shown by the petition, contains every element of a criminal lottery—consideration, chance, price, means of disbursement. The contentions of defendant that there is in Nebraska no statute against

betting on horse races and that defendant is violating no law, are, therefore, wholly without merit. When betting and gambling are conducted in the form, substance and livery of a criminal lottery they are unlawful and those who conduct them are amenable to the statute forbidding and penalizing lotteries. Neither the legislature nor the state racing commission had power to authorize defendant to operate a lottery in the guise of betting and gambling, or in any other form.

Having reached the conclusion, after mature deliberation, that the *pari-mutuel* betting plan operated by defendant, as shown by the petition and by admissions in open court, is an unlawful lottery and a method of gambling, it is unnecessary, in ruling on the motions, to discuss the question as to whether defendant independently of the lottery statute, violated the laws relating to games and gaming, gambling and betting. For the same reason the charge that defendant maintains a nuisance is not now considered.

Defendant's counsel, with exceptional skill and vigor, presented the further point that the supreme court, though having jurisdiction, should vacate the restraining order herein and abate or dismiss this proceeding out of deference to the district court for Douglas county where a prior action involving the same questions is pending. A transcript of the proceedings in that case was received in evidence and it shows in connection with the record herein that Honorable James M. Fitzgerald, as a judge of the district court for Douglas county, granted a restraining order to prevent the attorney general of the state from interfering with defendant's method of raising money by means of the *pari-mutuel* system of betting on horse races. On the other hand it was earnestly contended that the district court did not have jurisdiction to restrain the attorney general. Under the circumstances it is deemed unnecessary to decide this point as an interlocutory matter.

Motions to vacate restraining order overruled and preliminary injunction allowed.

Note—See Lotteries, 38 C. J. 293 n. 72, 302 n. 88, 303 n.

91; 52 A. L. R. 74; 12 R. C. L. 721; R. C. L. Perm Supp. 3171.

RICHARD W. BOURNE V. STATE OF NEBRASKA.

FILED OCTOBER 3, 1929. No. 26644.

Homicide: SUFFICIENCY OF EVIDENCE. In this proceeding the only ground of error assigned and argued is that the verdict and judgment are not sustained by sufficient evidence as to the guilt of the defendant of murder in the second degree. Evidence examined and reviewed, and *held* to sustain the verdict and judgment.

ERROR to the district court for Dawes county: WILLIAM H. WESTOVER and EARL L. MEYER, JUDGES. *Affirmed.*

M. F. Harrington and *George M. Harrington*, for plaintiff in error.

C. A. Sorensen, Attorney General, Lloyd Jordan and *W. A. Prince, contra.*

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

GOSS, C. J.

This is the second review of this case. The defendant was convicted of murder in the second degree on his first trial. We reversed the judgment and remanded the case for a new trial. *Bourne v. State*, 116 Neb. 141. He was again convicted of murder in the second degree and again prosecutes error.

The information was filed in Sheridan county and the first trial was held there. On application of defendant a change of venue to Dawes county was allowed and the second trial took place in the latter county.

The brief on behalf of defendant does not comply fully with our rule requiring the errors discussed in the brief and relied on for reversal to be printed in the statement of the case. No formal assignment of errors appears there. The statement of the case leaves us to infer that the de-

fendant relies for reversal on the insufficiency of the evidence. This is supported by the fact that almost the entire brief of 81 pages is devoted to printed portions of the evidence. There is no specific claim in the brief that the court erred as to instructions given nor as to instructions refused. There is no direct assertion that the court erred in rulings on evidence, except perhaps as to insurance on the life of the deceased. The main contention of the defendant seems to be that the evidence was insufficient to support the verdict. We shall review the facts as if such assignment were duly made.

The information was drawn in the old-fashioned and involved way much in vogue prior to *Nichols v. State*, 109 Neb. 335. In that opinion a brief form of information for murder in the first degree was set out. Prosecutors will find it helpful to use it as a model.

The information in the instant case charged, in effect, that in Sheridan county, Nebraska, on October 8, 1925, the defendant, R. W. Bourne, feloniously, purposely, and of his deliberate and premeditated malice, shot Ferris C. Westervelt with a shotgun and as a result thereof Ferris C. Westervelt died on said day; and that the defendant thus committed murder in the first degree.

On the former appearance in this court, the cause was reversed chiefly on three grounds: First, that the evidence of motive, in relation to insurance on the life of deceased in favor of defendant, was insufficient, and the court should have given a requested instruction withdrawing such evidence from the jury's consideration; second, that the court erred in refusing and failing to instruct as to the manner of considering verbal statements or admissions attributed to the defendant by witnesses for the state; and, third, that the court erred in not instructing the jury as to the law inherent in the crime of manslaughter. There was, too, an intimation that the first trial of the defendant was not entirely surrounded by that atmosphere of fairness, undisturbed by prejudice, passion or ill will, due in such a case. If any confirmation, other than the lack of errors

assigned by the defendant, were needed, it may be said that, although not required to do so, we have read the entire record and find therein that both court and counsel appear to have conducted all phases of this trial with meticulous regard for the legal rights both of the defendant and of the people of the state of Nebraska.

The former opinion did not undertake to analyze the evidence to determine its sufficiency to support the judgment of guilt, but only as to its bearing on the errors there assigned. But it so happens that the opinion gives a general picture of the movements of the actors in this tragedy, the geography involved, and the detailed relations of many outstanding facts much as they appeared in the second trial. So, in the interests of whatever brevity we may achieve, we refer thereto for the general aspects of the case; and in this opinion we shall refer to the evidence as it appears in the present record in so far as it may apply to the points we take up for consideration and in so far as the present evidence is new or was not stated in the former opinion.

There is no doubt (1) that Ferris Westervelt's death was proved and that it resulted from gunshot wounds received on October 8, 1925; (2) that his death was either accidental or a homicide; (3) that it occurred between the time he and defendant were seen at Rushville and the time they were seen at the Westervelt home—a space of perhaps less than half an hour; and (4) that, no other eyewitnesses being produced, defendant's version of accidental death must be accepted, unless the circumstances shown in the evidence are such as to justify beyond a reasonable doubt in the minds of the jurors their finding that the defendant killed Ferris Westervelt.

Those circumstances are: (1) The state of the gun and manner and type of the gunshot wounds; (2) the condition of the body at the time the defendant first announced the shooting in relation to the time defendant claims the shooting occurred; (3) the acts of the defendant at and about the time of the announcement of the shooting; (4) the motive for the killing, if any, deducible (a) from defend-

ant's financial condition, (b) from the insurance features of the evidence, (c) from the chattel mortgage feature, and (d) from his connection with the probate of the estate of the deceased.

There were so many witnesses that we shall not undertake to review the evidence in the order of the above named circumstances nor to develop any one point fully before taking up another. They are too interwoven to make that treatment feasible.

Ferris Westervelt was born at Tilden, Nebraska, January 26, 1901, and died October 8, 1925. When he was examined for life insurance June 25, 1925, the medical examiner certified on his written report that he was exactly 5 feet, 10⅜ inches tall and weighed (coat and vest off) 150 pounds. He was unmarried, worked out on farms as occasion offered, owned no lands or livestock and had no property except such as was for his personal use. He had a 16-guage, double-barreled L. C. Smith shotgun of the visible hammer type. When not working out he made his home with his parents, Mr. and Mrs. Jeffrey Westervelt, on a farm four and one-half miles north of Rushville. He had a younger brother and five younger sisters. Richard Wayne Bourne, the defendant, who is commonly called by his middle name, was about the same age as Ferris Westervelt. They were friends. Defendant lived at Gordon and was in the insurance and real estate business at Gordon, in the same county as Rushville. He was married to a cousin of Frank O'Rourk, and was a subagent under O'Rourk, who was general agent for the Old Line Insurance Company of Lincoln. O'Rourk had a desk in Wayne's office and transacted business there, where they used a safe in common.

The last time any of the Westervelt family saw Ferris alive was when Wayne called for him shortly before noon on October 7, 1925, and they started toward South Dakota in Wayne's Chevrolet roadster. They next saw him about 9 o'clock the night of October 8, dead, lying outside the gate in front of the house. This house fronts south, has six rooms with a porch extending along the front and to

some extent around on the east side. The house is located about 15 rods west of the north and south highway and is reached by a private driveway running west. There is a fence running east and west with a gate or opening directly south of the house and about 30 feet therefrom. The members of the family who were then at home had gone to bed about 8:30. The father and mother slept in the downstairs bedroom at the northeast corner of the house. Mr. Westervelt testified that it was their custom to sleep with their windows open except in bitter cold weather and this night was only chilly. He did not know whether their window was open or not, but the door between the bedroom and livingroom was open. Eunice Westervelt, then about 16, was sleeping in the northeast bedroom upstairs with her sister Myrtie, then about 9 years old. The east window of that bedroom was open. Verna was sleeping in the south bedroom upstairs with the window (on the east) open. The family were awakened about 9 o'clock at night by the defendant. Mr. and Mrs. Westervelt testified that they were aroused by the defendant, who opened the front door and called to them to come quickly, that Ferris was shot. Without dressing, the father ran out and found his son lying on his back on the ground with his head near the gate, his right arm down by his side, and his feet together reaching about to the right running-board of the car. The car faced west. Its lights were off. He testified that he did not think it was over half a minute, it was not over a minute, anyway, after Wayne called before he was there and touched his son's body; that he first felt of his right hand and then laid his hand on his son's face; that they were cold and clammy, and that he neither saw nor could feel any twitching of the eyelids or muscles of the face. He had Eunice and Wayne carry the body in and it was laid on the bed he and his wife had been using. When found, and while on the bed, Ferris was clothed as one would be when riding on a chilly night. He had on over his regular coat an unlined overcoat made of so-called reversible cloth of rather close weave. The blood from his wounds did not

pass through it to any great extent, as shown by the testimony of witnesses and by the overcoat, which is before us; and the blood on the coat seems to have come only from the wound on the right side of his body. On the inside of the coat on that side is a bloodstain that can be covered by two hands and on the outside is a bloodstain that can be covered by one hand. These appear on that part of the coat that covered the back of his right shoulder and evidently ran from the entrance of the wound below his right clavicle. While he lay on the bed awaiting the undertaker, the blood from this wound made such spots on the bedding as would naturally follow from what blood would seep through the overcoat at the point on the back of the shoulder. The other wound was under the left arm, approximately as high as the left nipple. When the undertaker arrived about 10 o'clock, he removed enough clothing to examine the wound and the chest. The evidence is somewhat confused, but it would seem to indicate, though not definitely, that while at the home the undertaker removed all the clothing, probably after taking the body from the bed. He testified that the bleeding had been internal and the thoracic cavity was full of blood; there was little blood on the outside of the body except below one of the wounds (which one was clear to the jury but not to us, as we cannot visualize the place indicated on the counsel's body by the words "about in there"). No blood from the wound on the left side left any perceptible stain on the overcoat. His other clothing received and absorbed considerable blood according to the testimony. A neighbor took home and burned the feather bed and a blanket and the undertaker burned the clothing after taking the body to Rushville to prepare it for burial.

Eunice Westervelt testified that she was sleeping in the front room upstairs, with the east window open, and did not hear the car drive in, nor did she hear any shots; the first thing she heard was the defendant calling something at the door; shortly her mother called that Ferris was badly hurt and within three minutes she was downstairs, and then her father asked her to help defendant carry her

brother in, which she did; she describes the position of her brother's body much as her father did and says there were no indications of life in the body; as soon as they laid the body on the bed her father directed her and defendant to go down in Wayne's car to Carl Johnson's to get her brother Will; she saw no gun; they got in the car and he turned on the lights and drove to Johnson's house, some distance south, and drove east up to the house along a lane that is fenced to within 25 or 30 feet of the house, where there is a gate; she got out of the car, went back of it, and then up to the porch, leaving defendant sitting in the car; as she went back of the car she placed her hand on it and there was no gun there; the car was facing east and seven or eight feet from the gate; she got her brother and as she got out to the car Wayne was coming from behind it; all got into the car and drove away; that on the way down she had asked defendant how the shooting had happened and he said that, when he and Ferris stopped at the house, Ferris got out and he sat in the car talking to him as usual; that "Ferris reached in to get the gun and the gun in some way became entangled in the robe and fired once, and he saw Ferris was going down so he got out as quickly as he could on the south side of the car, or left hand side of the car, and ran around the back of the car, and when he got there he put his arm under Ferris to support him; and as he did that the second shot went off and he was burned on the finger at that time."

Will Westervelt, the brother, aged 23, testified that, when he and Eunice came from the Johnson house to get into defendant's car, the defendant was standing on the south or right-hand side of the car and that the defendant got into the car from that side and then took the driver's seat on the left-hand side; the witness did not see any gun in or around the car; when defendant turned the car around in the yard "the car was facing east and he turned to the south, and I should say it wasn't more than 125 feet, the circle, or half circle he made to get turned around to the

west;" that the next day Wayne described to him how Ferris was shot, but told him only about one shot.

Elmer Johnson, a cousin of Carl Johnson, was staying on one of his cousin's places three miles north of Rushville and heard of the shooting the night it occurred; he went up to Carl Johnson's home the next morning about 5:30; the house is about 40 rods east of the main road; he had heard that the gun could not be found and he went to look for it, as he had been at the Westervelt home the night before and heard that the gun was laid on the back of the car and might have dropped off when they went after Will; he testified, on direct examination, that he found it about 100 yards south of the Carl Johnson house and testified later in the trial that he found it 200 or 300 feet from the gate.

Jeffrey Westervelt, the father, testified that the defendant did not tell him the way in which the shooting happened until after Will had been brought home. Then "he told me that he and Ferris were standing beside the car and one of them, he couldn't tell which, reached in the car to get the gun, and as it was pulled out it was discharged, and he said there were two shots fired so close together he could hardly distinguish but one report."

Clyde Pace, a theatre manager of Gordon, called by telephone by defendant and told that Ferris had shot himself and asked to come and bring some one to drive defendant's car back, got Albert Austin, and also took defendant's wife to the Westervelt home and returned with defendant and wife in the car of witness. He testified that after they got back to Gordon, in front of the house of defendant's mother-in-law, the defendant told him how the shooting occurred. "I don't remember whether he said he was standing out of the car or not, but he said Mr. Westervelt was pulling the gun out and it went off, and he ran around the car. I don't remember whether he got out of the car or not, but I remember him saying he ran around the car and picked him up, and he said he was making a kind of gurgling noise with his mouth and then the gun went off again."

Albert Austin drove the other car to Gordon and was present when defendant told how the shooting occurred. He related it on direct examination as follows: "Well, he said they stopped up there in the yard and Ferris got out and was pulling the gun towards him, and he was going around back of the car when the first shot occurred, and he ran around and picked him up, put his arms under his arms and picked him up, and the gun fell across to one side and went off again." On cross-examination the witness testified the defendant said that when the gun went off the second time he was shot in the finger. There was a blanket on the seat of defendant's car and a fur robe on the ground at Westervelt's. Witness drove the car to Gordon. There were two or three little smears of blood on the windshield, some on the instrument board, and a little on the gearshift lever, such as might be made by a bloody finger. There was no blood noticed by witness on the blanket or car otherwise than above.

R. M. Bruce, the sheriff, testified that, after his arrest, the defendant told him he was going around the front end of the car as the first shot went off and Westervelt began to go down "and run in back of him and put his arms under young Westervelt and about the time he did that the second shot went off, * * * and he said that was when he got his finger powder-burnt or shot. I asked him what he done then and he said Westervelt continued going down and he just laid him down and went in the house and called Mr. Westervelt, or called the family. And a little later I asked him if he knew what was done with the gun, and he said he picked the gun up, took the shells out and went and laid it on the back of the car. * * * Later on I asked him about the shells, and he said he put the shells in his pocket. * * * He said later on, down at Gordon one day, he got out his raincoat or light coat, and he had taken the shells out and burnt them."

The defendant did not take the stand on the first trial, but he testified on this, the second trial. Evan J. Furman, a witness for the state, had testified that he had sold the

Chevrolet roadster, model 1925, to defendant; that the back of the car slopes and is practically smooth; that about 7 o'clock on the night of October 8, 1925, he had fixed a burnt-out fuse for the car at his garage at Gordon and defendant and Ferris Westervelt left in the car; that he noticed a gun between defendant, who was driving, and the left-hand side of the car. Defendant testified that the gun was carried in the car between him and Ferris and that he doubted if he could operate either the clutch or the steering wheel with the gun between him and the door at his left. He thinks it was about 9 o'clock when they left the front of the theatre in Rushville, where he had driven so Ferris could see the time by his watch; they then went to the Westervelt home; that he got out of the car on his side first, and the gun which was between them and had been leaning on him slid over towards him and one or the other of them pushed it back towards the middle of the seat, and that this is what he told the father; he got out of the car on his side, walked around back of the car, got the rubber boots, gun-belt and cap, took them out of the car and threw them down by the gate and stepped up to where Ferris was taking the gun from the car; the fur robe was over the gun. "Well, I had stepped up just back of Ferris, a little bit to the left of him, when there was an explosion of the gun, and I remember seeing the flash. * * * Just a flash of light shone over his shoulder. * * * That was the first shot? * * * Well, he kind of crumpled, and I grabbed him."

"Q. I wish you would take hold of me the way you took hold of Ferris Westervelt that night after you saw the flash over his left shoulder. A. I was standing in this position (indicating), and I saw this flash against the side of his face, against the collar of his coat, and when he started to crumple I grabbed him and spoke to him (grabbing Mr. Harrington under arms). Q. And what happened then? A. Well, there was a sort of gurgling sound in his throat, and as he went down why there was another explosion from the gun. Q. What happened to you? A. Well, I remember

there was a sharp pain in my finger. Q. Which finger? A. My right index finger; and I spoke to Ferris again, and there was no answer, and I laid him back down by the car. Q. How long did you remain there with him and speaking to him, trying to talk to him? A. Well, I couldn't say. I was there a minute. I spoke to Ferris, called to him, and shook him. Q. Did he respond in any way? A. No, sir. Q. Then what did you do? A. I run into the house and called the family. Q. Who was the first person you managed to arouse? A. I think it was Mr. Westervelt that answered first. Q. And then after a bit did he come out? A. Yes, sir; I went back to the body where Ferris was lying, and in a minute Mr. Westervelt came out."

The defendant further testified that "the body was laying practically horizontally with the car. (He probably means at right angles, though at another place he says it was "parallel.") The gun was laying about such an angle as this (indicating), and when I knelt down besides the body I kicked the gun over towards the car with my foot." He says that later, before going for Will, he broke the gun, took out the shells and put them in his pocket, and laid the gun on the sloping back of the car, but on which he says there was an iron key extending two or three inches up from the keyhole of the rear compartment, and back of the car was a tire carrier with a spare tire; that the gun could not have slipped off the car at the rear, but would have had to fall off one side or the other on the trip to the Johnson place; that defendant did not put the gun where it was found in the Johnson yard; that he wore gloves that night, the one on his right hand was torn by the shot and was wet with blood, and after the excitement subsided he took it off and put it in the cookstove at the Westervelt home; a day or two afterwards he felt the shells in his overcoat pocket and threw them in the stove at his mother-in-law's home; that the blood in the car came from his right index finger; and that that finger was treated for three weeks or longer.

The body of Ferris Westervelt was buried at Tilden,

Nebraska. In March, 1926, it was exhumed and an autopsy was there performed by Dr. Perry Allerton and by Dr. C. C. Barr of Tilden, in the presence of the late Judge Edmunds, then county attorney, and of Sheriff Bruce of Sheridan county. A photographer also took two pictures of the body, which are in evidence, one before the examination and the other afterwards. In the second picture small sticks were inserted in the gunshot wounds to indicate the place of entrance and the course of the wounds. They aid in making clear the testimony of the doctors that the left shot entered about the anterior axillary line, level with the fifth rib, extending upward and backward and lodging at about the second dorsal vertebra; the right shot entered below the clavicle about four inches above the right nipple and extended inward and perhaps a little downward to a point near the second dorsal vertebra about an inch and a half from the termination of the other shot. Both wounds terminated about an inch from the back surface of the body.

The overcoat which is before us shows that it was not touched by the shot which entered the left side of the body, but that the shot which entered the right side made a hole less than an inch in diameter. This coat is burned or powder-marked around the hole over a circular area of probably two inches in diameter. The coat collar was turned up when the wearer was shot, because, when the collar is down, the hole made by the shot is covered by that part of the collar below the notch on the right lapel.

Dr. Perry Allerton of Tilden assisted his partner, Dr. C. C. Barr, at the *post mortem*. He testified: The wounds both touched the lungs; the lungs were collapsed; more tissue of the left lung was collapsed than of the right because the wound entered lower; the left wound was undoubtedly fatal; there must be some slight external bleeding from the right wound, not much from the left; from the two wounds the man would die in a very short time, a few minutes, 10 or 15 minutes. We say a person is alive when we can feel his pulse; there might be an involuntary movement; he might be able to throw his arm up. There

might have been a shot or two in the aorta, but it was not severed; the course of the shot was not near the vagus, cardiac or phrenic nerves.

Dr. C. C. Barr testified that the spinal cord was severed at the level of the second dorsal vertebra; after that severance there could be no conscious motion below that point; the arms would have partial motion; the left wound would cause death in a few minutes; there might be voluntary motion above the wound, as the turning of the head or the movement of the arm, and possibly below there would be twitching or involuntary movement; the aorta, which is an inch or an inch and a quarter wide, was punctured by a "bullet" or "bullets" (meaning "small shot"); the subject might live 5 to 15 minutes, that is, there might be evidence of life that long.

Dr. Broz, of Rushville, was called to the Westervelt home and arrived there between 9:30 and 10 o'clock October 8. He examined the body of deceased; *rigor mortis*, which sets in from two to six hours after death, had not set in and the body was still warm under the clothing; he was the only doctor who examined the body before interment; he described the external wounds and such evidences as he derived by slight probing with his finger; powder burns around the wounds indicated that the gun was held close to the body; he found what appeared to be a powder burn on the index finger of defendant's right hand; he treated it, gave defendant "a shot of anti-lockjaw serum" and told defendant to see his doctor at Gordon; the witness remembers blood on the underclothing and clothing of the deceased; with such wounds there would be little external bleeding.

Dr. Overmass of Gordon treated the finger wound for several weeks; it was a slight wound, about the size of half a white bean cut in two.

On this trial two witnesses from South Dakota were called by the defendant. They testified that at about the hour when defendant appeared at the Westervelt home and aroused the family they were replacing a tire on their car

on the road about "five miles" north of Rushville. George Deemer, one of them, testified that he knew the Westervelt place well and that they stopped about 9 o'clock to change their blown-out tire about 200 yards east and a little north of the home. He and his brother-in-law, Jerry Soles, were there probably 20 or 25 minutes. While there a car, with lights on it, came to the Westervelt home. They did not pay any attention to it, but after it stopped they heard two shots "close together." On cross-examination he said he had heard that was where the Westervelts lived "because Charlie Rush had owned that place." The shots came from the southwest. The only way they could judge the distance of 200 yards was by the sound. Jerry Soles testified to hearing the two shots. He learned about the death of Ferris the next day in Gordon. He never told about the incident until now because no one asked him. On cross-examination, at first he maintained that the first man he told it to was defendant's counsel, but after considerable equivocation he answered that he had first discussed the matter with Frank O'Rourk.

Jeffrey Westervelt, on rebuttal, testified that Charlie Rush's place was a mile north of his place; that so far as he knew his place had never been known as the Rush place, and that a search of his abstract of title did not show that Rush had ever owned it.

The shotgun was in evidence. As described in our former opinion: "The right hammer of the gun is defective, and it was this hammer that the deceased had riveted and repaired, long prior to the evening in question." However, under the evidence in this trial, the jury would be warranted in finding that defect has no influence on the firing qualities of the gun.

In his opening statement for the state, Mr. Prince said: "The gun has a safety-lock device by which you cannot fire that gun by any jar, unless some man has hold of the trigger of that gun." Following is an abstract of the testimony of the state witnesses relating to the gun:

E. F. White, of Chadron since 1899, handles firearms.

The week before the trial he examined lock to see that it was not defective; says it is not defective; standing in front of the jury, explains the mechanism of the gun and states to the jury that you can raise the hammer from half-cock position back to the full-cock position, "but in no way can you let the hammer go to the firing pin without pulling the trigger." Witness removes barrels from stock and removes locks; explains to the jury, in answer to a question, "Why you say it cannot be fired that way;" and the locks are passed to the jury for examination; witness testifies that on last Friday night, at the request of Mr. Jordan, county attorney, he made a test of the gun, and again on Saturday made another test, in the presence of McNeff, deputy sheriff, Mr. Earlewine and Mr. Byerly; the test on Friday was made with Mr. Jordan present, over the hill north of Chadron about a mile and a half; the gun could be fired after raising the hammer by pulling the trigger only; they made 20 or 25 trials; then on Saturday, White, Earlewine, McNeff and Byerly went along the hillside north of Chadron and took several shells along and "tried in every shape, every manner we could think of, to discharge this gun without pulling the trigger" and it was impossible to explode a shell; they probably made a hundred trials, each man trying it; the little piece of one of the screws broken off the lock does not in any manner affect the mechanism of the gun; they tried with their thumbs, without using the trigger, and "drug it over the top of fence posts, and over a barbed wire, and we was unable in any manner to discharge the gun or even have the hammer snap;" in the opinion of the witness the hammer cannot be forced down on the firing pin without the trigger being pulled.

O. C. Earlewine, a resident of Chadron for 24 years, an undertaker, familiar with firearms, explains the action of the hammers, and that there is no way to discharge the gun unless something caught the trigger and pulled it off right; that you could strike the hammer, but you "would have to break that dog, and the chances are break the hammer, and then you would not fire the gun;" he partici-

pated with McNeff, White and Byerly in the tests and his evidence is about the same as that of White; but they could not discharge the gun in any way except by pulling the trigger.

B. L. McNeff, deputy sheriff at Chadron, participated in the tests on the Saturday before the latest trial, with about the same results detailed by the other witnesses.

Elmer Byerly, confectioner at Chadron, participated in the Saturday test before the latest trial, with the result that they were not able to discharge the gun without pulling the trigger.

E. F. White recalled, puts the gun together, produces two blank shells "unloaded, but with the caps on," draws the hammer back as far as he can and lets it go without touching the trigger, and releases the right hammer three times and does the same with the left hammer four times, removes the shells, and neither has been exploded; he expresses the opinion that the hammer cannot be forced down on the shells enough to explode it without pulling the trigger.

Jeffrey Westervelt, recalled for cross-examination, says that Ferris brought the gun home from the eastern part of the state somewhere. It was then a used gun. Witness also says that Ferris riveted one hammer on the gun at home. This was the right-hand hammer.

The above is all from state witnesses, and is believed to be all they have testified to relating to defects in the gun. The following is from witnesses for the defense on the same subject:

Charles H. Townsend, living south of White Clay, Nebraska, is familiar with guns; testified to two instances in which his own gun had gone off without pulling the trigger; he investigated and found the locks very dirty and interfering with the action of the safety springs; on one occasion, going over a fence, he struck one hammer on the wire and discharged one barrel of the gun.

John Baer, Chadron born and raised, precinct assessor, has had a Smith gun 14 years; his gun went off last fall

without pulling the trigger; some times guns go off when worn and sometimes if dirt, sand or anything else gets under the springs that hold the hammer back; in fact, he states that his old gun went off accidentally twice last year; he has one like the gun in evidence and another that is hammerless. (Comment: Here the gun is again taken apart and analyzed before the jury.) About the only difference between a hammer gun and a "hammerless" gun consists in the fact that in the latter the hammers are on the inside and on a hammer gun the hammers are on the outside.

Clarence L. Gibson, confectionary business, knows about firearms and safety devices; was one of the boys overseas; has a hole in his garage where his gun went off when he set it down on the floor, although the safety was on; this was a Fox, but is the same as a Smith; once was shooting at the traps and one of the guns went off from a similar cause; this was a hammerless gun but the safety was on.

J. H. Ewen, aged 63, Chadron, recently moved from eastern Iowa, was jeweler and gunsmith for 45 years, understands make of the L. C. Smith, Fox, Parker, Remington, and many other kinds, explains works to the jury; thinks Parker, Fox or Ithaca have a safer device than the Smith, considers "any gun dangerous; without lock, stock or barrel," never knew a shotgun made that did not go off accidentally under some conditions; sand, weeds, too much oil, dust and dirt accumulating in the oil and getting under the leaf and weakening them away from the bearing points are some of the causes; then a blow, or some such thing, can explode the cartridge; you can discharge a gun without ever pulling the trigger (indicating to the jury how the hammer can go past the notch with the safety on); has had his gun go off when he struck it on something; there is a hole in his ceiling right now; weeds can work through the stock into the lock and set off the gun just as the stick the witness used; the hammer gun is more likely to go off than the hammerless.

W. T. Wyckoff lives in Gordon, knew both boys, hunted

with them either the 26th or 27th of September, 1925, 25 or 30 miles south and a little east of Gordon; each had a gun, Ferris had one L. C. Smith double barreled (exhibit looks like it); it had a hammer loose that day and was kind of ricketty; it went off, one barrel after another, and Ferris said that when he pulled one trigger both barrels exploded; he said it was not working right and Ferris told him he might take it to shoot at a bird; he shot at a duck, pulling one trigger only and the first barrel set off the second one.

Ed Young lives in Bennett county, South Dakota, north and east of Gordon; Ferris and Wayne were at his place the day before Ferris died; owns an L. C. Smith hammer gun, which discharged "itself accidentally just riding along;" he had it laid across a saddle, riding along a creek.

It is not necessary to show motive for a homicide, but a motive is a circumstance which may be taken into consideration with other circumstances and evidence to be weighed in determining the guilt of one accused. The state undertook to prove a motive in connection with certain life insurance on the life of Ferris Westervelt and in connection with a note and chattel mortgage. In the former opinion it was held that the state had failed in its proof of motive in relation to the life insurance and that the court therefore erred in refusing to give an instruction, requested by the defendant, that the jury should disregard the evidence relating to the insurance policy in question. This holding was required by the evidence on that trial, the conclusion in regard to which was stated in connection with the holding in these words: "Therefore, as before concluded, it is clear that the defendant was without interest in the policy for $15,000, and could in no manner benefit by Westervelt's death, which fact he was cognizant of long prior, up to, and at the time of the death of deceased." It is just as true from the evidence on the later trial that the defendant could not take benefit from the policy, but the evidence in the instant trial so differs from that on the first trial that it is here an issue of fact as to whether defendant was cognizant of lack of beneficial interest in the insurance

policy. The $15,000 insurance policy is described and the evidence relating to it is stated in the former opinion much as it is shown in general in the evidence on the present trial. Not unduly to prolong the statement here, we refer to that opinion for the general statement. But on this trial the evidence as to defendant's knowledge and belief as to the situation relating to the policy differs materially from the evidence on the former trial, as will appear from the following:

Dr. Broz, local medical examiner, testified that he never examined deceased for insurance purposes but once and that was for the $2,500 policy; that the $15,000 entry on the medical report following the $2,500 item was not written by him, and that Ferris Westervelt and he never talked about a policy of that size. The state's evidence proved that the separate application for the $15,000 policy was signed in the handwriting of the deceased, and, after the state had spent considerable time in offering testimony to prove that the body of the application was filled out by other than his handwriting with particular reference to the "$15,000" and for the benefit of "creditors and partner" and "Balance to partner, R. W. Bourne," it was admitted, on behalf of defendant, that these items were all written by the defendant. It was the theory of the prosecution that Ferris Westervelt was procured to sign applications in duplicate, and that the one was used to apply for the $2,500 policy he intended to procure in favor of his mother and the other was used by defendant to procure a $15,000 policy about which deceased knew nothing.

The policy for $2,500 in favor of deceased's mother was written by the company, sent back and delivered. The company also wrote the policy for $15,000, making it in favor of the estate of Ferris Westervelt instead of to "creditors and partner" and returned it to O'Rourk, the general agent, with blank forms of assignment and with the explanation that it could not be made to such a beneficiary as named in the application. No assignment of the policy was ever executed. Mr. O'Rourk put the policy in the safe.

O'Rourk testified briefly in the present trial. We do not find anything in his testimony to indicate that the defendant ever saw the $15,000 policy before Ferris Westervelt was shot. The defendant, on cross-examination, admitted that he never examined the policy before the death and "never saw it until the next day or two after his death; possibly the next day." He testified that he had received a letter from the insurance company at the time the policy was issued, calling his attention to the necessity of an assignment, but he is unable to produce the letter. John G. Maher, of Lincoln, president of the insurance company, testified that it was the custom when such a letter about a policy was sent to a general agent to send a copy to the sub-agent producing the business, but he could not say whether such a letter had been sent to defendant. The insurer limited its risks to $5,000 and had reinsured the $15,000 risk.

Charles M. Rowan, of Chicago, an investigator for the Zurich Insurance Company, interested as a reinsurer on the life of Ferris Westervelt, testified that about November 10, 1925, he was directed by his company and came to Lincoln; went to the office of the Old Line Insurance Company and met Mr. Maher and later in the day met O'Rourk there; later that day they met by appointment in Omaha and he also saw and conversed with defendant that night at the Rome Hotel; that later he had a conversation with defendant at the Fontenelle Hotel about the insurance, and defendant told him he had never seen the policy until after the death of Ferris.

In addition to the state's claim of motive relating to life insurance, it presented evidence in relation to a chattel mortgage to secure a note for $1,500 and used by defendant as collateral security for a loan of $700 obtained by dedefendant from the American State Bank of Gordon. There was testimony from an officer of the bank that defendant, on August 10, 1925, first presented as collateral an unsecured note for $1,500, purporting to be signed by Ferris Westervelt. The banker asked for further security for the collateral note, as Ferris was not known to the bank or

known to be financially responsible. Defendant departed and on the same day returned with a chattel mortgage covering 193 hogs, purporting to be signed by Ferris Westervelt, to secure the $1,500 note maturing November 15, 1925; the money was loaned on the strength of the security and several times the officer of the bank talked with defendant about the note and mortgage; that, when the bank learned of the death of Ferris Westervelt, the defendant stated that he had been or would be appointed administrator and would sell the hogs and pay the note; later defendant said the hogs had been shipped and still later declared that some young man had the proceeds but never secured them; upon the bank looking into the matter it learned that deceased never had any hogs, and thereupon it received notice that if it would forward the note and mortgage to the Union Bank of Rushville it would be paid. The papers were so forwarded and the evidence shows the note and mortgage were paid to the Rushville bank by defendant's aunt. The papers were turned over to her, and upon the state demanding them at the trial it was admitted on behalf of defendant that they had been destroyed and could not be produced. A copy of the mortgage had been recorded. It showed that the defendant had inscribed as the only witness to the execution of the mortgage. When the bank was investigating the mortgage, it exhibited the original chattel mortgage to Jeffrey Westervelt, the father of deceased, and he examined the signature. He testified that in his opinion it was not the signature of Ferris. He thought the signature to the $1,500 note was that of his son; but testified that defendant never filed or made any claim against the estate of the deceased on account thereof. The state argues that motive for the murder lies herein because defendant wished to do away with proof of his forgery of deceased's name to a chattel mortgage on nonexistent property.

Also the state produced evidence that defendant asked to be and was first appointed administrator of the estate of deceased; in the petition for appointment he estimated the value of the property of the deceased at $2,500; there was

no such property and defendant knew the $2,500 policy of insurance was in favor of deceased's mother and could not pass through the estate; that Bourne never mentioned the $15,000 policy to the father; that some time after his appointment Bourne and O'Rourk came to the Westervelt home and one of them said, but both were present when it was said, that they were going to get at least $5,000, and "we are going to get $6,000 for you if we can, if we have to lie like the devil to get it." The state argues that defendant's scheme or plan was to get a settlement from the insurance company on the estate policy and surreptitiously conceal the bulk of it from the estate.

The foregoing covers the main features of the case, perhaps already extended beyond warrant in the telling. The question, whose answer we are to deduce, is whether there was sufficient evidence to submit to the jury and to support the verdict of guilt.

This is a law case. We are not permitted to try it *de novo* on the record as we do an equity case. It is not a question as to what we would have decided if we had been jurors. Society has committed the findings of fact to the chosen jury in such a case. The jury were properly instructed by the court as to their legal duties and as to the application of the law to the facts presented in the evidence.

The defendant took the deceased from his home alive and well and he restored him the night of the following day lifeless and voiceless. As the dead cannot speak, and as the guilt of the defendant must be proved by the evidence beyond a reasonable doubt, the only way to prove guilt generally is by the circumstances in the case. Yet when the defendant testifies, as he did here, and proffers an explanation, his testimony, weighed and tested in the light of the circumstances and of his personality and manner, may also aid the jury in discerning the truth.

The defendant testified that the deceased shot himself accidentally. It seems to us that the manner and type of the wounds is perhaps the strongest circumstance in the case to be considered by the jury as proving the case and

as impeaching the explanation of the defendant. The wound under the left arm and the wound on the right side were made by two gunshots at about right angles to each other. A considerable and appreciable time must have elapsed, either for the position of the gun to have changed or for the body to have rotated 90 degrees so that these wounds could have been inflicted. In view of the evidence relating to the condition of the gun, the jury might have found that these wounds could have been made only by pulling the triggers of the gun; or taking the view of the evidence as to the condition of the gun that, when one barrel went off accidentally, it set off the other barrel, then the jury might have concluded that the accidental firing of the gun would have produced but one wound from the discharge of both barrels, or at most that no sufficient time could elapse between the two discharges so as to permit two wounds to be made so convergent as were made. They were not bound to credit the implications of the theory of defendant's testimony—in effect, that the deceased, in pulling the gun out, caused one accidental discharge, and then later, by some movement, caused another and separate accidental discharge of the other barrel of the gun. They might believe in one accident, but their credulity might halt at the acceptance of two accidents in such close succession.

That defendant's car had its lights off when his car stood in front of the Westervelt home; that he could drive from the highway to the house at that time of early night with the lights on, and that a shotgun could be fired twice so near the house, all without awakening any of the family; for what it is worth, the evidence as to the attempted concealment of the gun; all these are circumstances that might have been considered by the jury with other evidence, as indicative of guilt; and the jury probably disbelieved the testimony of Deemer and Soles that they were near the Westervelt home, saw a lighted car drive in and heard the shots.

As to the circumstances offered by evidence tending to show motive. The defendant admitted that he filled out the

application for the $15,000 policy to be made in favor of "creditors and partner." An insurance agent who did not know that such a policy would have to be made out to an estate as beneficiary rather than as applied for might well be considered by the jury as not really knowing that a policy he had never seen or inspected actually was so written that it would not benefit him in case of the death of the insured. The evidence as to the chattel mortgage being forged by the defendant as to the name of the deceased was a circumstance, for whatever weight it might have, to be considered by the jury.

On the whole, we think that the evidence was sufficient to submit to the jury and was sufficient for the basis of a valid verdict. Two juries, in different venues, on substantially the same facts, have decided that the defendant was guilty. It is true we set aside the first judgment, but to the lay jury the force of the evidence and the instructions would, in the particular circumstances, appear about the same. At any rate, even if our verdict might, perhaps, be different, we decline to overturn the verdict rendered by the jury on facts and circumstances which we hold to be sufficient.

For the reasons given, the judgment of the district court is

AFFIRMED.

THOMPSON and EBERLY, JJ. dissent.

INDEX

Appeal and Error. SEE CRIMINAL LAW. TRIAL.

1. A party in an equity suit has three months after overruling of motion for new trial within which to file a transcript on appeal. *Algermissen v. Crete Mills*..... 72
2. Findings of fact in a law action tried to the court have the same force and effect as the verdict of a jury; and the court's findings on conflicting evidence will not be disturbed unless clearly wrong. *Bodge v. Skinner Packing Co*..... 179
3. While a case must be tried in the district court on appeal on the issues tried in the lower court, an issuable fact not alleged below can be pleaded in the district court if the identity of the cause of action is preserved. *Howard County v. Enevoldsen*..... 222
4. A motion for a new trial is necessary to review errors of law occurring on the trial of an equity case, and a transcript on appeal filed within three months from the date of overruling such motion is in time. *State, ex rel. Davis, v. Banking House of A. Castetter*..... 231
5. Defense of the statute of limitations, not brought to the attention of the trial court, will not ordinarily be considered on appeal. *State, ex rel. Davis, v. Banking House of A. Castetter*..... 231
6. A money judgment for rents in a decree setting aside a deed, not supported by evidence, will be reversed, though the decree in general is affirmed. *Haynes v. Farmers & Merchants State Bank*..... 297
7. Waiver of right of appeal must be intentional, and it is not waived by a mistaken attempt to pursue the wrong remedy without benefit, or injury to the party claiming the waiver. *Haschenberger v. Dennis*..... 411
8. The appellate court is mindful of the fact that the district court had better opportunity to observe the demeanor of witnesses, and their apparent probity, or lack of it. *Northwestern State Bank v. Hanks*..... 442
9. A verdict so clearly wrong as to induce the belief that it must have been found through passion, prejudice, or mistake will be set aside. *Trute v. Holden*..... 449
10. Findings of referee on conflicting evidence confirmed. *Stutzman v. Bates*..... 520
11. Misconduct of counsel in a personal injury action in claiming that defendant was protected by insurance without evidence to sustain it, *held* reversible error. *Lewis v. Beckard*..... 533

12. Repeated objections to improper argument are not necessary. *Lewis v. Beckard* 533
13. A verdict in favor of one of two joint tortfeasors is not the subject of review by the other, where neither asks for relief against the other. *Lewis v. Beckard* 533
14. The rule that pleadings and proof must agree will not be applied where an issue is tried without objection by either party. *Hensley v. Chicago, St. Paul, M. & O. R. Co.* 690
15. Where the district court takes action pursuant to mandate of the supreme court, it becomes vested with exclusive jurisdiction. *State Bank of Beaver Crossing v. Mackley* 734
16. The holding on appeal that plaintiff is entitled to recover becomes the law of the case on a second appeal, where the evidence is substantially the same. *Yeggy v. Fidelity Reserve Co* 792
17. The supreme court may examine its opinion on a former appeal to determine the matters considered and determined, though the opinion was not introduced in evidence. *Yeggy v. Fidelity Reserve Co* 792
18. Where the evidence on both trials was substantially the same, except as to the amount of the recovery, that question alone is open for consideration on the second appeal. *Yeggy v. Fidelity Reserve Co* 792
19. An erroneous instruction which is not prejudicial is not cause for reversal. *Vandervert v. Robey* 395
20. Where an instruction is not founded on evidence, and is misleading, the judgment must be reversed. *Trute v. Holden* 449
21. In determining whether a peremptory instruction was justified, appellant is entitled to the benefit of all controverted questions of fact, and to inferences deducible therefrom. *Kelly v. Kannarr* 472

Assault and Battery.

Refusal in a civil action of assault and battery to submit the issues of self-defense and defense of family *held* erroneous, in view of the evidence. *Pospisil v. Acton* 200

Attachment.

Levy of an attachment on a life estate in land to pay the remainderman's debt is erroneous. *First Nat. Bank of Walthill v. Stabler* 142

Attorney and Client.

1. Decree in a suit for an accounting is conclusive in disbarment proceedings for failure of an attorney to account to his client. *State, ex rel. Spillman, v. Priest*..... 47
2. The relation between an attorney retained on a contingent fee basis and another lawyer engaged to assist in the litigation is that of special partners. *Langdon v. Kennedy, Holland, DeLacy & McLaughlin*..... 290
3. Attorneys engaged in the prosecution of litigation for a contingent fee will, in absence of agreement, share equally in the distribution thereof. *Langdon v. Kennedy, Holland, DeLacy & McLaughlin*..... 290
4. Answer in an action to secure equal distribution of a contingent fee *held* not to constitute a defense. *Langdon v. Kennedy, Holland, DeLacy & McLaughlin*..... 290
5. In determining the reasonable value of an attorney's services, the court must consider the qualifications and standing of the attorney, the nature of the legal questions, the amount in controversy, the extent of services, and the responsibility imposed. *In re Estate of Moore*.... 568

Banks and Banking.

1. Public funds deposited without authority of law by a county treasurer constitute trust funds. *Gering v. Buerstetta*..... 54
2. Claimants *held* entitled to preference as to trust funds, as against receiver representing general creditors of an insolvent national bank. *Gering v. Buerstetta*..... 54
3. Claimants *held* not entitled to interest on trust funds in insolvent bank. *Gering v. Buerstetta*..... 54
4. A judgment against a state bank in the hands of liquidating officers creates no lien on real estate of the bank, as against those in possession. *Brownell v. Svoboda*..... 76
5. While knowledge of a bank president who obtains a note for his own profit by false representations is not ordinarily imputed to the bank, still, if he has been given complete control of its business, such knowledge will be imputed to the bank. *Haynes v. Farmers & Merchants State Bank*..... 297
6. Depositors of a failed bank have a lien only on assets of the bank. *State, ex rel. Spillman, v. Citizens State Bank*..... 337

7. The constitutional double liability of stockholders of a bank is not an asset of the bank, but is for the security of the bank's creditors. *State, ex rel. Spillman, v. Citizens State Bank* 337
8. The constitutional provisions relating to double liability of bank stockholders are self-executing, and the liability thereby created is free from legislative interference. *State, ex rel. Spillman, v. Citizens State Bank* 337
9. The double liability of stockholders of a bank is for the benefit of all creditors against all who are stockholders when the creditors' claims accrue, without preference. *State, ex rel. Spillman, v. Citizens State Bank* 337
10. A cause of action to recover double liability of bank stockholders does not accrue until the deficit is determined and the amount due is judicially ascertained. *Dempster v. Williams* 776
11. Where officers and directors of a bank form a partnership and the partnership borrows money from the bank, such borrowing is not a borrowing by the officers and directors of the bank. *State v. Pielsticker* 419
12. A partnership formed by officers of a bank is not prohibited from borrowing from the bank. *State v. Pielsticker* 419
13. Whether bank officers forming a partnership used the partnership as a subterfuge to borrow indirectly from the bank is a question for the jury. *State v. Pielsticker* 419
14. A bank is authorized to pay only to the person designated by the depositor; it cannot charge the depositor's account with an amount paid on a forged indorsement, unless attributable to negligence of the depositor, or the money actually reached the intended person. *Federal Land Bank v. Omaha Nat. Bank* 489
15. Evidence *held* to establish that money paid on irregular indorsement reached the person intended, relieving bank from liability. *Federal Land Bank v. Omaha Nat. Bank* 489
16. False entries by the president of a bank indicating that money deposited by him as executor was withdrawn do not terminate the relationship of depositor and banker. *State, ex rel. Spillman, v. Farmers & Merchants Bank of Kennard* 495
17. Acts of president of a bank in diverting deposits as executor to other accounts by falsifying records *held* to be in performance of banking functions. *State, ex rel. Spillman, v. Farmers & Merchants Bank of Kennard* 495

18. Bank held liable for wrongful diversion of trust funds. *State, ex rel. Spillman, v. Farmers & Merchants Bank of Kennard* 495
19. One voluntarily assuming the status of a stockholder and director of a bank is estopped as against creditors to deny such status when sued to enforce the constitutional liability. *Dempster v. Atwood* 579
20. An agreement with the state banking department that a person may hold bank stock without liability for the superadded constitutional liability is void. *Dempster v. Atwood* 579
21. The stockholders of a bank who are liable for the superadded constitutional liability are those who were such when credit was extended to or liability incurred by the bank. *Dempster v. Atwood* 579
22. Evidence *held* insufficient as to liability of stockholder in a bank for constitutional liability. *Dempster v. Atwood* 589
23. One knowingly and fraudulently uttering and negotiating a forged note and procuring the proceeds without consideration is liable therefor in equity. *United States Nat. Bank v. Dunbar State Bank* 624
24. Bank *held* chargeable with knowledge of managing officer fraudulently uttering and negotiating a forged note in the name of the bank. *United States Nat. Bank v. Dunbar State Bank* 624
25. Proceeds of a forged note indorsed to a bank and by it knowingly and fraudulently uttered and negotiated may be traced into and identified as a deposit therein. *United States Nat. Bank v. Dunbar State Bank* 624
26. Payment of checks without exchange will not deprive a deposit of the protection of the guaranty fund, though the deposit draws the legal rate of interest. *State, ex rel. Spillman, v. Nebraska State Bank* 660
27. Deposits will not be held loans to a bank merely because the depositor knew that the bank needed funds. *State, ex rel. Spillman, v. Nebraska State Bank* 660
28. Deposits by a corporation *held* not obtaining money to effect a loan to the bank, because the president of the corporation was a stockholder in the bank. *State, ex rel. Spillman, v. Nebraska State Bank* 660
29. Interest on daily balances in a bank may be within the protection of the guaranty fund. *State, ex rel. Spillman, v. Nebraska State Bank* 660
30. Interest on a deposit is a mere incident to the principal sum, within the guaranty law. *State, ex rel. Spillman,*

v. Nebraska State Bank 660
31. A valid police regulation providing for the safety of bank deposits includes interest thereon. *State, ex rel. Spillman, v. Nebraska State Bank* 660
32. An allowed claim against the depositors' guaranty fund draws interest after date of allowance at 7 per cent. per annum. *State, ex rel. Spillman, v. Nebraska State Bank* 660
33. A deposit induced by a collateral agreement between the bank and the depositor for the benefit of the latter is not allowable as a claim against the guaranty fund. *State, ex rel. Spillman, v. Farmers State Bank of Erickson* 743
34. A renewal of a certificate of deposit by the receiver of an insolvent bank does not make the guaranty fund liable therefor. *State, ex rel. Spillman, v. Farmers State Bank of Erickson* 743
35. The rule that a contracting party unwilling to perform cannot rescind *held* inapplicable to the purchaser of bank stock representing the controlling interest, where the seller was unable to transfer. *Killeen v. Doran* 750
36. The purchaser of bank stock representing the controlling interest *held* entitled to rescind on the ground that the seller was unable to transfer. *Killeen v. Doran* 750

Bills and Notes.

1. One to whom the entire beneficial interest in a note was transferred *held* a holder in due course to the exent of the amount paid at the time of receiving knowledge of an infirmity. *Haschenberger v. Dennis* 411
2. An indorsee who takes a note in good faith before maturity from a holder in payment of a preexisting debt is a purchaser for value. *Haschenberger v. Dennis* 411
3. A purchaser in good faith must have purchased with due regard for the rights of the maker, and the circumstances must not show bad faith. *Haschenberger v. Dennis* 411
4. An offer of a certificate of deposit does not carry with it an offer of an indorsement thereon. *Commercial Investment Corporation v. Farmers State Bank* 678

Carriers.

1. Bus companies are common carriers, are required to exercise the utmost skill, diligence, and foresight for the

safety of passengers, and are liable for the slightest negligence. *Griffen v. Lincoln Traction Co*..... 459
2. Common carriers are liable for personal injuries to passengers produced by concurrent negligence of their servants and third persons. *Griffen v. Lincoln Traction Co.* 459

Charities.

1. A city receiving a bequest for the erection of a hospital may receive funds from other sources to aid in completion of the hospital. *Allebach v. City of Friend*..... 781
2. A bequest to a city for the erection of a hospital creates an estate on a condition subsequent, and it is incumbent on the donee to carry out the purposes of the bequest within a reasonable time; otherwise the gift will revert. *Allebach v. City of Friend*..... 781
3. Delay in consummating bequest to city for erection of hospital *held* not unreasonable. *Allebach v. City of Friend*..... 781

Chattel Mortgages.

An agreement to mortgage a crop not *in esse* creates an equitable lien which takes precedence over a mortgage taken by a party with notice. *Kelly v. Kannarr*..... 472

Commerce.

1. Whether a railway employee at the time of injury, was engaged in interstate transportation or in work related to it determines the applicability of the federal law. *Hensley v. Chicago, St. Paul, M. & O. R. Co*..... 690
2. Injured employee *held* not engaged in interstate commerce. *Hensley v. Chicago, St. Paul, M. & O. R. Co*..... 690

Constitutional Law. SEE DRUGGISTS. STATUTES, 1.

1. Statute authorizing county board of equalization to place omitted property on the assessment rolls *held* not unconstitutional because failing to provide for notice. *Radium Hospital v. Greenleaf*..... 136
2. The constitutional amendment purporting to exclude the schools for the deaf and blind from the jurisdiction of the board of control *held* inoperative for failure to comply with constitutional requirements. *State, ex rel. Hall, v. Cline*..... 150
3. The self-imposed limitations on the power to amend the

Constitution should not be so construed as to defeat the will of the people if the requirements are substantially observed. *State, ex rel. Hall, v. Cline* 150
4. Substantial compliance with requirements of the Constitution are necessary to effect a valid submission or adoption of a proposed constitutional amendment. *State, ex rel. Hall, v. Cline* 150
5. Classification is a legislative question, subject to judicial revision only to see that it is founded on real distinctions. *Erwin v. City of Omaha* 331
6. Courts will enforce an unambiguous statute, regardless of consequences. *Garrett v. State* 373
7. Courts will not pass on the constitutionality of a statute unless necessary to a proper disposition of a case. *State, ex rel. Garton, v. Fulton* 400
Omaha Grain Exchange v. Spillman 729
8. The supreme court will not determine the constitutionality of a statute unless necessary to the proper disposition of an action. *War Finance Corporation v. Thornton* 797
9. A valid exercise of police power may affect or destroy property values. *Miller v. McLaughlin* 174
10. The state, in its exercise of police power, may enact laws for the promotion of public safety, health, morals, and public welfare. *State v. Geest* 562
11. The legislature may not, under the guise of police regulations, arbitrarily invade personal rights or private property. *State v. Geest* 562
12. The legislature may not impose performance of nonjudicial duties on courts, nor delegate to them legislative power. *Searle v. Yensen* 835
13. The legislature may delegate power over local subjects to public bodies within legislative classification, but not to another governmental department. *Searle v Yensen* 835
14. Questions of public policy, convenience, and public welfare respecting light, heat, and power districts are purely legislative and may not be referred to the courts. *Searle v. Yensen* 835
15. The legislature may require the courts to determine whether the law respecting light, heat, and power districts has been complied with as a condition of organization. *Searle v. Yensen* 835
16. Ch. 108, Laws 1927, providing for the organization of light, heat, and power districts, *held* unconstitutional as imposing nonjudicial duties on the courts. *Searle v. Yensen* 835

Contracts.

To ratify a mortgage or other instrument procured by fraud, there must be an unequivocal act of ratification, with full knowledge of the fraud. *Haynes v. Farmers & Merchants State Bank* 297

Corporations.

1. A certificate of preferred stock is evidence of the holder's title to shares of stock. *Miller v. M. E. Smith Building Co* 5
2. The terms of a stock certificate and of the articles of incorporation, together with the general law and by-laws, evidence the contract between corporation and stockholder. *Miller v. M. E. Smith Building Co* 5
3. A corporation must treat all shareholders of the same class alike. *Miller v. M. E. Smith Building Co* 5
4. A holder of preferred stock is not a creditor of the corporation, except as to declared dividends. *Miller v. M. E. Smith Building Co* 5
5. Articles of incorporation *held* to require that holders of preferred stock be treated alike in the event of dissolution or liquidation. *Miller v. M. E. Smith Building Co* 5
6. Articles of incorporation *held* to contemplate redemption and retirement of matured preferred stock only from corporate earnings. *Miller v. M. E. Smith Building Co.* 5
7. Stockholders of a corporation operating at a loss are entitled to have the corporation dissolved and the assets distributed among the stockholders after payment of debts. *Miller v. M. E. Smith Building Co* 5
8. A court of equity has power to appoint a receiver for a corporation operating at a loss with insufficient assets to pay preferred stockholders in full. *Miller v. M. E. Smith Building Co* 5
9. An order appointing a receiver for a corporation, where the stockholders intervened and contested the appointment, will not be held void for want of notice. *Miller v. M. E. Smith Building Co* 5
10. The right of a foreign corporation to do business within this state is a matter of comity, and the privilege may be revoked by the state in *quo warranto* proceedings. *State, ex rel. Spillman, v. Central Purchasing Co* 383
11. Evidence *held* to warrant ouster of foreign corporation because of loaning money at usurious rates. *State, ex rel. Spillman, v. Central Purchasing Co* 383
12. A corporation is liable for false representations concern-

ing the subject-matter of a contract made by its agent within the scope of his actual or apparent authority. *Jacobson v. Skinner Packing Co*..... 711

Costs.

Generally, allowance of attorney fees as costs must be authorized by statute. *Ehlers v. Chicago, B. & Q. R. Co*..... 477

Counties and County Officers.

1. The statutory limitations on a county treasurer's authority for the deposit of public moneys in banks must be complied with by such officer and all who deal with him with reference to such funds. *Shambaugh v. City Bank of Elm Creek*..... 817
2. General deposits alone are authorized to be made in county depositories by county treasurers. *Shambaugh v. City Bank of Elm Creek*..... 817

Courts.

1. A county court has inherent power to vacate or modify its judgments in civil cases beyond jurisdiction of a justice of the peace during the term; the "term" being the monthly term. *Stone v. Jensen*..... 254
2. A county court cannot vacate or modify its judgments in civil cases beyond jurisdiction of a justice of the peace after expiration of the monthly term, except as provided by statute. *Stone v. Jensen*..... 254
3. Attempt of county court to vacate its judgment in a civil action after expiration of the term without notice is void. *Stone v. Jensen*..... 254
4. The district court, on appeal in forcible entry and detainer, is without jurisdiction to try title. *Northwestern State Bank v. Hanks*..... 442
5. Interpretation of an act of congress by the United States supreme court is binding on state courts. *Hensley v. Chicago, St. Paul, M. & O. R. Co*..... 690

Creditors' Suit.

A creditor whose claim has not been reduced to judgment is not entitled to an injunction restraining his debtor from disposing of property. *First State Bank v. Kastle*.... 630

Criminal Law.

1. The test of insanity stated. *Sherman v. State*..... 84

2. A conviction on irrelevant and incompetent evidence will be set aside, unless it is reasonably certain accused was not deprived of a fair trial. *Graeme v. State* 113
3. In a prosecution for grand larceny, reception of evidence showing illegal possession and operation of a still *held* reversible error. *Graeme v. State* 113
4. Credibility of witness and weight of testimony are questions for the jury. *Blanchard v. State* 149
5. Power to define crimes and to authorize penalties therefor is inherent in state government. *Miller v. McLaughlin* 174
6. Nebraska has jurisdiction west of the boundary line in the middle of the Missouri river channel to enforce the law forbidding the use of fishing nets, traps, and seines in that part of the river. *Miller v. McLaughlin* 174
7. The state first acquiring jurisdiction of a crime committed on or near the boundary line in a river may retain it to the exclusion of the other. *Miller v. McLaughlin* 174
8. Admission of protest made by notary of a check presented to the bank of which he was cashier is not error. *Lahners v. State* 184
9. A motion for a new trial is not ordinarily necessary to a review of rulings of the trial judge on exceptions taken by a county attorney. *State v. Seward* 249
10. Evidence is admissible to explain or reconcile a variance between the complaint in the transcript on appeal from justice court and the original complaint. *State v. Seward* 249
11. Expression of opinion by a prospective juror as to defendant's guilt, not founded on knowledge of facts, is not sufficient to require a new trial. *Trimble v. State* 267
12. Affidavits of jurors that a juror stated he had made up his mind before the case ended are incompetent for impeaching the verdict. *Trimble v. State* 267
13. Motion to strike evidence because of facts elicited on cross-examination showing it incompetent is within the discretion of the court. *Trimble v. State* 267
14. Evidence of other similar acts *held* admissible, though constituting another criminal offense. *Williams v. State* 281
15. Cross-examination of defendant's husband as to other similar offenses *held* erroneous. *Williams v. State* 281
16. Cross-examination must be confined to matters and transactions brought out on direct examination. *Williams v. State* 281
17. An application for continuance is within the sound dis-

cretion of the court. *Wakeley v. State* 346
18. An expert witness may be interrogated as to fees paid or promised him in excess of the legal witness fees. *Wakeley v. State* 346
19. Expert testimony on handwriting based wholly on comparison of hands is in the nature of circumstantial evidence. *Wakeley v. State* 346
20. Decree of divorce being void, refusal to sustain objection to wife testifying against husband in murder case *held* error. *Garrett v. State* 373
21. In a criminal case, no matter how strong the proof, whether or not a fact has been established is a question for the jury. *Grosh v. State* 517
22. Ordinarily, unless his fundamental rights are violated by misconduct of the prosecutor in argument, accused must make timely objection thereto. *Swartz v. State* 591
23. Criminal intent is a necessary element of the crime of embezzlement which must be established beyond a reasonable doubt, and refusal to permit defendant to offer evidence tending to show absence of criminal intent is reversible error. *Davis v. State* 828
24. Refusal of instruction directing the jury not to consider exhibits not received in evidence is not error. *Lahners v. State* 184
25. Instruction that defendant charged with concealing a child might be convicted of either detaining or concealing, *held* erroneous. *Peckham v. State* 265
26. Reference in instruction to a repealed statute, instead of reference to it as reenacted, the only change being in duration of punishment, *held* not prejudicial. *Trimble v. State* 267
27. An instruction on reasonable doubt *held* not erroneous, as excluding doubt arising from want of evidence. *Trimble v. State* 267
28. The court is not required, on its own motion, to instruct the jury that reasonable doubt may arise from want of evidence. *Trimble v. State* 267
29. If defendant desires a specific instruction as to his identification, he should request it. *Trimble v. State* 267
30. It is not error to instruct the jury that they have nothing to do with the punishment, and are not to consider it in arriving at their verdict. *Trimble v. State* 267
31. Refusal to instruct as to care in considering evidence of detectives regularly employed by a city is not error. *Trimble v. State* 267

32. The courts should instruct as to general rules of law, and so as not to withdraw from the jury an essential issue. *Williams v. State* 281
33. Instruction relative to consideration by the jury of character evidence introduced by defendant approved. *Wakeley v. State* 346
34. Refusal to give a cautionary instruction on the subject of circumstantial evidence, when requested, *held* error. *Wakeley v. State* 346
35. Where the evidence is wholly circumstantial, refusal of an instruction that the circumstances must be consistent with every reasonable hypothesis of guilt and inconsistent with any reasonable hypothesis of innocence is erroneous. *O'Neil v. State* 360
36. An instruction that defendant must be proved guilty beyond a reasonable doubt does not correct a failure to give a proper instruction on circumstantial evidence. *O'Neil v. State* 360
37. One desiring an instruction to guide the jury in weighing certain features of evidence must present it in writing at the conclusion of the evidence. *Grosh v. State* 517
38. Instruction requested by defendant relating to the necessity of scrutinizing the testimony of detectives *held* properly refused. *Nelson v. State* 812

Customs and Usages.

One relying on a special custom must allege and prove such custom, and also that the person sought to be bound thereby had actual knowledge thereof and contracted with reference thereto. *Shambaugh v. City Bank of Elm Creek* 817

Damages.

1. An unauthorized act or injury must result in loss in order to recover damages therefor. *Federal Land Bank v. Omaha Nat. Bank* 489
2. Where plaintiff's deposit in an insolvent bank was applied in payment of his note on which he was not liable, defendant may show, in reduction of damages, that the deposit was not worth its face value. *Yeggy v. Fidelity Reserve Co.* 792
3. Compensation is the rule of damages in Nebraska, and, in an action for money paid or property lost or converted, recovery is limited to the amount paid or the value

of the property, with interest. *Yeggy v. Fidelity Reserve Co.* ... 792

Deeds.

1. The question as to delivery of a deed is one of intent to be determined by the facts and circumstances of each case. *Horn v. Horn* ... 364
2. A deed need not be delivered to the grantee personally; delivery to a third person unconditionally for grantee's use, with instructions to deliver it to the grantee on death of grantor, is sufficient. *Horn v. Horn* ... 364

Depositions.

Use of depositions are permissible in disbarment proceedings. *State, ex rel. Spillman, v. Priest* ... 47

Dismissal.

Defendants who preserve in their answers objections to jurisdiction are entitled to a dismissal on showing that they were summoned outside the county of the forum, and that plaintiff is not entitled to a judgment against the only defendant served with summons therein. *Morearty v. Strunk* ... 718

Divorce.

1. Permanent alimony *held* inadequate. *Haase v. Haase* ... 94
2. A divorce granted within six months after service is void. *Garrett v. State* ... 373
3. The six months within which a suit for divorce may not be tried means calendar months. *Garrett v. State* ... 373
4. The statute prohibiting trial of a divorce within six months after service, being special, requires strict construction, and where summons was served October 19, 1926, a decree rendered April 19, 1927, was void. *Garrett v. State* ... 373

Drains.

1. One who appeals from an assessment of benefits by drainage waives his right to insist that no apportionment of benefits was made. *Rudersdorf Drainage District v. Chicago, R. I. & P. R. Co.* ... 43
2. Railroad company *held* entitled to set off against special benefits derived from drainage the reasonable value of

benefits contributed by work done. *Rudersdorf Drainage District v. Chicago, R. I. & P. R. Co.* 43
3. One receiving substantial benefit from public improvements must bear a reasonable part of the expense. *Rudersdorf Drainage District v. Chicago, R. I. & P. R. Co.* 43

Druggists.

1. A law which restricts to registered pharmacists the sale of useful but harmless articles is beyond the scope of police power, and is invalid. *State v. Geest* 562
2. Ch. 167, Laws 1927, limiting to licensed pharmacists the sale of all articles listed in the United States Pharmacopœia or National Formulary *held* invalid. *State v. Geest* 562

Eminent Domain.

1. The state and county are jointly and severally liable for damage to property caused by construction of a bridge as a joint enterprise. *Nine Mile Irrigation District v. State* 522
2. The constitutional prohibition against appropriation of or damage to property without just compensation applies to the state as well as subdivisions thereof. *Nine Mile Irrigation District v. State* 522
3. The right of an irrigation district to appropriate water constitutes "property" within sec. 21, art. I, Const. *Nine Mile Irrigation District v. State* 522
4. Neither the state nor a county, by acquisition of a right of way for a highway, acquires the right to divert water of a natural stream to the damage of property of an irrigation district. *Nine Mile Irrigation District v. State* 522
5. Where the state constructs a bridge jointly with a county, it is jointly liable for resulting damage. *Nine Mile Irrigation District v. State* 522
6. An owner who retains possession of condemned land after date of filing petition for assessment of damages cannot recover interest on the appraisers' award from that date. *Ehlers v. Chicago, B. & Q. R. Co.* 477
7. Delay in procuring assessment of damages for right of way *held* not to create a liability for interest on the award. *Ehlers v. Chicago, B. & Q. R. Co.* 477
8. Notifying the county judge to retain condemnation money until expiration of the time to appeal *held* not to

create a liability for interest on the award. *Ehlers v. Chicago, B. & Q. R. Co.* 477
9. The holder of a tax sale certificate is an "owner" within the law granting the right of eminent domain to railroad corporations. *Ehlers v. Chicago, B. & Q. R. Co.* 477
10. All persons having an interest in the land are "owners" within the statute granting the right of eminent domain to railroad corporations. *Ehlers v. Chicago, B. & Q. R. Co.* 477
11. A landowner who fails to appeal from a condemnation award is bound thereby. *Ehlers v. Chicago, B. & Q. R. Co.* 477
12. The holder of tax sale certificates is entitled in condemnation proceedings to taxes paid, with interest. *Ehlers v. Chicago, B. & Q. R. Co.* 477

Equity.

A plaintiff in a court of equity must do equity; and a defendant may have relief, though he could not have secured it as a plaintiff. *Hawkins v. Mullen* 129

Escrows.

1. Escrow defined. *Killeen v. Doran* 750
2. An escrow providing that an initial payment under a contract of purchase shall be intrusted temporarily to the depositary may imply conditions not performed by the seller when the contract of purchase was signed. *Killeen v. Doran* 750

Estoppel.

1. Estoppel *in pais* defined. *Haschenberger v. Dennis* 411
2. Pleading facts constituting an estoppel is sufficient, though the word "estoppel" is not used. *Smith v. Liberty Life Ins. Co.* 557
3. A party asserting an estoppel must show that he altered his position for the worse in reliance on his adversary's conduct and in ignorance of his rights. *Commercial Investment Corporation v. Farmers State Bank* 678

Evidence.

1. Parol evidence *held* inadmissible to show that a "cash payment" on land was to be held in escrow, as it tended to contradict the contract of escrow. *State, ex rel.*

Davis, v. Banking House of A. Castetter 231
2. Parol evidence *held* not tending to prove a condition precedent, but to vary the contract. *State, ex rel. Davis, v. Banking House of A. Castetter* 231
3. The rule that evidence of a parol promise is inadmissible to vary a written contract is not applicable in an action for fraud or to rescind, where the oral promise was an inducement to the contract. *Chapin v. Noll* 318
4. An expert witness may be interrogated as to the amount of fees paid or promised to be paid him in excess of legal fees. *Fetty v. State* 169
5. Nonexpert witnesses can express opinions as to sanity only on showing sufficient qualifications and stating facts and circumstances on which their opinion is based. *In re Estate of Charles* 634
6. Hypothetical questions are sufficient if so framed as to fairly and reasonably reflect the facts proved. *Jacobson v. Skinner Packing Co* 711
7. A hypothetical question should not include improper irrelevant statements, nor assumptions not supported by proof. *Jacobson v. Skinner Packing Co* 711

Executors and Administrators.

1. The estate should be given the benefit of doubts in determining the value of an attorney's services in administration. *In re Estate of Moore* 568
2. The final report of an executor may properly include an attorney's fee as costs. *In re Estate of Moore* 568
3. An appeal from allowance of an attorney's fee will be tried *de novo*. *In re Estate of Moore* 568

False Pretenses.

Proof that defendant stated he owned land *held* insufficient to sustain charge of false pretenses in representing himself as owner of the legal title. *Graf v. State* 485

Fish.

The exercise of police power to protect food at the source of supply within state boundaries is a legitimate function of sovereignty and may extend to the protection of fish in a river where the boundary line between two states is the middle of the channel. *Miller v. McLaughlin* 174

Forcible Entry and Detainer.

Forcible entry and detainer will not lie to try title to realty. *Northwestern State Bank v. Hanks* 442

Fraud.

In an action for fraud, whether plaintiff was justified in relying on fraudulent representations made by defendant and whether such representations were made to induce the sale were questions for the jury. *Chapin v. Noll*..... 318

Gaming.

1. The statute creating the state racing commission does not authorize the *pari-mutuel* system of betting in connection with horse races. *State, ex rel. Sorensen, v. Ak-Sar-Ben Exposition Co*..... 851
2. The state racing commission is without power to permit betting or gambling at horse races. *State, ex rel. Sorensen, v. Ak-Sar-Ben Exposition Co*..... 851
3. The *pari-mutuel* system of betting on horse races is a game of chance, a lottery, and gambling. *State, ex rel. Sorensen, v. Ak-Sar-Ben Exposition Co*..... 851

Hawkers and Peddlers.

1. "Rolling Store" defined. *Erwin v. City of Omaha*..... 331
2. A metropolitan city may include a "rolling store" in an ordinance defining peddlers and impose a fee and an occupation tax on applicants for permits to operate such stores; and may provide a penalty for operating a rolling store on its streets without first having obtained the permit and paid the occupation tax. *Erwin v. City of Omaha*..... 331
3. An applicant obtaining a permit to operate a rolling store is granted an extraordinary use of streets. *Erwin v. City of Omaha*..... 331

Highways.

1. A county is liable for elevating a highway across the flood channel of a natural stream without providing for natural drainage. *Clark v. Cedar County*..... 465
2. An instruction that a county, in constructing a highway across a flood channel, was not required to provide against an extraordinary flood, *held* erroneous. *Clark v. Cedar County*..... 465
3. One who furnishes labor or supplies to a highway contractor may sue in his own name on a surety bond, conditioned for payment "for materials and supplies used or employed on said contract," as a contract made with a third person for his benefit. *West v. Detroit Fidelity & Surety Co*..... 544

4. Claims for labor and material furnished a contractor for public work may be assigned, and the assignee may sue thereon in his own name. *West v. Detroit Fidelity & Surety Co*..... 544
5. A compensated surety on a bond for construction of a road will not be released because of extension of time granted the contractor, unless he suffers injury or loss by reason thereof; the bond being in the nature of a contract of insurance. *West v. Detroit Fidelity & Surety Co*..... 544
6. A surety bond given for faithful performance of a contract for graveling a public road *held* to cover gasoline, oil and temporary repairs for trucks, and cooking supplies, but not permanent repairs to trucks, nor cost of new trucks. *West v. Detroit Fidelity & Surety Co*..... 544
7. One required to warn the public of the unsafe condition of a highway is not liable to a party injured after removal or destruction of barriers without his knowledge or consent, and refusal to so instruct the jury constitutes reversible error. *Pratt v. Western Bridge & Construction Co*..... 736
8. What is reasonable time for discovering removal of barriers warning the public of the unsafe condition of a highway is a question for the jury. *Pratt v. Western Bridge & Construction Co*..... 736

Homicide.

1. Submission of question as to whether a police officer, shooting an intoxicated person in attempting to arrest him, was guilty of unintentional manslaughter while engaged in the commission of an unlawful act, *held* not error. *Broquet v. State*..... 31
2. A police officer, in arresting one for a misdemeanor, may use such force as appears reasonably necessary to an ordinarily prudent person; and whether he used more force than was reasonably necessary is a question for the jury. *Broquet v. State*..... 31
3. Sentence reduced. *Broquet v. State*..... 31
4. Evidence *held* not to justify reduction of death sentence. *Sherman v. State*..... 84
5. Sentence reduced. *Swartz v. State*..... 591
6. Homicide committed in the perpetration of a robbery is murder in the first degree, and the turpitude of the act supplies the element of deliberate and premeditated

malice. *Swartz v. State* 591
7. Evidence *held* to sustain conviction of murder in second degree. *Bourne v. State* 862

Indians.

Under the act of congress authorizing an Omaha Indian allottee to dispose of the allotment by will, the execution, approval and probate of a will may have the effect of terminating the trust period and passing title to the devisee. *First Nat. Bank of Walthill v. Stabler* 142

Indictment and Information.

An information for embezzlement must charge the particular property embezzled with sufficient certainty to apprise defendant of the facts relied on for conviction. *Davis v. State* 828

Injunction.

1. The mere averment that an applicant for an injunction will suffer an irreparable injury is not sufficient to authorize its issuance. *Omaha Grain Exchange v. Spillman* 729
2. A state officer will not be enjoined from enforcing an alleged unconstitutional statute, unless the applicant is without adequate remedy at law and will suffer irreparable injury. *Omaha Grain Exchange v. Spillman* 729
3. Repeated violations of a penal statute harmfully affecting the rights of people generally is a public wrong which may be enjoined by the supreme court in an original suit wherein the state is plaintiff. *State, ex rel. Sorensen, v. Ak-Sar-Ben Exposition Co* 851

Insurance.

1. Applicant for insurance may refuse a policy which did not conform to terms of a verbal request of its agent. *Farmers Mutual Hail Ins. Ass'n v. Hainer* 116
2. Applicant for insurance may refuse a policy substantially different from the policy applied for; and tender of the policy will not entitle the insurer to the premiums. *Farmers Mutual Hail Ins. Ass'n v. Hainer* 116
3. A valid contract of insurance requires a definite understanding as to the amount of insurance, duration of risk, and premium. *Farmers Mutual Hail Ins. Ass'n v. Hainer* 116
4. Damage from soot, smoke and volatilized oil escaping

from a furnace *held* recoverable under a policy covering loss or damage by fire. *Coryell v. Old Colony Ins. Co.* 312
5. Friendly and hostile fires defined. *Coryell v. Old Colony Ins. Co.* 312
6. Where an insurance company retains premiums with knowledge that insured was beyond the inhibited age expressed in an accident policy, the forfeiture is waived. *Smith v. Liberty Life Ins. Co.* 557
7. A forfeiture incurred by insured is waived, if insurer, with knowledge of the facts, collects and retains premiums until after death of insured. *Smith v. Liberty Life Ins. Co.* 557

Interest.

"Interest" defined. *Peters Trust Co. v. Hecht* 390

Intoxicating Liquors.

1. Complaint charging unlawful possession of liquor in a private dwelling-house, and a previous conviction for unlawful possession, *held* sufficient. *State v. Seward* 249
2. Finding of liquor on premises creates presumption of unlawful possession. *Grosh v. State* 517

Judgment.

1. A judgment at law is not a lien on property which cannot be taken on execution. *Brownell v. Svoboda* 76
2. A decree void for want of jurisdiction may be attacked in any proceeding in which a right is asserted under it. *Garrett v. State* 373

Jury.

1. The cashier of an insolvent bank, made a party to proceedings to establish a preference, *held* entitled to a jury trial. *Gering v. Buerstetta* 54
2. Failure to select jurors 15 days before opening of term *held* not prejudicial. *Fetty v. State* 169
3. A juryman is not disqualified merely because his wife is suffering from injuries similar to those for which plaintiff is seeking relief. *Lewis v. Beckard* 533
4. Suit for an accounting and cancelation of warrants *held* triable in equity. *Village of Petersburg v. Carey* 601
5. Evidence *held* insufficient to support challenge to array on the ground that the jury were improperly selected. *Nelson v. State* 812

Kidnapping.

A statute forbidding the enticing away of a child with intent to detain or conceal it from its parents defines two separate offenses. *Peckham v. State* 265

Landlord and Tenant.

1. Provision in lease, granting exclusive right to cut ice, that the grant does not exclude grantor from cutting ice *held* a mere personal privilege. *Algermissen v. Crete Mills* 72
2. Lease upheld. *Federal Trust Co. v. Sundeen* 612

Libel and Slander.

1. In an action to recover for slander, there must be proof that the slanderous words were spoken in the presence of, and heard and understood by, a third person. *Giveen v. Matthews* 125
2. An alleged libelous publication should be considered in its entirety. *Morearty v. Strunk* 718
3. Words and expressions in an alleged libel should be construed in connection with the entire publication in their ordinary and popular meaning. *Morearty v. Strunk* 718
4. In determining whether a newspaper article is libelous, due weight must be given to every part of it, including the occasion for its publication. *Morearty v. Strunk* 718
5. A political advertisement *held* not libelous. *Morearty v. Strunk* 718

Licenses.

1. A city may under a regulatory ordinance impose a tax for extraordinary use of streets which serves a restrictive purpose. *Erwin v. City of Omaha* 331
2. An occupation tax is not to be measured by the profits of the business taxed; and courts will not declare it void, unless clearly shown to be unreasonable or confiscatory. *Erwin v. City of Omaha* 331

Limitation of Actions.

1. Where the pledgor and pledgee enter into an agreement that pledgee shall hold collateral pending determination of liability in court, limitations will not run against an action to recover the collateral until such liability has been determined or the pledgee repudiates the trust. *Parker v. First Nat. Bank* 96

2. A tenancy at sufferance being terminated by statutory notice to quit, a cause of action for forcible entry and detention accrues and limitations begin to run at date of service of notice. *Federal Trust Co. v. Overlander* 167
3. Limitations do not begin to run against an action to recover double liability of bank stockholders until the amount due from stockholders is judicially determined. *Dempster v. Williams* 776

Lotteries.

1. Under the Constitution, the legislature is without power to authorize a lottery. *State, ex rel. Sorensen, v. Ak-Sar-Ben Exposition Co* 851
2. A lottery or scheme of chance of any kind is unlawful. *State, ex rel. Sorensen, v. Ak-Sar-Ben Exposition Co* 851
3. Gambling or betting in the form and substance of a lottery is unlawful and punishable as a lottery. *State, ex rel. Sorensen, v. Ak-Sar-Ben Exposition Co* 851

Mandamus.

1. Mandamus will not lie to coerce judicial discretion of an inferior court, nor to predetermine the character of judgment the court shall enter. *State, ex rel. Garton, v. Fulton* 400
2. Mandamus will not issue to review the action of an inferior court where there is an adequate remedy at law by appeal or writ of error. *State, ex rel. Garton, v. Fulton* 400
3. Mandamus will not lie to compel a county court to vacate an order denying a jury trial to one charged with violation of the liquor law, there being an adequate remedy by appeal or error. *State, ex rel. Garton, v. Fulton* 400

Master and Servant.

1. Injuries to employee by reason of being required to work with incompetent, insane, and dangerous co-employee arise out of such employment. *Dodson v. Woolworth Co* 276
2. Furnishing medical, surgical and hospital services constitute payment of compensation extending time to file claim for compensation. *Baade v. Omaha Flour Mills Co.* 445
3. The employers' liability act will not be defeated by technical refinements of interpretation. *Baade v. Omaha*

Flour Mills Co. 445
4. Evidence *held* not to establish actionable negligence on the part of a railroad company for injury to employee from snake-bite. *Brannan v. Chicago & N. W. R. Co.* 503
5. An appeal from the award of a compensation commissioner to the district court must be tried *de novo*. *Lewis v. Allied Contractors* 605
6. The method of computing compensation for permanent partial loss of member is by applying percentage of disability to period of compensation. *Lewis v. Allied Contractors* 605
7. A judgment for an injured railway employee under the federal employers' liability act cannot be sustained as a judgment in a common-law action for negligence. *Hensley v. Chicago, St. Paul, M. & O. R. Co.* 690
8. A verdict may be in favor of a servant and against the master in a negligence case, if the pleadings and proof warrant it. *Lewis v. Union P. R. Co.* 705

Mechanics' Liens.

Owner *held* to have ratified contract for improvements on farm buildings contracted by son-in-law in possession of farm. *Hawkins v. Mullen* 129

Money Lent.

"Loan of money" defined. *State, ex rel. Spillman, v. Central Purchasing Co.* 383

Money Paid.

Money voluntarily paid to a third person in discharge of the debt of another cannot be recovered back. *First Nat. Bank v. Fairchild* 425

Monopolies.

Conspiring to create a monopoly in the electrical business is prohibited by statute. *State, ex rel Spillman, v. Interstate Power Co.* 756

Mortgages.

1. A mortgage lien is not subordinate to mechanics' liens, merely because the money was loaned for the purpose of improving the mortgaged premises. *Union Loan & Savings Ass'n v. Johnson* 17

2. Refusal to give second mortgagee judgment for full amount unpaid on a commission note *held* proper. *Peters Trust Co. v. Hecht* 390

Municipal Corporations.

1. The charter provision of cities of the second class authorizing pavement on a vote of three-fourths of the council *held* not amended or repealed by sec. 8336, Comp. St. 1922, as amended; and that such paving is not a work of internal improvement, requiring submission of the proposition to the electors. *Wookey v. City of Alma* 158
2. Taxpayers of an improvement district knowingly permitting, without protest, work to be done on a paving project *held* estopped to enjoin collection of special assessments. *Wookey v. City of Alma* 158
3. A contract by a city council for repairing and rebuilding the city hall, calling for a sum in excess of the amount authorized by a vote of the people, *held* void. *Moore v. City of Central City* 326
4. The city council of a city of the second class cannot enter into any contract without a previous appropriation, unless the proposition has been sanctioned by the voters. *Moore v. City of Central City* 326
5. Assessments for local improvements cannot be attacked collaterally, in absence of jurisdictional defect in the proceedings. *Bamrick v. Village of Minatare* 644
6. Proceedings for special assessment *held* to show that an assessment for a sanitary sewer was in proportion to benefits. *Bamrick v. Village of Minatare* 644
7. A property owner who delayed to act for five years after an assessment for a sanitary sewer, under the belief that his property was outside of the village limits, *held* guilty of laches. *Bamrick v. Village of Minatare* 644

Negligence. SEE HIGHWAYS, 7, 8. RAILROADS.

1. One backing automobile out from private property onto a public highway must use greater care than required of one driving on highway. *Vandervert v. Robey* 395
2. The duty of the driver of a vehicle entering upon the highway from a private drive to look for approaching vehicles implies the duty to see what is in plain sight. *Vandervert v Robey* 395

Officers.

1. Usage will not excuse discharge of an officer's duties in a

manner different than prescribed by statute. *Shambaugh v. City Bank of Elm Creek* 817
2. Proof of custom is not permissible to enlarge the powers of an officer whose authority is defined by statute. *Shambaugh v. City Bank of Elm Creek* 817

Parties. SEE HIGHWAYS, 3, 4.

Partnership.

A partnership is an entity distinct and apart from the members composing it. *State v. Pielsticker* 419

Paupers.

1. Evidence *held* to show that defendant's daughter was a poor person unable to earn a livelihood in consequence of an "unavoidable cause," requiring defendant to furnish support to her and her minor children. *Howard County v. Enevoldsen* 222
2. Relatives, being of sufficient ability, are required to furnish support to their poor relatives, in the order named in the statute. *Howard County v. Enevoldsen* 222
3. A cause of action does not accrue in favor of a county against a relative who fails to furnish support to an indigent relative until directed by the county board to furnish support. *Howard County v. Enevoldsen* 222
4. The evidence in this case *held* sufficient to show that the defendant refused to furnish support to his daughter and her minor children after being directed by the county board to do so. *Howard County v. Enevoldsen* 222

Physicians and Surgeons.

1. An emergency exists when the exigency of an obstetrical case requires action before the services of a physician can be readily procured. *Williams v. State* 281
2. In an action for malpractice, a surgeon is not held to a higher degree of skill than physicians and surgeons in the community. *McGuire v. Rix* 434
3. Whether a surgeon should resort to an operation was a question of professional judgment. *McGuire v. Rix* 434
4. The presumption is that physicians and surgeons performed professional duties with the requisite degree of skill and care. *McGuire v. Rix* 434
5. Evidence as to surgeon's negligence in resorting to an operation *held* insufficient to raise a question for the jury. *McGuire v. Rix* 434

6. Consent to a surgical operation may be implied. *McGuire v. Rix* 434
7. The burden is on plaintiff to prove actionable negligence that was the proximate cause of an injury pleaded. *McGuire v. Rix* 434
8. Physicians and surgeons are not liable for negligence because they pursue one rather than the other of two generally recognized methods of treatment. *McGuire v. Rix* 434

Pleading. SEE ESTOPPEL, 2. INJUNCTION, 1.

1. A demurrer admits only facts well pleaded. *Dodson v. Woolworth Co* 276
2. Motion to strike parts of an answer on the ground that such parts stated a defense not pleaded in the lower court *held* properly sustained. *Langdon v. Kennedy, Holland, DeLacy & McLaughlin* 290
3. An allegation that plaintiff at the request of defendant loaned money for his use and that defendant agreed to repay same is put in issue by a general denial. *First Nat. Bank v. Fairchild* 425
4. A defendant or intervener may present any defense, legal or equitable, in any case. *Kelly v Kannarr* 472
5. Suit to cancel warrants and for conversion *held* not a misjoinder of causes of action. *Village of Petersburg v. Carey* 601
6. A petition failing to plead actionable facts is vulnerable to a general demurrer. *First State Bank v. Kastle* 630

Pledges.

1. The pledgee of notes may hold pledged collateral only for obligations held by the pledgee on which the pledgor is liable. *Parker v. First Nat. Bank* 96
2. The pledgor of collateral securities may not recover pledged collateral until the debt is paid or lawful tender is made, and in the event of suit he must tender in court the amount due. *Parker v First Nat. Bank* 96
3. The pledgee of collateral may retain possession thereof until the debt is paid, or tender of the full amount is made. *Parker v. First Nat. Bank* 96

Principal and Agent.

Agency and authority to request a loan of money, *held* questions for the jury. *First Nat. Bank v. Fairchild* 425

Principal and Surety. SEE HIGHWAYS, 5, 6.

Process.

The authority to summon a defendant in another county depends on the right to recover against a resident defendant. *Morearty v. Strunk* 718

Property.

"Owner," as applied to real estate, includes all persons having an interest in the property, whether legal or equitable. *Graf v. State* 485

Railroads.

1. Duty of a driver of an automobile at a railroad crossing, stated. *Lewis v. Union P. R. Co* 705
2. Negligence of automobilist at a railroad crossing *held* more than slight as compared with the negligence of the railroad company. *Lewis v. Union P. R. Co* 705
3. In an action for death at a railroad crossing, evidence *held* to warrant direction of verdict for defendant. *Lewis v. Union P. R. Co* 705

Sales.

1. The buyer, on breach of warranty, may sue for damages or rescind the sale and recover the price paid; but he does not have both remedies. *Henry v. Rudge & Guenzel Co.* 260
2. The buyer, after rescinding the sale and accepting the purchase price, cannot sue for breach of warranty. *Henry v. Rudge & Guenzel Co* 260
3. "Sale" defined. *State, ex rel. Spillman, v. Central Purchasing Co* 383

Schools and School Districts.

1. It is the duty of the county superintendent to attach territory of a district not maintaining school for two years to adjoining districts. *State, ex rel. Higgs, v. Summers* 189
2. "Provided" as used in sec. 6261, Comp. St. 1922, relating to failure to maintain public school, has the same meaning as the conjunction "and" or "but." *State, ex rel. Higgs, v. Summers* 189
3. Action of electors in voluntarily donating sufficient

money to an adjoining district for school privileges was not maintaining public school within the district. *State, ex rel. Higgs, v. Summers* 189
4. Parents whose children have been transferred as pupils to an adjoining school district cannot vote on a change of schoolhouse site in the district in which they reside. *Cunningham v. Ilg* 682
5. One present but not voting at an annual rural school district meeting must be counted as present in determining the requisite majority for change of schoolhouse site. *Cunningham v. Ilg* 682
6. An unmarried woman without children or property is not entitled to vote at the annual meeting of a rural school district. *Cunningham v. Ilg* 682
7. Decree confirming change of schoolhouse site of a rural school district without the requisite two-thirds vote *held* erroneous. *Cunningham v. Ilg* 682

Specific Performance.

1. A person contracting for the sale of real estate will not be excused from performance because of his wife's refusal to join in the deed. *Zvacek v. Posvar* 163
2. The wife's marital rights in real estate are not affected by a decree for specific performance of contract for sale against the husband. *Zvacek v. Posvar* 163

States.

1. The admission of Nebraska into the Union established her sovereignty over the entire area within her boundaries, except as restricted by treaty, by act of congress, or by the federal Constitution. *Miller v. McLaughlin* 174
2. The eastern boundary of Nebraska is the middle of the channel of the Missouri river. *Miller v. McLaughlin* 174
3. The Missouri river, though boundary states may not agree on methods of exercising concurrent jurisdiction, is not thereby a zone without police protection. *Miller v. McLaughlin* 174
4. The state by consenting to be sued simply waives its immunity, but does not concede its liability, nor create a cause of action not previously existing. *Kent v. State* 501
5. A resolution by one branch of the legislature authorizing action against the state for damages from negligence of the state's officers does not render the state liable. *Kent v. State* 501

Statute of Frauds.

If the person for whose benefit a promise was made is himself liable, the promise, although made before the services were rendered, is collateral, and within the statute of frauds. *Union Loan & Savings Ass'n v. Johnson* 17

Statutes.

1. The law permitting fences with gates across highways *held* not unconstitutional as class, local, or special legislation. *McFadden v. Denter* 38
2. The general purpose of a proviso, stated. *State, ex rel. Higgs, v. Summers* 189
3. Clear and unambiguous language of a statute must be given effect according to its plain terms. *Gibson v. Peterson* 218
4. A statute will be held to operate prospectively only, unless the legislature clearly intended it to operate retrospectively. *War Finance Corporation v. Thornton* 797

Subrogation.

1. Conventional subrogation will be enforced as a matter of legal right, but only to subserve the ends of justice in the particular controversy. *Hoagland & Co. v. Decker* 194
2. Conventional subrogation arises where one pays the debt of another under an agreement for subrogation to liens existing as security for the debt. *Hoagland & Co. v. Decker* 194
3. Equitable subrogation is for the purpose of doing full and complete justice between parties. *State, ex rel. Spillman, v. Citizens State Bank* 337
4. Equitable subrogation will be applied in cases demanded by dictates of equity, good conscience, and public policy, and will generally be applied where one pays the debt of another in the performance of a legal duty. *State, ex rel. Spillman, v. Citizens State Bank* 337

Taxation. SEE CONSTITUTIONAL LAW, 1.

1. Payment of taxes on land assessed by the county board of equalization cannot be avoided without showing that the land was exempt, or other valid reason. *Radium Hospital v. Greenleaf* 136
2. One failing to appear before the county board of equalization or to appeal therefrom cannot avoid payment of taxes assessed by the board. *Radium Hospital v. Green-*

leaf 136
3. A suit to foreclose a tax sale certificate must be brought within five years from its date. *Gibson v. Peterson*..... 218
4. The owner may redeem from a sale under a tax lien foreclosure before a final order has been entered on appeal in the supreme court; the amount to be paid being the same as for redemption from sales under mortgage foreclosures. *Mummert v. Grant*..... 651
5. The legislative power to impose taxes, unless prohibited by the Constitution, lies within its discretion. *Fontenelle Forest Ass'n v. Sarpy County*..... 725
6. The legislature had authority to exempt from taxation real estate held in trust for education of the public. *Fontenelle Forest Ass'n v. Sarpy County*..... 725
7. Property of the state is exempt from taxation by necessary implication, unless unmistakably included in the tax laws. *Fontenelle Forest Ass'n v. Sarpy County* 725

Treaties.

1. The French words "*fonds et biens*," translated as "goods and effects," in the treaty between the United States and Norway, *held* to include realty. *Engen v. Union State Bank*..... 105
2. Treaty rights of aliens must be enforced by state courts without regard to conflicting statutory provisions. *Engen v. Union State Bank*..... 105
3. The provisions of law operating as restraints on alienation of a homestead *held* repugnant to rights guaranteed by the treaty between the United States and Norway. *Engen v. Union State Bank*..... 105
4. Restraints on alienation of realty conflicting with treaty rights are inoperative. *Engen v. Union State Bank*..... 105
5. Treaty-making power has been committed to the federal government. *Miller v. McLaughlin*..... 174

Trial. SEE APPEAL AND ERROR. CRIMINAL LAW.

1. It is highly improper for counsel to make extraneous remarks within hearing of the jury tending to create prejudice for or against either party litigant. *Johnson v. Jensen*..... 1
2. In a jury trial counsel should conform their conduct to the law. *Johnson v. Jensen*..... 1
3. The jury in a law action are the sole triers of questions of facts. *Chapin v. Noll*..... 318

4. A verdict against one of two defendants and silent as to the other will be presumed to be in favor of such other defendant. *Lewis v. Union P. R. Co.* ... 705
5. Failure to instruct clearly and definitely on each of two causes of action constitutes error. *Giveen v. Matthews* 125
6. Where an instruction is properly requested on some special feature of the case, it should be given, unless covered by instructions of the court; and, if the requested instruction is defective in form, it is the duty of the court to prepare and give a proper instruction. *Pospisil v. Acton* ... 200
7. If more explicit instructions are desired, complainant should tender them. *In re Estate of Charles* ... 634
8. Where evidence as to an issue is conflicting, the issue should be submitted to the jury. *In re Estate of Charles* 634

Trusts.

1. A devise to a daughter in trust for a son, with no duties to perform, vests in the trustee a naked legal title. *Flanagan v. Olderog* ... 745
2. A devise to a daughter in trust for a son, *held* to vest title in the son. *Flanagan v. Olderog* ... 745
3. A creditor may levy an attachment and maintain a creditors' bill against the interest of a beneficiary under a passive trust. *Flanagan v. Olderog* ... 745
4. Generally, a debtor's interest under a trust created for his benefit may be reached by a creditors' bill, unless placed beyond the reach of creditors by the instrument creating the trust. *Flanagan v. Olderog* ... 745
5. To create a valid spendthrift trust, the language of the founder must be clear and unequivocal. *Flanagan v. Olderog* ... 745

Usury.

1. Sec. 5952, Comp. St. 1922, as amended by ch. 178, Laws 1927, providing that an agreement in a mortgage requiring the mortgagor to pay taxes on the mortgage or debt shall not render the mortgage note usurious, *held* not to operate retrospectively. *War Finance Corporation v. Thornton* ... 797
2. A mortgage which requires payment of the maximum legal rate of interest and taxes on the mortgagee's interest in the mortgaged premises is usurious. *War Finance Corporation v. Thornton* ... 797

Vendor and Purchaser.

1. In absence of specific provision in a contract of sale, the vendor, in order to rescind, must restore or tender the purchaser what he had received thereunder. *Hawkins v. Mullen* 129
2. A vendor may on default have a quitclaim deed representing the purchaser's interest under an oral contract of sale canceled. *Hawkins v. Mullen* 129

Waters.

1. Where an obstruction in a watercourse constitutes a permanent and irremediable injury, a riparian owner may have it removed. *Crummel v. Nemaha County* 355
2. There is a duty on those who build structures across natural drainways to provide for the natural passage of all waters which may be reasonably anticipated. *Crummel v. Nemaha County* 355
3. The course of overflow water of a stream in flood is a natural flood channel. *Clark v. Cedar County* 465
4. A flood, within the term "act of God," must be so extraordinary as not to have been reasonably anticipated. *Clark v. Cedar County* 465
5. An instruction that plaintiff could not recover damages from flooding caused by construction of highway, if the lands across which the highway was constructed were higher than plaintiff's land, *held* erroneous. *Clark v. Cedar County* 465

Wills.

1. In construing wills, the inference of a vested remainder is stronger than the inference of a contingent remainder. *In re Estate of Hanson* 208
2. A will devising a life estate to the widow, the property at her death to be divided among six children, *held* to create a vested remainder in children living at testator's death. *In re Estate of Hanson* 208
3. The word "heirs" may include a surviving spouse, permitting a surviving husband to be an heir of his deceased wife. *In re Estate of Hanson* 208
4. Receiving oral testimony as to a testator's intention that the word "heirs," as used in his will, did not include devisee's husband, *held* error. *In re Estate of Hanson* 208
5. Courts will give effect to testator's meaning which is clear from the terms of the will. *Seybert v. Seybert* 246

6. Courts, in arriving at the testator's intention, will consider all the language of the will, and endeavor to give each part its proper meaning and effect. *Seybert v. Seybert* 246
7. Devise *held* to go to daughter of devisee, and not to his estate. *Seybert v. Seybert* 246
8. A will revoking prior wills was not invalidated because one of the two subscribing witnesses was an heir who had been disinherited by the first will. *In re Estate of Charles* 634

Witnesses. SEE CRIMINAL LAW, 15, 16, 18. EVIDENCE, 4, 5.
1. The wife is an incompetent witness for the judgment creditor in proceedings in aid of execution on a judgment against the husband. *Stalcup v. Jepsen* 240
2. 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. *Chapin v. Noll* 318
3. An expert witness may give reasons for an opinion. *McGuire v. Rix* 434