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MONA M. WILSON V. STATE OF NEBRASKA.

FILED DECEMBER 5, 1930. No. 27361.

1. **Criminal Law:** INDORSEMENT OF NAMES OF WITNESSES ON INFORMATION. A trial judge may, in his discretion, grant permission to the prosecuting attorney to indorse the names of additional witnesses on the information before the trial, and where no continuance was requested by the defendant, no rights are prejudiced thereby.
2. ———: INSANITY. In a criminal prosecution, the degree of mental derangement, if any, to exempt one from punishment must be such that the accused was unable, at the time of the commission of the unlawful act complained of, to distinguish between right and wrong in respect of the subject-matter of the inquiry.
3. **Homicide:** SUFFICIENCY OF EVIDENCE. The evidence of witnesses as to the circumstances surrounding the commission of the offense in the present case, and the defendant's appearance and conduct at the time in question here, *held* sufficient to justify the jury in finding, beyond a reasonable doubt, that the defendant was clearly responsible for the unlawful act.
4. **Criminal Law:** CONVICTION: AFFIRMANCE. The jury having heard the evidence and having observed the demeanor of the witnesses, it follows that, where there is sufficient evidence to support the jury's findings of guilt, as in the present case, the verdict will not be disturbed.
5. **Information:** AMENDMENT. "The court may, in its discretion, before trial, permit the county attorney to amend a criminal information, provided the amendment does not change the nature or identity of the offense charged, and the information as amended charges no other crime than the one on which the accused has had a preliminary examination." *Razee v. State*, 73 Neb. 732.
6. **Criminal Law:** TIME OF TRIAL. "The time for retrial is not a matter of absolute right but is addressed to the discretion of the court." 16 C. J. 445, sec. 804.

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

Charles E. Matson and *A. C. Plantz*, for plaintiff in error.

C. A. Sorensen, Attorney General, and *Homer L. Kyle*, *contra.*

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

DEAN, J.

Mona M. Wilson, a married woman, was convicted in Sheridan county of having wickedly and maliciously administered a deadly poison, namely, a quantity of strychnine, to her mother, Mrs. Olive E. Loomis, and from the effects of the poison so administered, her mother died the same day. Pursuant to the submitted evidence, the jury found the defendant guilty of first degree murder and fixed the penalty at life imprisonment in the penitentiary. From the judgment on the verdict counsel for the defendant prosecute error.

This is the second appearance of this case before this court. Upon arraignment in the trial court under the original information, defendant pleaded guilty and was sentenced to serve a term of 30 years imprisonment in the penitentiary. On appeal to this court the judgment was reversed for certain errors appearing in the record and the cause was remanded to the district court for further proceedings. *Wilson v. State,* 117 Neb. 692. Before the present trial was begun, however, the defendant asked for and was granted leave to withdraw her former plea of guilty and enter a plea of not guilty on the alleged ground of mental derangement when the former plea of guilty was entered.

At the present trial the original information was amended by leave of court by the insertion of the word "intending," by interlineation before the trial commenced, to the end that the information should clearly charge that the poisoning was perpetrated by the accused with "premeditated malice, intending" thereby to "kill and murder * * * Olive E. Loomis." The defendant contends that the court erred, in that the information, as above amended, was not verified on oath before it was refiled. But we do not think the court committed reversible error in the respect noted. We have held:

"The court may, in its discretion, before trial, permit the county attorney to amend a criminal information, provided the amendment does not change the nature or identity of the offense charged, and the information as amended charges no other crime than the one on which the accused has had a preliminary examination." *Razee v. State*, 73 Neb. 732.

Objection is also made that certain witnesses were permitted to testify against the defendant whose names had not been indorsed on the information when it was filed. But, under section 10087, Comp. St. 1922, a trial judge may, in his discretion, grant permission to the prosecuting attorney to indorse the names of additional witnesses on the information before the trial and where, as in the present case, no continuance was requested by the defendant, no rights were prejudiced thereby.

It is argued that the court erred in overruling the motion to quash the information on the alleged ground of undue delay of the trial. The argument is that more than two terms of court elapsed from the time the mandate was received and filed in the district court to the time of defendant's trial and that she never at any time asked for nor did she consent to a continuance. Defendant also argues that the delay was not occasioned by lack of time to have her case heard. But an examination of the evidence and of the record in the matter of the defendant's motion for a nonsuit discloses that the court docket was overcrowded and that the services of another district judge could not then be procured. And besides, the defendant had not withdrawn her plea of guilty at the time the motion for a discharge was filed and, of course, her plea of guilty was still standing against her. While there is some correspondence in the record tending to show that defendant inquired as to the date of the trial, at no time was a formal application made for trial, nor was any objection made to a continuance. On this feature it has been held that the constitutional or statutory requirements are satisfied by a speedy first trial, and that the time for retrial is not a matter of absolute right but is addressed to the

discretion of the court. 16 C. J. 445, sec. 804. Nor do we find reversible error in the order overruling defendant's motion for a discharge.

When the information was filed, the defendant was 31 years of age and, with the exception of one year when she was teaching school, she lived with her parents. Some time before her mother died, the defendant was married to Herman Wilson, an employee on her father's farm, and after their marriage they lived on the same farm with her parents but in a separate house.

Dan Loomis, defendant's father, testified that he and his wife had been suffering from a stomach trouble for some time prior to the evening in question here, and that defendant went to Hay Springs for medicine for him and for her mother. He testified that, upon defendant's return, they each took a capsule which she brought home and gave to her parents, and that he and his wife suffered convulsions therefrom. And he also testified that the convulsions were continuous until his wife died the same evening.

From Mr. Loomis' evidence it appears that the land on which they lived was formerly owned by his wife's father, but that, upon her father's death, a life estate to the land vested in Mrs. Loomis. And it is not without significance here that provision was made in the deed that the land in question, upon the death of her mother, should become the property of the defendant.

A few days after her mother died, the defendant made a written statement and therein she confessed that she procured the empty capsules at a drug store, and that she later filled them with strychnine, which was kept on the home farm for poisoning gophers. And she admitted that she falsely told her parents that the doctor had ordered her to give each of her parents a capsule, which she administered to them, and that, from the effect of the poison-charged capsules, her parents both became violently ill and suffered convulsions. Her father recovered from the effects of the poison but, as above noted, her mother died the same evening.

The defendant's husband, Herman Wilson, testified that they were married in 1925, and that he formerly worked on the home farm for her father, but that, after some disagreements between Mr. Loomis and himself, he left the Loomis farm and found employment elsewhere. But, upon being notified of the conditions at the Loomis home, he immediately returned and was there the night Mrs. Loomis died. From his evidence it appears that his wife had frequent fainting spells after they were married and that her weight gradually became less and that he frequently noticed a tremor in her hands. He also testified that he took her to a doctor by whom certain remedies were prescribed for her, but that her condititon remained unchanged.

Certain witnesses, some of whom were related to the defendant, testified in her behalf. From their evidence it appears that she suffered occasional fainting spells before her mother died and that, on the night of her mother's death, she fainted and was carried to a couch. The defendant, according to their evidence, appeared to some of these witnesses to be unconscious of what was going on about her for some considerable time before her mother passed away. It also appears from the evidence of some of the patrons, in whose district the defendant formerly taught school, that she was a successful school teacher. Several witnesses testified that she was compelled to give up teaching because of ill health.

In respect of the defendant's condition during her imprisonment in the penitentiary, the depositions of certain witnesses who observed her there were introduced in evidence. The penitentiary matron testified that the defendant had a vacant, staring expression and that it was only at times that she would answer questions. The matron also testified that the defendant was subject to epilepsy and that, after such attacks, she would lie in bed for a day at a time. It also appears from the evidence of these witnesses that defendant often complained of headaches and pains in her head and that she was unable to do factory work on account of her physical condition. The ma-

tron's testimony was corroborated by that of another witness who acted as matron during the absence of the regular matron on a vacation. The warden of the penitentiary testified that he observed the defendant closely and found her to be in a dazed condition as though she was under the influence of a narcotic. There is also evidence tending to prove that defendant's condition has improved during her stay in the penitentiary. But the above witnesses were of the opinion that she was an incompetent person at the time of her arrival there and that she was then unable to distinguish between right and wrong.

Evidence was introduced tending to prove that certain members of the Loomis family had been or were confined in insane asylums. And the evidence of two physicians who examined defendant in the penitentiary is to the effect that she was suffering from a mental derangement at the time and that additional time should be allowed to determine her mental condition.

Dr. A. J. Molzahn testified on the part of the state and from his evidence it appears that he was called to attend the defendant's parents but that Mrs. Loomis died before he arrived. In his opinion, as related to the jury, the convulsions were brought on from the effects of strychnine poisoning. And from his recital it is disclosed that the defendant appeared to faint while he was at the Loomis home, but he testified that he did not hear her fall to the floor, and he concluded that she did not faint but lay down of her own volition. Subsequently she was taken to his hospital for observation and she remained there several days. While there he testified that the defendant admitted that she administered the strychnine to her parents. A nurse testified that, from her observation of defendant at the hospital, defendant appeared to be a person of weak intellect and that she bore the facial expression of an epileptic.

Another physician testified on the part of the state to the effect that he, together with another physician, saw and examined the defendant at the penitentiary five different times when she was first incarcerated there, and that de-

fendant was again examined by them fourteen months later. He testified that defendant "was mentally normal, and physically, at the first examination, in fair condition, and succeeding examinations showed her in better physical condition each time," and, in his opinion, defendant was sane. This physician also testified that he found no indication of epilepsy in defendant and that it was not inconsistent to conclude that her fainting spells were manifestations of hysteria only.

The record is voluminous and the evidence is conflicting as to the defendant's ability to distinguish between right and wrong at and before the time when the offense charged against her was committed. It may be noted, however, that much of the evidence in defendant's behalf was submitted by witnesses who were related either to her or to her husband. The evidence against the defendant, on the part of the state, however, was submitted in large part by witnesses who were the defendant's former neighbors and who had long known her and had advantageous opportunity to observe her conduct and actions generally. They testified that defendant was sane and knew what she was doing at the time in question here.

The evidence of the physicians who testified on the part of the defendant and that of the physicians on behalf of the state conflicts. In a criminal prosecution, the degree of mental derangement, if any, to exempt one from punishment must be such that he was unable at the time to distinguish between right and wrong in respect of the subject-matter of the inquiry. We conclude that the evidence of the witnesses as to the circumstances surrounding the commission of the offense in the present case, and the defendant's appearance and conduct at the time in question here, was sufficient to justify the jury in finding, beyond a reasonable doubt, that the defendant knew the difference between right and wrong and that she was clearly responsible for her unnatural and unlawful act. The jury heard the evidence and, of course, observed the demeanor of the witnesses who testified. And we have long held that, in such

case, where there is sufficient evidence to support the jury's findings, the verdict will not be disturbed.

A review of the record discloses that the homicide herein discussed was perpetrated in cold blood and, in view of the facts, we conclude that the defendant has forfeited the right to be at large among her fellows so far as human foresight can determine. But for her sex, the defendant might not have fared so well at the hands of the jury.

We have carefully examined the instructions given by the court of its own motion and we do not find reversible error therein. The jury were properly instructed in respect of the mental capacity of the defendant and of the material facts hereto appertaining at the time of the offense charged against her by the state.

It follows that the judgment must therefore be and it hereby is

AFFIRMED.

M. HERZOFF, APPELLEE, V. J. F. HOMMEL, APPELLANT.

FILED DECEMBER 5, 1930. No. 27414.

1. **Automobiles:** ACTIONS: CONSTITUTIONAL LAW. Section 1, ch. 63, Laws 1929, relating to service on nonresident automobile owners, construed, and that part thereof providing for a continuance not exceeding 90 days from the filing of the action to afford defendant reasonable opportunity to defend such action is found to be discriminatory, hence unconstitutional. However, it being apparent that such part of the continuance clause was not an inducement to the adoption of the remainder of the act, and as such remainder is intelligible, complete, and capable of enforcement, it is not rendered unconstitutional by reason of such discriminatory part of the act. Further, with that part of the continuance clause, reading, "not exceeding ninety (90) days from the date of the filing of the action in such court," stricken, the act is clearly within constitutional limitations and enforceable.
2. **Record** examined and found to reflect proof sufficient to sustain the verdict of the jury.

APPEAL from the district court for Douglas county: WILLIAM A. REDICK, JUDGE. *Affirmed.*

Brogan, Ellick & VanDusen and *James J. Fitzgerald, Jr.*, for appellant.

Leon & White, contra.

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

THOMPSON, J.

This is an action by Herzoff, appellee, against Hommel, appellant, to recover on two causes of action; one for personal injury to his minor son and the other for damages to his automobile, by reason of a collision of Hommel's automobile with that of Herzoff in the city of Omaha on July 28, 1929. Service of notice on appellant was had in accordance with section 1, ch. 63, Laws 1929, providing for service on nonresident automobile owners, all of which is admitted in defendant's answer. At the time of the alleged accident, Hommel was a resident of Kansas City, Missouri, which city was at the time, as well as ever since, the last known address of such Hommel. Herzoff was a resident of Iowa. The jury found in favor of Herzoff on both counts of his petition, and judgment was accordingly entered. Hommel appeals.

For reversal of the judgment Hommel urges that the above act is unconstitutional, in that "it seeks to deprive appellant of the equal protection of the laws and seeks to take his property without due process of law," hence contravenes that part of the Fourteenth Amendment to the Constitution of the United States, which provides: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." In due form he interposed this challenge by way of a special appearance objecting to the jurisdiction of the trial court. This being overruled, the same objection was carried into his answer to the merits.

Such challenge, as we view the record, includes the following: Is the right involved a proper subject of state legislation? Is the manner of service of notice one which makes it reasonably probable that notice of service on the secretary of state will be communicated to the nonresident defendant who is sued? Is the act, wherein it provides for a continuance of not to exceed 90 days from the filing of the action to afford defendant a reasonable opportunity to defend, discriminatory?

The aforesaid section 1, ch. 63, Laws 1929, so far as here material, reads as follows: "The use and operation by a nonresident of the state of Nebraska or his agent of a motor vehicle over or upon any street or highway within the state of Nebraska, shall be deemed an appointment by such nonresident of the secretary of state of the state of Nebraska as his true and lawful attorney upon whom may be served all legal processes in any action or proceeding against him, growing out of such use or operation of a motor vehicle over or upon the streets or highways within this state, resulting in damages or loss to person or property, and said use or operation shall be a signification of his agreement that any such process which is so served in any action against him shall be of the same legal force and validity as if served upon him personally within this state. Service of such process shall be made by serving a copy thereof upon the secretary of state or by filing such copy in his office, together with payment of a fee of two dollars ($2), and such service shall be sufficient service upon the said nonresident: Provided, that notice of such service and a copy of the process shall within ten (10) days after the date of service be sent by the plaintiff to the defendant by registered mail at defendant's last known address and it shall be the duty of the plaintiff to file with the clerk of the court in which the action is brought an affidavit that he has complied with such requirement. The court in which the action is pending shall order such continuance as may be necessary to afford the defendant reasonable opportunity to defend any such action, not exceeding ninety (90) days from the date of the filing of the action in such court."

The above challenge is before us for the first time. That it is within the constitutional right of a state to safeguard its interests by the enactment of a statute which imposes upon a nonresident thereof using its highways a duty to answer for his conduct is sustained by the weight of authority. In *Hess v. Pawloski,* 274 U. S. 352, 356, it is stated: "Motor vehicles are dangerous machines; and, even when skilfully and carefully operated, their use is attended by serious dangers to persons and property. In the public interest the state may make and enforce regulations reasonably calculated to promote care on the part of all, residents and nonresidents alike, who use its highways. The measure in question operates to require a nonresident to answer for his conduct in the state where arise causes of action alleged against him, as well as to provide for a claimant a convenient method by which he may sue to enforce his rights. Under the statute the implied consent is limited to proceedings growing out of accidents or collisions on a highway in which the nonresident may be involved." The above conclusions have been followed in *Poti v. New England Road Machinery Co.,* 83 N. H. 232, and in *Schilling v. Odlebak,* 177 Minn. 90. Again, in *State, ex rel. Cronkhite, v. Belden,* 193 Wis. 145, 155, the court said: "The statute does not attempt to provide a method for securing jurisdiction over the person of the defendant in respect to controversies other than those which arise out of the operation of the automobile within the state. While it is true that constitutional rights may not be subordinated to administrative convenience, we perceive no just reason why a nonresident coming within the state, using the special facilities provided by the state and afforded the protection of its laws, may not be subjected to the jurisdiction of the state in respect to acts done by him in violation of its law and be compelled to respond in damages for wrongs done its citizens while within the state in the operation of his automobile." Thus, we conclude that the enactment here under consideration was clearly within the province of the state legislature.

As to the manner of communicating notice to the defendant sued: Appellant insists that the holding on this question in *Hess v. Pawloski,* aforesaid, that the service was sufficient, sustains his contention in this, that in such case the Massachusetts statute involved required "that notice of such service and a copy of the process are forthwith sent by registered mail by the plaintiff to the defendant, and the defendant's return receipt and the plaintiff's affidavit of compliance herewith are appended to the writ and entered with the declaration," while the Nebraska statute does not require that the defendant actually receive and receipt for the notice of service, but only that the notice be mailed. The distinction between the two statutes on this point lies more in the form than in the substance. Our statute provides, as heretofore shown, that "service of such process shall be made by serving a copy thereof upon the secretary of state * * * and such service shall be sufficient service upon the said nonresident: Provided, that notice of such service and a copy of the process shall within ten (10) days after the date of service be sent by the plaintiff to the defendant by registered mail at defendant's last known address." Thus, the service provided for by our statute is equivalent to a personal delivery, as in such a case the person to whom the registered mail is sent is presumed to have received the same until the contrary is alleged and proved. Therefore, the claimed distinction is of no material consequence, as it is made reasonably probable that notice of the service on the secretary of state will be communicated to the nonresident defendant.

Is the act discriminatory? As to this, appellant contends: "The provision in the above statute providing for continuances and limiting the time of the continuances to 90 days is clearly unconstitutional. No provision is made in Nebraska for limiting the continuances which may be granted to a resident to 90 days, and consequently the limitation applied to nonresidents denies to such nonresidents privileges accorded residents." As sustaining such contention appellant cites *State, ex rel. Cronkhite, v. Belden,* 193 Wis. 145; *Jones v. Paxton,* 27 Fed. (2d) 364. It is

quite apparent that the part of the statute providing for a continuance not exceeding 90 days from the filing of the action to afford defendant reasonable opportunity to defend the action is discriminatory, hence unconstitutional. However, as it is obvious that such limitation of 90 days was not an inducement to the adoption of the remainder of the act, and as such remainder is intelligible, complete, and capable of enforcement, it is not rendered unconstitutional by reason of such discriminatory part of the act. Further, with that part of the continuance clause reading "not exceeding ninety (90) days from the date of the filing of the action in such court," stricken, the act is clearly within constitutional limitations and enforceable. It follows that error was not committed by the trial court in overruling the special appearance. In this conclusion we have but followed the law as announced in the last above cited cases, also the holdings of this court in *Scott v. Flowers,* 61 Neb. 620, and *State v. McShane,* 93 Neb. 46, 50.

Appellant also calls our attention to what he claims is a lack of proof to sustain the jury's finding that the injury complained of happened while the automobile of defendant was being used in the course of and in furtherance of the business of such defendant; further, that such lack of proof exists as to the ownership of the automobile. As to each of these challenges: Taking into consideration the facts and circumstances apparent in the record, and considering the same in connection with the testimony of the witnesses, it cannot be said that the record fails to disclose ample proof to sustain the jury in finding for the plaintiff and against defendant as to each of these questions.

Other claimed errors presented have had consideration, but are found not to be prejudicially erroneous.

The judgment of the trial court is

AFFIRMED.

C. GEORGE CARLBERG, APPELLANT, v. RICHARD L. METCALFE ET AL., APPELLEES.

FILED DECEMBER 23, 1930. No. 27675.

1. **Municipal Corporations:** HOME RULE CHARTERS: MUNICIPAL AND STATE MATTERS. It is the well-established law of this state that, in matters of strictly municipal concern, cities which have adopted a home rule charter under article XI of the Constitution are not subject to state legislation. But, in such cities, state legislation is not excluded upon such subjects as pertain to state affairs as distinguished from strictly municipal affairs.
2. ———: ———: ———. The Constitution does not define which laws relate to matters of strictly municipal concern and which to state affairs. There is no sure test which will enable us to distinguish between matters of strictly municipal concern and those of state concern. The court must consider each case as it arises and draw the line of demarcation.
3. ———: EDUCATION. Education has always been a matter of state concern in Nebraska, as distinguished from a matter of strictly municipal concern.
4. ———: ———. The schools, in which are educated the children who are to become in time the directors of our political destinies, are matters of state and not of strictly municipal concern.
5. ———: MUNICIPAL UNIVERSITY. The constitutional provision by which certain cities may adopt a home rule charter does not render invalid legislation which provides that such a city may establish and maintain a municipal university.
6. ———: ———. In accepting the privilege conferred upon it by such legislation, the city, in providing said educational institution, acts as a political subdivision of the state in a matter of state concern.

APPEAL from the district court for Douglas county: FRANCIS M. DINEEN, JUDGE. *Affirmed.*

John P. Breen, for appellant.

John F. Moriarty, Harry B. Fleharty, Thomas J. O'Brien, F. H. Woodland and *Clinton Brome, contra.*

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

DAY, J.

This is an action brought by a resident, elector and taxpayer to enjoin the city of Omaha from proceeding to carry out the provisions of an act of the legislature authorizing it to establish and maintain a municipal university. The plaintiff contends that the legislative act, chapter 200, Laws 1929, is unconstitutional and void. The defendants filed demurrers to the petition of the plaintiff, which were sustained by the trial judge, the Honorable Francis M. Dineen. The plaintiff elected to stand upon his petition and refused to plead further, whereupon the action was dismissed.

The record in this case is very brief, consisting only of the petition and the demurrer of the several defendants. The defendants are the councilmen of the city of Omaha and the appointed regents of the projected university. In the present state of the record, the pleadings establish the questions of fact in the case. The city of Omaha, pursuant to the power and authority conferred upon such a city by article XI of the Constitution became on July 18, 1922, a home rule city by adopting the "existing law" or charter governing it as its "home rule" charter. The legislative act, which the appellant contends is unconstitutional and void, authorizes the establishment, maintenance, and operation of a municipal university in cities of the metropolitan class, upon a vote of the electors thereof, provides for its management and control by a board of regents, and a special tax to be levied annually for the support of such university. By virtue of the authority conferred by this legislative act, the question was submitted to a vote of the electors of the city of Omaha, with the result that the majority of the votes cast upon the proposition were in favor of it. The city council of the city of Omaha then passed an ordinance establishing the university under the provisions of the statute.

It is urged by the appellant that, the city having adopted a "home rule" charter under the provisions of article XI of the Constitution, the legislature was excluded from any right to authorize the establishment and maintenance

of the university provided for by said act. The constitutional provision under which the city adopted its "home rule" charter is as follows: "Any city having a population of more than five thousand (5,000) inhabitants may frame a charter for its own government, consistent with and subject to the Constitution and laws of this state." Const. art. XI, sec. 2.

The effect of the adoption of a "home rule" charter has been heretofore considered by this court in several cases. In *Schroeder v. Zehrung,* 108 Neb. 573, we held: "The provisions of section 3, art. III of the Constitution, relating to the referendum, have reference to the acts of the state legislature only, and are not applicable to municipal legislation." The court cited with approval upon this point *Simpson v. Paddock,* 195 Mich. 581; *Heilbron v. Sumner,* 186 Cal. 648; and *Ex parte Johnson,* 20 Okla. Cr. Rep. 66.

In *Consumers Coal Co. v. City of Lincoln,* 109 Neb. 51, the court proceeded to advance a step in defining the situation created by the adoption of a "home rule" charter under our constitutional provision:

"By section 2, art. XIa of the Constitution, power is conferred upon the electorate of a city to frame a charter for its own government as fully and completely as the electorate of the state may form a state Constitution, subject only to the limitations contained in said section that said charter shall be 'consistent with and subject to the Constitution and laws of this state.'

"The purpose of the constitutional provision is to render cities independent of state legislation as to all subjects which are of strictly municipal concern; therefore, as to such matters general laws applicable to cities yield to the charter." Then follows in order of consideration by this court *Sandell v. City of Omaha,* 115 Neb. 861, which cites, quotes, and approves the rule as to subjects which are exclusively for a "home rule" city to determine and from which state legislation is excluded.

In *Schroeder v. Zehrung,* 108 Neb. 573, the court again held: "While a home rule charter of a city, adopted pur-

suant to the constitutional provisions, may not contravene any provision of the Constitution or of any general statute enacted by the legislature, it is, in all other respects, binding and controlling. A city may enact and put into such character any provisions for its government that it deems proper, so long as they do not run contrary to the Constitution or any general statute."

To a like effect is *State v. Johnson,* 117 Neb. 301, in which we used this language: "In matters relating exclusively to municipal affairs, the Lincoln home rule charter prevails over conflicting provisions in a state statute containing legislation on the same subject applicable to cities of different classes generally."

We have cited at some length from the cases heretofore decided by this court, because an examination of the adjudicated cases in other jurisdictions impresses us with the desirability and even the necessity of keeping the history of the judicial construction of this constitutional provision ever in mind. It is the well-established law of this state that, in matters of strictly municipal concern, cities which have adopted a "home rule" charter under article XI of the Constitution are not subject to state legislation. But, in such cities, state legislation is not excluded upon such subjects as pertain to state affairs as distinguished from strictly municipal affairs.

Now, the appellant contends that the establishment and maintenance of the university by the City of Omaha, as provided by chapter 200, Laws 1929, is a municipal concern, a municipal affair as distinguished from a matter of state concern. A careful perusal of the decisions of the courts of other states, wherein the question has arisen as to what are the functions of the municipality and the functions of the state in relation to each other, clearly indicates that this is a difficult and intricate task.

To support his contention, the appellant cites the case of *Sinclair v. City of Lincoln,* 101 Neb. 163. This case held that a tax authorized by the city of Lincoln, to induce the state to keep the state university in Lincoln rather than move it to a location on the state farm, 2½ miles

distant and just outside the city limits, was one for a corporate or municipal purpose. This case arose and was decided prior to the adoption of a home rule charter by the city of Lincoln. Hence, it was not decided with reference to a "home rule" charter or the constitutional provision authorizing its adoption. However, considering the case as an authority upon the question presented here, it decided that the matter of the *location* of the state university was a municipal matter or concern. It cannot be made to hold, by any construction of words, that the university was a "municipal affair" or a "municipal concern" of the city of Lincoln.

Turner v. Hattiesburg, 98 Miss. 337, also cited by the appellant is almost identical to the *Sinclair* case. There is dictum in the case which supports the appellant's contention. Nevertheless, the question before the court in that case was the validity of a tax for the purpose of procuring the location of a state normal school in that city. Whatever may be stated in that opinion, the point decided, as shown by a careful reading of the opinion and the syllabus, was that taxes to pay bonds, the proceeds of which were used to induce the location of the state normal college, were for a municipal purpose. Likewise, this case was not decided under a "home rule" charter adopted under a constitutional provision, with a view to determine under such a situation the apparently illusive line of demarcation that differentiates between state and municipal affairs.

Appellant cites us to *Law v. San Francisco,* 144 Cal. 384, wherein the court held that the issuance of bonds for the repair of existing schoolhouses and for new schoolhouses is a municipal affair; that, also, the charter provisions for a bonded indebtedness for municipal improvements, including schoolhouses, must prevail over a general state law. The opinion in this case quotes and approves language to the same effect in the previous case of *In re Wetmore,* 99 Cal. 146. In California there was a complicated system of school control. In the early days the cities operated under a special legislative charter which provided for a department of education. The Constitution of 1879 did

not entirely remove the schools from the control of the municipalities. One vestige of the former system remaining seems to have been city control over bonded indebtedness for buildings. However, the same court held in *Hancock v. Board of Education,* 140 Cal. 554, that the school system is a matter of general concern, and not a municipal affair. To the same effect also is *Kennedy v. Miller,* 97 Cal. 429. These cases were decided prior to *In re Wetmore, supra,* and *Law v. San Francisco, supra.* The latter cases seem to be a qualification of the rule formerly announced. These cases were discussed in the case of *Los Angeles City School District v. Longden,* 148 Cal. 380, which attempted to reconcile them, but in fact overruled them as an apparent authority for the doctrine that education was a municipal affair. It appears that the legal history of the schools in California so affect the decisions of the court on this question that they can have but little persuasive force in the solution of our problem. For an analysis of the California cases on this subject, see McBain, Law and Practice of Municipal Home Rule, 200, and "Municipal Affairs" by William Carey Jones, 1 California Law Review, 132.

In passing, we note that *The Mayor v. Baker,* 73 Ga. 686, also cited by appellant, holds that, unless the municipal charter forbids, the city may build a schoolhouse. As indicated, we have examined every case cited by appellant, and we have not neglected the cases cited by appellees. Particular attention has been given to those decisions cited from states which have a similar constitutional provision for the adoption of a "home rule" charter. The appellees cite several Missouri cases. An examination of the Missouri cases brings us the following information: That they throw no great light upon our subject. At a time much later than any of the cases cited, the court in *State v. Police Commissioners of Kansas City,* 184 Mo. 109, stated their precedents were of little help in determining the distinction between local and state matters. These cases, together with many other cases from other jurisdictions, are not strictly in point, but they are sufficiently analogous to demonstrate the difficulty of determining a

test by the application of which we may determine whether a matter is one of strictly municipal concern or one of state concern.

Up to the present time this court has decided, in cases arising under a home rule charter adopted under the constitutional provision, that voting municipal bonds for an aviation field (*State v. Johnson,* 117 Neb. 301) and that improving the streets, alleys and highways within the corporate limits of a city (*Salsbury v. City of Lincoln,* 117 Neb. 465) are subjects of strictly municipal concern. In *Consumers Coal Co. v. City of Lincoln,* 109 Neb. 51, this court said: "It is not easy in all cases to distinguish between municipal powers and state powers. * * * We must therefore content ourselves with the consideration of each case as it arises, applying those principles which precedent and logic approve."

It is evident that article XI of the Constitution contemplated a division between state affairs and municipal affairs. The language is that certain cities may frame a charter for their own government consistent with the Constitution and laws of the state. The Constitution does not define which laws relate to matters of strictly municipal concern and which to state affairs. There is no sure test which will enable us to distinguish between matters of strictly municipal concern and those of state concern. The court must consider each case as it arises and draw the line of demarcation. In *Helmer v. Superior Court,* 48 Cal. App. 140, the court of appeals, following *Ex parte Daniels,* 183 Cal. 636, and *In re Murphy,* 190 Cal. 286, recognized the necessity of following such a rule, "Until the advent of the automobile, interurban traffic was so small as to be negligible and, as a result, traffic regulations were a matter of concern only to the inhabitants of the city. But when autos and motor-trucks invaded our highways and streets in tens and hundreds of thousands, a matter that yesterday was local has become of state and nation-wide importance today. * * * The term 'municipal affairs' is not a fixed quantity, but fluctuates with every change in the conditions upon which it is to operate."

The establishment and maintenance of a university by the city of Omaha relates to the matter of education. Education has always been a matter of state concern in Nebraska as distinguished from a matter of strictly municipal concern. It has been recognized in Constitution and Statute as a matter of state policy. From an early date by our Constitution the state legislature was solemnly charged with a duty to provide free instruction in our public schools. Const. art VII, sec. 6. In fact, the entire article is devoted to the subject of education. The state has ever exercised by general laws control over education. For example, the laws relating to compulsory education, to patriotic instruction in schools, to certification of teachers, to inspection of private denomination and parochial schools and to many other provisions of our school law, all indicate that the state of Nebraska has always considered education a state affair.

Before the constitutional amendment the state legislature could legislate upon any and every subject with reference to cities. This amendment was therefore a limitation upon the power of the legislature. *State v. Dodge County*, 8 Neb. 124; *Elmen v. State Board of Equalization and Assessment, ante*, p. 141. The Constitution expressly defines the limitation to the power of state legislation as excluding it from matters of local government. The charter must conform to the Constitution and laws of the state. The right of the state to legislate upon educational matters has not been limited by the Constitution. Education in the city of Omaha is not a strictly municipal affair. It is preeminently a state affair. The schools, in which are educated the children who are to become in time the directors of our political destinies, are matters of state and not of strictly municipal concern. To have educated and intelligent men and women cannot be a strictly local concern. It concerns and affects the whole state. "Essentially and intrinsically, the schools in which are educated and trained the children who are to become the rulers of the commonwealth are matters of state, and not of local, jurisdiction. In such matters the state is a unit and the

legislature the source of power. The authority over schools and school affairs is not necessarily a distributive one to be exercised by local instrumentalities, but, on the contrary, it is a central power residing in the legislature of the state. It is for the lawmaking power to determine whether the authority shall be exercised by a state board of education, or distributed to county, township, or city organizations throughout the state." 19 R. C. L. 765, sec. 71. This was quoted with approval in *Salt Lake City v. Board of Education,* 52 Utah, 540. The constitutional provision by which certain cities may adopt a home rule charter does not render invalid legislation which provides that such a city may establish and maintain a municipal university. In accepting the privilege conferred upon it by such legislation the city, in providing said educational institution, acts as a political subdivision of the state in a matter of state concern. It acts very much in the same manner as it does in the maintenance of a police department and other matters unquestionably of state concern. This university was not forced on the city of Omaha. It was established as provided by a general law of the state. A petition of 10 per cent. of the registered voters caused the council to submit the matter to a vote, and a majority of the voters at said election voting on the question voted to establish and maintain such university.

Lastly, the powers given the board of regents to certify the tax for the establishment and maintenance of the university is challenged as unconstitutional. In the consideration of this question, the appellees and appellant have discussed the question as to whether the act in question created a public corporation, separate and distinct from the municipality of Omaha. We specifically do not pass upon the question as to whether or not the act under consideration creates a public corporation. By the statute the legislature delegates the duty to levy the tax for the establishment of said university to the city council of any city authorized to established such a school under the act. It is not contended that they are without authority, but it is said that the board of regents of the projected university

are an appointive and administrative body, and that therefore they are not competent under the Constitution to levy a tax. Judge Cooley in his work on Taxation (4th ed.) vol. 1, sec. 81, states that the legislative power to tax cannot be delegated to mere administrative officers. If, as is contended by the appellant, the certification to the city council of the amount necessary to run the university leave the city council a mere administrative act to perform, and the tax is in fact levied by the regents of the university, who are an administrative body, an additional statement by Judge Cooley is pertinent. In the same section, he says: "Of course, if the people of a local district have in any way consented to the delegation of the power to tax to a local board, they cannot contest the validity of the delegation of power"—citing *People v. Knopf*, 171 Ill. 191; *People v. Morgan*, 90 Ill. 558; and *Brown v. Baltimore & O. & C. R. Co.*, 186 Ind. 81; and to the same effect, *Woodward v. Fruitvale Sanitary District*, 99 Cal. 554; *West Chicago Park Commissioners v. Sweet*, 167 Ill. 326. So that even a consideration of this matter from a view most favorable to the appellant forces us to the conclusion that the method provided for raising funds for this institution does not render the statute unconstitutional.

The judgment of the lower court in sustaining the demurrers of the defendants to the plaintiff's petition and dismissing the action is

AFFIRMED.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1931.

LEO B. STUHR ET AL., APPELLANTS, V. CITY OF GRAND ISLAND ET AL., APPELLEES.

FILED JANUARY 2, 1931. No. 27198.

1. **Appeal in Equity.** A motion for a new trial must be filed and overruled in the district court to authorize a review of rulings on evidence in an equity case.
2. **Nuisance:** INJUNCTION. In granting an injunction against a nuisance, a court of equity will not go beyond the necessities of the particular case before it.
3. **Municipal Corporations:** SEWERS: INJUNCTION. While a court of equity may enjoin such manner of construction or operation of a sewer system as causes or results in a nuisance, yet it will not perpetually enjoin the construction or operation of the system if so changed as not to cause or create a nuisance.

APPEAL to the district court for Hall county: EDWIN P. CLEMENTS, JUDGE. *Affirmed.*

Horth, Cleary & Suhr, for appellants.

Arthur G. Abbott, A. C. Mayer and *H. G. Wellensiek, contra.*

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

GOSS, C. J.

Plaintiffs appeal from rulings excluding evidence and from certain terms of a decree rendered by the district court in their suit to enjoin the city from building an open canal for sewage purposes over a strip condemned through their lands to Wood river. Defendants cross-appeal on

account of the admission of certain evidence and because of certain terms of the decree, but particularly because it ordered "that the defendant, City of Grand Island, be and it is hereby enjoined from the constructing of an open canal across the lands of the plaintiffs in accordance with the plans proposed by Kenneth Y. Craig or in accordance with the plan proposed by Black and Veatch, until such a time that said city shall, by the construction of an adequate disposal plant, or by other appropriate means, render the output of the sewage of such city, which flows past the lands of the plaintiffs, and which may be carried thereon by overflow, clear and odorless, with the contents of organic matter sufficiently oxidized so that it is non-putrescible and incapable of causing a nuisance, and when so constructed the defendants herein may apply to this court for a dissolution of this injunction."

The problem of the disposal of both storm and sanitary sewage for Grand Island is difficult because of the level character of the land and the slightly lower elevation of any stream into which the sewage can be discharged. For many years the city conducted both its sanitary and storm sewage through the same system. When the growth of the city in area and population rendered these provisions inadequate, a new sewer was constructed to take care of storm sewage and the old one was used for sanitary sewage. Both of these systems led toward the southeastern part of the city. The parties stipulated at the beginning of the trial that the sanitary sewage of the city was conducted through its closed sewers to the corner of Cherry and Sutherland streets (about six blocks east of the county courthouse) where the city maintained a disposal plant, thence it ran through a closed sewer down Cherry street in a southeasterly direction about 3,000 feet (as shown by applying to the map in evidence the scale indicated thereon) to Bismark road, and thence east about 4,800 feet to Wood river; that the storm sewer is a closed sewer until it reaches a point known as Plum and Sutherland streets (one block west of Cherry street); from that point it runs as an open ditch approximately a block east, thence

southeast on Cherry street and Bismark road to Wood river, alongside the sanitary sewer on the west and south on its course to the river; that the city has its disposal plant for sanitary sewage immediately east of the corner of Cherry and Sutherland streets and on the east side of the Burlington Belt Line tracks; that the city intends to build a sewer system from the present point of the end of its closed storm sewer, at Plum and Sutherland streets, east to Wood river over the land of some of the plaintiffs.

The maps and oral evidence are confusing. Some of the maps show, and the testimony sometimes speaks of, the Platte river as the place of wasting the sewage. It is not the Platte river, as now existing and running several miles farther south and east of this location, that is meant. Usually it is called Wood river, and consists of two channels beginning to branch apart several hundred feet south of the point where the sewer now discharges into what is known as the north branch or the west branch or channel. A large portion of the year this branch is dry. The other branch probably carries water at all times. Both branches run in a northeasterly direction at all points with which we are concerned. By the use of the scale they appear to be nowhere more than 400 feet apart. We understand that the Wood river empties into the Platte some miles northeast of the plaintiffs' lands.

Plaintiffs sought an injunction against the extension of the open sewer system from its disposal plant directly east to Wood river through and past the lands of plaintiffs. It is unnecessary to abstract the voluminous pleadings fully, but the points of the petition that need be stated are that the storm sewage alone contained bacteria dangerous to those living in the vicinity where it was carried, and that the inadequacy of the disposal plant and of the capacity of the sanitary sewer resulted in the escape of such harmful elements from the sanitary sewage into the open storm sewer ditch; that the city was threatening to build the open ditch across and adjacent to plaintiffs' lands to handle the storm sewage carried by the present open ditch and also the products from its disposal plant

when necessities require; and it is alleged the things complained of will constitute a nuisance.

The answer of defendants denied that any sanitary sewage is transferred to the present open ditch and that they were intending to use the proposed open ditch across the condemned right of way for any sanitary sewage but alleged that it was to be used exclusively for storm water sewage. It had further answered that, when its financial condition permitted, the city intended to inclose the storm sewer in a water tight box of reenforced cement and thereafter to conduct its sanitary sewage through it. The trial was begun on the 4th of October, 1928, and, after three days, was discontinued until June 18, 19, and 20, 1929, when it was concluded. After the suit had been begun, on the recommendation of its engineers, the city had devised a plan to modernize its sewage disposal plant. And so, on June 18, 1929, it amended the aforesaid answer by striking out the references to the inclosed concrete sewer and alleged that it did not "contemplate, nor did it ever intend, to run its sanitary sewer through said open ditch until after it had completed its disposal plant in accordance with the recommendations of its engineers;" and it left its former allegations that, if the open ditch when completed were used for an unlawful purpose or caused a nuisance, this would give plaintiffs an action for damages or a right to enjoin the maintenance of a nuisance, but that plaintiffs should not be permitted to assume that defendants will disobey the law.

The pleadings and the evidence show that the strip of land condemned for the purposes of the new sewer outlet is 66 feet wide. It runs directly east from the disposal plant, and the map showing its extent indicates that this storm sewer or proposed sewer outlet is to run to the east branch of the Wood river or Wood river proper, whereas the sanitary sewage is deposited in the west or so-called "dry" branch. The plaintiffs had attacked in their pleadings the legality of the condemnation of these lands but evidently abandoned this point on the trial.

There was evidence to the effect that in times past sewage escaped from the sanitary sewer into the ditch carrying the storm water, consisting only of drainage from the streets and water wasted from the electric light plant; that the present disposal plant was not of the type that eliminated the harmful bacilli from the sanitary sewage or greatly modified its content in that respect; that in times of high water causing overflow of the storm sewer it, with added content sometimes escaping from the sanitary sewer, as aforesaid, went upon the lands of plaintiffs, and, when the waters receded, was left there; that the deposit of sanitary sewage at the present outlet in the dry branch of Wood river was offensive to health, and on occasions of high water would likewise overflow on the lands of plaintiffs and when the waters receded would be left there; that the natural surface drainage of plaintiffs' lands was to the north and east and that the dry branch of Wood river aided drainage and secured an earlier run-off in times of flood; that the proposed open canal or ditch on the condemned right of way, through the lands of plaintiffs to Wood river, would cross the dry channel, and, in order to carry sewage water there, would require dikes or banks about seven feet high; that without such dikes or banks the canal would be sluggish and shallow and would permit the sanitary sewage in the north branch to back up into the canal for a considerable distance toward the residences of the plaintiffs and to create a nuisance and menace to their health; that the construction of such dikes and the carrying of the canal across the dry channel would cause the overflow of plaintiffs' lands to be greater and hold the water upon the land longer; and the evidence seemed fairly to indicate that the present disposal plant of the city could be so completed by the addition of units for the removal of harmful elements from the sanitary sewage by modern methods as to abate or eliminate that which now creates a nuisance at the present outlet and to do away with the danger from overflow and deposit on the lands of plaintiffs.

The findings of the court were substantially in line with what we have just recited and the decree was in accordance therewith.

The plaintiffs assign as error that the court excluded certain evidence offered by them. No motion for a new trial was filed by appellants. A motion for new trial must be filed and overruled in the district court to authorize a review of rulings on evidence in an equity case. *Farmers Loan & Trust Co. v. Joseph,* 86 Neb. 256; *State v. Citizens State Bank,* 115 Neb. 271; *Hall v. Bowers,* 117 Neb. 619.

The plaintiffs also assign as error the first finding of the court to the effect that "the building of the open storm sewer, such as contemplated by the defendants at the inception of the suit, would not, in itself and disconnected with the problem of an influx and overflow of sewage from Wood river at the proposed outlet, constitute a nuisance or endanger the health of the plaintiffs to the extent that it should be enjoined." The evidence indicates, as given by nonexperts and experts, that the storm waters from Grand Island probably contain no other or different harmful bacteria or bacilli than those found in or coming from any manure pile or from the ordinary farm barnyard. Unless kept from sources of water supply for man or beast, both are harmful. If this canal carrying storm sewage only could be kept on the city's right of way until it mingled with a flowing stream, and if the canal to carry it there could be built so as not to interfere with the escape of the sanitary sewage deposited elsewhere by the city, it would do no harm. We think there was no error there.

The only other assignment of error by plaintiffs is as to that "portion of the court's order which permits the city to build such open ditch and transport therein the sewerage proposed to be transported after additions have been made to the present disposal plant." As we analyze the order, it was at least as favorable to plaintiffs in this respect as they could expect under the law. The order enjoined the construction or use of the open canal for any sewage, storm or sanitary, not only until after the amendment of the disposal plant, but until its product reached

a defined state of harmlessness. The plaintiffs cannot complain of these terms which fully protect them and which are objected to by the defendants in their cross-appeal as being erroneous. Practically the entire order part of the decree is quoted in the first paragraph of this opinion.

The first assignment of error by the defendants on their cross-appeal is that the court erred in its order enjoining the city from constructing or maintaining the storm sewer ditch until after certain additions are made to the sanitary disposal plant. Defendants state in their argument in their brief on this point that the proposed ditch "is not only to be entirely disconnected from the sanitary sewage system, but it is to be inclosed for about a quarter of a mile until it passes beyond the Burlington right of way, and there is, therefore, no possibility of any of the sanitary sewage running over into the proposed ditch. Indeed, the plaintiffs admit that the proposed ditch is to be only for the water from its electric light plant and storm waters." The city evidently overlooks its answer as amended at the time of resuming the hearing in June, 1929, to which we have heretofore referred. Thereby it alleged, or at least strongly implied, its intent to use this open ditch or canal for its sanitary sewage after the completion of its disposal plant. The judgment and order evidently was intended by the court to be so devised as to prevent sanitary sewage from being a nuisance to or deposited on the lands of the plaintiffs whether such sewage came from the present place of discharge or from its carriage through the "open canal across the lands of the plaintiffs in accordance with the plans," etc. It seems to us, after reading the evidence, that the court had no intention of enjoining the city from using the condemned land for a canal or ditch to carry storm water so long as it did not build dikes across the north channel while it continued to discharge the sanitary sewage of the city at the present place farther south and up that same channel and, further, so long as the city did not build dikes along the canal west of said channel in such a way as to increase

the danger of holding sewage now deposited in the channel on the lands of plaintiffs when taken there in times of high water. With these limitations the city has a right to use its land for the carriage of its storm sewage and we think there is nothing in the decree itself to prevent it, though from the evidence there is some question whether it is feasible to carry the storm sewage to the north channel only without the aid of dikes that might be objectionable under the decree so long as the sanitary sewage is discharged in the north chanel.

It is to be noted that the court did not perpetually enjoin the city from constructing the canal across the strip. The injunction was against the construction according to certain plans and until certain changed conditions arose under which the construction in that manner would not be objectionable as in aid of the creation of a nuisance. This is on the principle that in granting an injunction a court of equity will not go beyond the necessities of the particular case before it. *City of Omaha v. Hugh Murphy Construction Co.*, 114 Neb. 573; *Francisco v. Furry*, 82 Neb. 754.

The defendants formally assign other errors but they are not argued or are otherwise covered in our discussion. The district court was careful in its judgment to preserve to the city an opportunity to have the injunction dissolved when by a disposal plant or by other appropriate means the output of sewage would cease to cause a nuisance to the plaintiffs. While the description of the content of the sewage to be produced by such means as the city may use is, if taken literally, too strict, yet it will, on any further test, be interpreted rather by the spirit of the judgment to mean such a content as will not create a nuisance. With such an understanding there is no error in the judgment.

For the reasons stated, the judgment of the district court is

AFFIRMED.

ALBERT W. CAMPBELL, APPELLANT, V. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, APPELLEE.

FILED JANUARY 2, 1931. No. 27471.

1. **Master and Servant:** ACTION FOR PERSONAL INJURIES: BAR. "Assumption of risk is a bar to the action, in a case governed by the federal employers' liability act, and does not, like contributory negligence, operate merely in reduction of damages." *Pryor v. Williams*, 254 U. S. 43; *Preble v. Union Stock Yards Co.*, 110 Neb. 383.
2. ———: ASSUMPTION OF RISK. An employee of mature years is taken to assume the risk of such dangers as are normally and necessarily incident to the occupation, whether he is aware of them or not. *Seaboard Air Line Railway v. Horton*, 233 U. S. 492.
3. ———: WARNING OF DANGER. Where the plaintiff's knowledge of the situation and of whatever danger existed was at least equal to that chargeable against the defendant, the plaintiff was not entitled to a warning as a matter of law.
4. ———: ASSUMPTION OF RISK. "An employee assumes risks not ordinarily incident to his employment, provided he knows of them and appreciates the danger, or provided they are so plainly observable that he must be presumed to know them and to appreciate the danger." *Atchison, T. & S. F. R. Co. v. Wyer*, 8 Fed. (2d) 30.

APPEAL from the district court for Douglas county: FRED A. WRIGHT, JUDGE. *Affirmed.*

Lower & Sheehan, for appellant.

Guy C. Chambers, contra.

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

GOSS, C. J.

This is an action for damages for personal injuries received by an employee under the federal employers' liability act. At the close of the evidence on behalf of plaintiff, the court sustained defendant's motion to dismiss.

Plaintiff had been employed by defendant as a section-hand for about a year. He had worked for the Burlington railroad at one time for almost five years. One year of that

service was as a section-hand and the rest was on the paint gang and on the bridge gang. He was about 44 years old and had an eighth grade education.

The injury occurred May 29, 1929, on the main line about three miles east of Havelock. Plaintiff was a member of a gang relaying new steel rails in the place of old. They had been at this work about three days. The spikes holding several rails to the ties would be pulled and this line of rails, still held together at their ends, would be detached from the track at one end of the line and then pulled over to the edge of the ballast from that end. This left the last length of rail still attached to the track at the other end of the line of old rails in process of removal and replacement, so left because it is often necessary to cut this rail in connecting up the new rails with the old in order not to interrupt train service. It left the old rails still attached together by plates or angle bars. These angle bars are plates or pieces of iron used to connect the two rails by means of bolts through the plates on either side of the rails and through the rails themselves. It was necessary to unscrew the bolt nuts and knock off these angle bars in order to detach the rails. Plaintiff had helped to push the rails out. The foreman told plaintiff to take a maul or sledge and knock the angle bars off. Plaintiff testified that he walked to the middle of the track where the sledge was, took it and proceeded to knock off the angle bar that connected the pushed-out line of old rails with the other end of the rail still left attached to the main line by one end; that when the angle bar was knocked loose that end of that rail flew about 18 inches back to the track, hit him on the left ankle and broke it; that the foreman gave him no directions as to where he should stand; that the end of the rail where he disconnected it was up eight or ten inches, he supposed, from the ground.

It was agreed on the trial that the injury arose out of and in the course of plaintiff's employment in interstate commerce. Therefore, the terms of the federal employers' liability act govern.

"Assumption of risk is a bar to the action, in a case governed by the federal employers' liability act, and does not, like contributory negligence, operate merely in reduction of damages." *Pryor v. Williams,* 254 U. S. 43; *Preble v. Union Stock Yards Co.,* 110 Neb. 383. "Such dangers as are normally and necessarily incident to the occupation are presumably taken into the account in fixing the rate of wages. And a workman of mature years is taken to assume risks of this sort, whether he is actually aware of them or not." *Seaboard Air Line Railway v. Horton,* 233 U. S. 492.

It is apparent from the evidence that the danger of the attached rail springing back toward its former position on the track was obvious. The plaintiff demonstrated in the presence of the court and jury just where he stood when he knocked off the angle iron. While the demonstration is not fully depicted in the words transcribed, it indicates that plaintiff stood on the inside of the rail, whereas, if he had stood on the outside or beyond the end of the rail, it would not have struck him in its sweep back toward its former position when it was released. He had merely been ordered to knock off the iron with the sledge. Where he should stand was not indicated by the foreman nor was he warned of danger incident to carrying out the order. Where the plaintiff's knowledge of the situation and of whatever danger existed was at least equal to that chargeable against the defendant, the plaintiff was not entitled to a warning. *National Biscuit Co. v. Nolan,* 70 C. C. A. 436, 138 Fed. 6, 12, cited with approval in *Missouri P. R. Co. v. Aeby,* 275 U. S. 426; 3 Labatt, Master and Servant (2d ed.) secs. 1113, 1142, and 1148; *Atchison, T. & S. F. R. Co. v. Wyer,* 8 Fed. (2d) 30. In the last cited case it was held by the circuit court of appeals in this circuit: "An employee assumes risks not ordinarily incident to his employment, provided he knows of them and appreciates the danger, or provided they are so plainly observable that he must be presumed to know them and to appreciate the danger."

Plaintiff describes *Rathjen v. Chicago, B. & Q. R. Co.*, 85 Neb. 808, as "almost identical with the one at bar." The cases are quite different. There the injured employee was engaged with others in removing one rail at a time. "The undisputed evidence shows that while loosening the rails, if they had become wedged, the inside of the track is a dangerous position. The plaintiff, in ignorance that the rails were wedged, in obedience to a command of the foreman, stepped inside the rail to pry or lift the rail with a crowbar. Another workman had been directed to pry the rail at the joint. As he proceeded to do this, the rail sprang, striking plaintiff, and others, and severely injuring him. *Held,* (a) that the proximate cause of the injury was the negligent command to the plaintiff to place himself in a position which was known, or ought to have been known, to the foreman as one of danger on account of the wedging of the rail, a fact which the foreman knew, and of which the plaintiff was ignorant." The foreman there directed him to stand inside of the rail and lift. In the instant case the foreman gave no orders as to where he should stand. In the *Rathjen* case "the proximate cause of the injury was the negligent command." In the instant case the foreman did not know anything about the rail which the plaintiff did not know. He had helped to detach one end of the line and to push the line of rails out to the edge of the ballast. This left the last rail still attached and taut. It was free to fly back when he removed its connection with the next rail because that end was, as he testified, several inches from the ground. The plaintiff's own negligence was the proximate cause of his injury. The court did not err in sustaining the motion to dismiss.

The judgment of the district court is

AFFIRMED.

EDWARD J. CONNOR ET AL., APPELLANTS, V. CHARLES B. MCDONALD, SHERIFF, ET AL., APPELLEES.

FILED JANUARY 2, 1931. No. 27339.

1. **Homestead**: SELECTION. In Nebraska, homestead rights and exemptions were created by statutes that leave the selection of the homestead to the owner or rightful claimant.
2. ———: ———. The homestead of husband and wife can only be selected from the separate property of the wife with her consent. *First Nat. Bank of Tekamah v. McClanahan*, 83 Neb. 706.
3. ———: EXEMPTION. "An undivided interest in real estate, accompanied by the exclusive occupancy of the premises by the owner of such interest and his family as a home, is sufficient to support a homestead exemption." *Giles v. Miller*, 36 Neb. 346.
4. ———: LIENS. Judgments rendered against a husband in a municipal court and docketed in the district court during the existence of a homestead, while occupied by him and his wife, do not become liens thereon, where a former valid mortgage and the homestead exemption of $2,000 exceed the value of the husband's undivided half interest in the premises, in absence of the wife's consent to the selection of the homestead from her separate estate or the other undivided half interest.
5. ———: VALUATION. "The extent of a homestead is to be determined by the claimant's interest in the land, and not by the fee-simple value of the premises. In determining his homestead interest, valid mortgages and other liens are to be deducted from the value of the land, and not from the $2,000 homestead exemption." *Corey v. Plummer*, 48 Neb. 481.
6. ———: SALE: LIENS. "A purchaser of a homestead of the net value of not to exceed $2,000 takes the same free from the lien of a judgment docketed prior to such purchase and during the existence of the homestead right." *Radbruck v. First Nat. Bank*, 95 Neb. 288.

APPEAL from the district court for Douglas county: FRANCIS M. DINEEN, JUDGE. *Reversed, with directions.*

Morsman & Maxwell, for appellants.

Montgomery, Hall, Young & Johnsen, contra.

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

ROSE, J.

This is a suit in equity to enjoin a sheriff's sale of lot 26, block 1, in Brevoort Place, Omaha, under executions on two judgments, and to cancel the apparent liens thereof as clouds on the title of plaintiffs.

The judgments were entered in the municipal court of Omaha; one for $254.32 December 24, 1925, and the other for $954.21 December 31, 1925. A transcript of each was docketed in the district court for Douglas county January 6, 1926. The sheriff received executions on the judgments September 28, 1928, levied on the lot October 3, 1928, and eight days later advertised it for sale on November 13, 1928. The judgment creditor was Louis Bradford Lumber Company and the sole judgment debtor was Alfred J. Abramson. The executions were stayed by a preliminary order.

When the transcripts of the judgments were docketed in the district court, Alfred J. Abramson and Emma Abramson, his wife, owned the lot, each having an undivided one-half interest therein, subject to a 3,500-dollar mortgage, the proceeds of which had been devoted by them to the construction of a dwelling house thereon. While they were occupying the premises as a homestead, they conveyed the improved lot by warranty deed February 17, 1926, to John Abrahamson, father of Alfred J. Abramson, the latter having abbreviated his patronymic. This conveyance was subject to the existing mortgage, and the grantee, a widower, conveyed the lot by warranty deed May 11, 1928, to Edward J. Connor and Catherine C. Connor, his wife, subject to a new 3,500-dollar mortgage, with the proceeds of which the lien of the prior mortgage was released.

In the present suit in equity Edward J. Connor and Catherine C. Connor are plaintiffs. Charles B. McDonald, sheriff of Douglas county, and Louis Bradford Lumber Company, judgment creditor, are defendants. Plaintiffs seek equitable relief by injunction on the grounds that they acquired by their warranty deed the entire interests of Alfred J. and Emma Abramson and also of John Abra-

hamson, including the homestead, subject to the second 3,500-dollar mortgage; that the entire homestead exemption was allowable out of the undivided one-half interest of Alfred J. Abramson; that, long before the transcripts of the judgments were docketed in the district court, and continuously since, the lot has been occupied as a homestead by Alfred J. and Emma Abramson, and their successors in title; that the first mortgage lien of $3,500 and the homestead exemption of $2,000 far exceeded the value of Alfred J. Abramson's undivided one-half interest in the lot and that therefore he had therein no interest or property right to which the judgments could lawfully attach. The facts and grounds of relief outlined are pleaded in detail by plaintiffs in their petition in equity.

The grounds on which the application of plaintiffs for equitable relief was defended, as shown by the answer to the petition, were that the warranty deed to John Abrahamson was a subterfuge and fraudulent as to creditors, conveying title in secret trust for his son; that by reason thereof the judgments became liens on the interest of Alfred J. Abramson, depriving him and subsequent grantees of any right to exemption, since they were all chargeable with the notice imparted by the previous public record of the judgments when the transcripts were docketed in the district court; that, even had there been no conveyance in secret trust by which the judgment debtor lost his right to claim a homestead exemption of $2,000, his claim therefor would be allowable out of the joint interests of himself and wife; that in any event he had in the lot, when deeded to his father, a property right to which the judgments attached as liens. Unadmitted new facts pleaded in the answer were put in issue by a reply.

Upon a trial below the district court found the issues in favor of defendants and dismissed the suit. Plaintiffs appealed. The cause was heard before the commission and a judgment of reversal followed. A reargument before the supreme court was granted and the record was again submitted for further consideration.

The principal question presented by the appeal is the identity of the particular property or estate that supported the homestead when the transcripts of the judgments were docketed in the district court January 6, 1926, and when Alfred J. and Emma Abramson, husband and wife, conveyed the lot by warranty deed to John Abrahamson February 17, 1926. In Nebraska, homestead rights and exemptions were created by statutes that leave the selection of the homestead to the owner or rightful claimant. Comp. St. 1922, sec. 2816. The statute specifically provides:

"If the claimant be married, the homestead may be selected from the separate property of the husband, or with the consent of his wife from her separate property." Comp. St. 1922, sec. 2817.

This means that the homestead can only be selected from the separate property of the wife with her consent. The statute has been so construed. *First Nat. Bank of Tekamah v. McClanahan,* 83 Neb. 706; *Zeng v. Jacobs,* 101 Neb. 645. Whatever the law may be elsewhere, the rule in Nebraska is:

"An undivided interest in real estate, accompanied by the exclusive occupancy of the premises by the owner of such interest and his family as a home, is sufficient to support a homestead exemption." *Giles v. Miller,* 36 Neb. 346; *Doman v. Fenton,* 96 Neb. 94.

In the present instance the husband and the wife purchased the lot, and took the title, each owning an undivided half interest, built a house thereon with the proceeds of the mortgage executed by both and thereafter continuously occupied the premises as their home until after they conveyed to John Abrahamson the title to the entire estate by warranty deed, subject to incumbrances. These facts are established by the evidence without dispute. The record contains no evidence that the wife consented to the selection of the homestead from her separate estate—her undivided half interest. It follows therefore that the husband's undivided half interest in the improved lot supported the homestead.

Did the judgments docketed during the existence of the homestead while occupied by the husband and the wife become liens on the husband's interest in the property on which the sheriff levied? The law is that there were no such liens, if the first mortgage, the other valid incumbrances, and the homestead exemption of $2,000 exceeded the value of the husband's undivided half interest in the real estate. Well established rules were formerly stated as follows:

"The extent of a homestead is to be determined by the claimant's interest in the land, and not by the fee-simple value of the premises. In determining his homestead interest, valid mortgages and other liens are to be deducted from the value of the land, and not from the $2,000 homestead exemption." *Corey v. Plummer*, 48 Neb. 481.

In the case at bar one witness testified that the gross value of the premises was $6,000 January 6, 1926, when the judgments were docketed in the district court, and February 17, 1926, when the husband and wife executed their warranty deed. This was higher than the estimates of other witnesses. On that basis the gross value of the undivided half interest of the husband did not exceed $3,000. The unpaid debt secured by the first mortgage, the taxes, the special assessments and the homestead exemption of $2,000, on the dates mentioned, far exceeded $3,000. The net value of the homestead estate alone, therefore, was less than $2,000. It follows that the husband never had in the lot a property right to which the judgments attached and they did not become liens on any part of the real estate in controversy while he and his wife were the owners of the fee. They were free to transfer their title to John Abrahamson without any interference from the judgment creditor. The evidence does not prove any fraud in that transaction or disclose a secret trust in favor of grantee's son. By purchase and warranty deed plaintiffs acquired all the rights of the husband and the wife in and to the lot, including the homestead estate. In a former opinion it was held:

"A purchaser of a homestead of the net value of not to exceed $2,000 takes the same free from the lien of a

judgment docketed prior to such purchase and during the existence of the homestead right." *Radbruck v. First Nat. Bank,* 95 Neb. 288.

The judgment of the district court and the former judgment of the supreme court herein are set aside and the dismissed cause reinstated, with directions to the court below to enter a decree granting an injunction pursuant to the prayer of the petition and removing the cloud that the judgments on which the executions were issued cast on the title of plaintiffs.

REVERSED.

GEORGE VOLKER, APPELLEE, V. CHARLES B. MCDONALD, SHERIFF, ET AL., APPELLANTS.

FILED JANUARY 2, 1931. No. 27458.

1. **Criminal Law:** SENTENCE. Where a defendant is convicted and sentenced to a term of imprisonment, and, on error, the judgment is affirmed and a mandate issued, but, in the same proceeding, a delay occurs before the defendant is taken into custody, such delay will not invalidate the sentence.
2. ———: TERM OF IMPRISONMENT. A judgment in a criminal action, ordinarily, can be satisfied only by carrying into effect the sentence imposed by the trial court, and the term of imprisonment does not begin until the time the defendant is taken into custody on the mittimus or incarcerated under the sentence.
3. ———: SENTENCE. "The essential part of a sentence of imprisonment is not the time when it should be executed, but the extent of the punishment fixed; and expiration of time, without imprisonment, is in no sense an execution of the sentence." *Ex parte Vance,* 90 Cal. 208.
4. **Estoppel:** STATES. "Public policy, to prevent loss to the state through the negligence of public officers, forbids the application of the doctrine of estoppel to the state, growing out of the conduct and representations of its officers." *People v. Brown,* 67 Ill. 435.

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

Henry J. Beal, John W. Yeager, H. J. Schoening and *Jack W. Marer,* for appellants.

O'Sullivan & Southard, contra.

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

DEAN, J.

This habeas corpus proceeding was begun January 29, 1930, in the district court for Douglas county, by George Volker, relator, against the sheriff and the custodian of the county jail of Douglas county, as respondents. Volker charges that he was unlawfully imprisoned and restrained of his liberty, "without any warrant or authority in law whatsoever," and that he is entitled to have his liberty restored forthwith. From an order of the Douglas county court allowing the writ and discharging Volker, the sheriff and county jailer have appealed.

A stipulation of facts herein discloses that Volker was found guilty, in the district court for Douglas county, of having unlawfully received a stolen car, August 22, 1919, in Omaha, and that for this offense he was sentenced to serve an indeterminate term of imprisonment in the penitentiary of not less than one nor more than seven years. Upon appeal to this court, the judgment was affirmed, and a mandate was issued and directed to the Douglas county district court November 9, 1920, but it appears that no proceedings were had pursuant to such mandate until January 16, 1930, when a summons was issued thereon. Subsequently he was released pursuant to a judgment of the district court for Douglas county allowing the writ of habeas corpus, above noted.

The parties herein also stipulated that at no time were the bondsman or the defendant notified by any person or officer of the ruling of this court or of the mandate, nor was the defendant at any time required or requested to present himself to the sheriff or to any other person of authority, pursuant to the command of the mandate. It is also disclosed that, some time after the mandate was issued by this court, the relator was arrested and found guilty, in the federal court at Omaha, of another offense, namely, the violation of the Harrison narcotic act. Volker

was sentenced, pursuant to the above proceeding against him, February 6, 1923, to serve two years in the federal penitentiary at Leavenworth, Kansas. It appears that Volker was a prisoner in the federal penitentiary until September 14, 1925, when he was released and discharged therefrom.

The relator contends that more than ten years elapsed from the time the mandate of this court was issued until he was taken into custody thereunder; that he at no time had notice from his attorney, nor from any other source, of the affirmance of the sentence, nor did he at any time have any knowledge of the disposition of the case; that he was never at any time a fugitive from justice, and that no valid sentence now exists against him. He also argues that he did not request nor consent to, nor did he acquiesce in, the delay of the imprisonment.

As a matter of law and of practice, however, it does not appear to us that the lapse of time from the affirmance of the judgment to the time when Volker was taken into custody, namely, on January 29, 1930, thereby invalidated the sentence or any part of it, either with or without his knowledge. In *Riggs v. Sutton,* 113 Neb. 556, we announced the following rule:

"Where no time is fixed by statute for the beginning of a sentence of imprisonment in a criminal case, it does not, ordinarily, begin until the prisoner is taken into custody by, or offers to surrender himself to the custody of, the proper officer." And in the same case, we said: "When a defendant in a criminal action has been convicted and sentenced to a term of imprisonment, and a warrant of commitment has been issued, and delay occurs before it is executed, if defendant asks for or acquiesces in the delay, then the time which elapses before he is actually taken into custody will not be regarded as a part of the sentence." It does not appear that Volker at any time offered "to surrender himself to the custody of the proper officer." Hence, it follows that the time which elapses before he was "actually taken into custody" cannot "be regarded as a part of the sentence" in the present case.

To substantially the same effect is *Mercer v. Fenton, ante,* p. 191.

True, while Volker did not request the delay, he was charged with knowledge of the status of his case and thereby he clearly acquiesced in the delay. Counsel observe that Volker assumed that "the matter had been disposed of in his favor." But will it be seriously argued that the mere assumption of a material fact by a litigant can be made to take the place of an existing fact? And a litigant is, of course, in the absence of fraud or deceit, clearly bound by the actual status of his case. There is nothing in the record going to show that Volker ever at any time made inquiry of any person or of any court official in respect of the then pending case against him in the district court for Douglas county. The relator's contention of his ignorance of the status of the case and of its disposition, under the facts before us, affords no grounds for his discharge from the penalty of imprisonment imposed by the court. In a similar case in California, the court announced this self-evident rule:

"The essential part of a sentence of imprisonment is not the time when it should be excuted, but the extent of the punishment fixed; and expiration of time, without imprisonment, is in no sense an execution of the sentence." *Ex parte Vance,* 90 Cal. 208.

"The time when a sentence of imprisonment shall commence, although specified in the same entry, is properly no part of the sentence, and may be changed by the court at a subsequent term, if for any reason execution of the sentence has been delayed." *Bernstein v. United States,* 254 Fed. 967.

And, in *Ex parte Salisbury,* 98 Tex. Cr. Rep. 341, where the mandate was issued December 31, 1921, and a summons was not issued until December 13, 1924, lacking only a few days of three years, it was held that the lapse of time did not at all operate to discharge the accused. And in a like case in Iowa, the court used this language:

"It was undoubtedly the duty of the clerk to issue mit-

timus, and of the sheriff to execute the same promptly upon rendition of judgment; but can it be said that the neglect of these officers shall defeat the very object of the prosecution, i. e., punishment for violation of the criminal laws? * * * While the court could not postpone the penalty of the law denounced against the offender, its officers might by procrastination wholly obviate and prevent punishment." *Miller v. Evans,* 115 Ia. 101.

In an opinion by Mr. Justice Story in *United States v. Kirkpatrick,* 9 Wheat. (U. S.) 720, 735, the court, among others, advanced this rule: "The general principle is, that laches is not imputable to the government; and this maxim is founded, not in the notion of extraordinary prerogative, but upon a great public policy." We think the rule announced in the *Kirkpatrick* case is applicable to the facts before us.

And, in *People v. Brown,* 67 Ill. 435, the court made this observation: "Public policy, to prevent loss to the state through the negligence of public officers, forbids the application of the doctrine of estoppel to the state, growing out of the conduct and representations of its officers."

As relating to the present case, we hold that, where a defendant is convicted and sentenced to a term of imprisonment, and, on appeal, the judgment is affirmed and a mandate issued, but, in the same proceeding, a delay occurs before the defendant is taken into custody, such delay will not invalidate the sentence. In such case, it appears, on reason and by virtue of the weight of authority, that the judgment can be satisfied only by carrying into effect the sentence imposed by the trial court, and the term of imprisonment does not begin until the time the defendant is taken into custody on the mittimus or incarcerated under the sentence.

It clearly appears to us that the relator is not entitled to the relief he seeks. Under the facts, and pursuant to the law, the imprisonment of defendant was not unlawful, nor was he unjustly restrained of his liberty.

The judgment allowing the writ must be and it hereby

is reversed, with directions that the relator be incarcerated in the penitentiary for the time designated in the judgment.

REVERSED.

MARGARET SAYRE BAKER, APPELLEE, V. SCHOOL DISTRICT NO. 48 OF SCOTTS BLUFF COUNTY, APPELLANT.

FILED JANUARY 2, 1931. No. 27459.

1. Contracts: ABANDONMENT. Where a contract is entered into and thereafter each party thereto performs acts inconsistent with its existence, but in each instance the inconsistent act of the one is acquiesced in by the other, such contract will be treated as abandoned by mutual consent.
2. ———: ———. Record examined and found to reflect a mutual abandonment of the contract involved.
3. Appeal. Further, in overruling the motion of the school district to direct a verdict in its favor, interposed at the close of Baker's evidence in chief, the trial court committed reversible error.

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

Raymond & Fitzgerald, for appellant.

George C. Porter, contra.

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

THOMPSON, J.

This action was instituted by the appellee, Margaret Baker, formerly Margaret Sayre, hereinafter called Baker, against the appellant school district on an ordinary school teacher's contract for nine months, to recover salary as such teacher for a period of five months that she did not teach, having been, as she claims, wrongfully discharged. Trial was had to a jury, verdict returned for Baker and judgment entered thereon for the full amount claimed, to reverse which the school district appeals.

There are numerous claimed errors for reversal presented. It is our conclusion, however, arrived at from an

examination of the entire record, that the question for our determination is, whether or not the motion of the school district for an instructed verdict in its favor, interposed at the close of Baker's evidence in chief, should have been sustained. As a basis for such motion, the following grounds, in substance, were urged: The evidence is insufficient to sustain a verdict in favor of Baker; the evidence affirmatively shows that the contract was not breached by the school district; the evidence shows that Baker voluntarily relinquished any claim under the contract; further, there is no evidence proving or tending to prove any legal damages.

Thus, the evidence should have our first consideration. The execution of the contract, the entering upon the performance thereof by Baker, the service rendered thereunder for four months by her, and the receipt of compensation therefor, are admitted. Sometime during the Christmas vacation period of 1928 and 1929 Baker was married. Thereafter the school board of the district, through J. K. Butcher, director, being desirous of obtaining a release from this contract, formulated and submitted by way of the mail a proposition to Baker, which, so far as material is as follows:

"Morrill, Nebraska, January 1, 1929. Mrs. Margaret Baker. Dear Margaret: I have talked with the other members of the board, in regard to continuing your school after marrying and it was our decision that Milton's inclination to be with you has been so strong that it would indicate that now since you are all his own he would be inclined to feel that he had a perfect right to be with you all he pleased, and we too believe he should have that privilege; therefore after carefully considering all we believe it would be more satisfactory to all concerned if you would hand in your resignation. I am very sorry things had to turn out this way, but under the circumstances, I am afraid it would end up unsatisfactory and if it was necessary to change teachers at all we much prefer to do it now."

A day or two after this letter was received by Baker, such Butcher called her over the telephone, and inquired if she had received such communication. She, in testifying as a witness in her own behalf, and as part of her main case, said that she had, and further stated:

"And he started to tell me that he had talked with the school board and they had decided it was the only thing to do. And I told him I would be out and talk to him that afternoon, and he said that would be all right."

Butcher, in testifying as her witness, and as a part of her case in chief, on this same matter, stated:

"I said, 'Did you get my letter?' And she said, 'Yes.' I said, 'I am very sorry things have turned out the way they have, but you know the dissatisfaction that existed out there and still seems to exist and after we have talked it over with the other members of the board, we decided that was the best thing to do.' She said, 'All right.' She said, 'I was just going out to your place.' And I said, 'I will be leaving town right away.' She said, 'I want to get my things.' And I said, 'Mrs. Butcher is home.' And I think that is all the conversation over the telephone."

Immediately thereafter Baker went to the Butcher home, where she had been rooming and boarding, obtained her belongings, then went from there to the schoolhouse, procured such articles of hers as had been used there by her as teacher, surrendered the key to the school building, or at least left such key, and returned to her then home. In the evening of this same day, Butcher, having relied on the statements and acts of Baker, and having discussed the matter with the county superintendent, employed another teacher; and such teacher, with full knowledge thereof on the part of Baker, entered upon the discharge of her duties and fully complied therewith for the remaining five months of the school term, and received the compensation agreed upon from the district therefor. During such period of five months Baker at no time objected to the course pursued by the school district; neither did she inform the school officers that she was ready, willing and

able to assume the duties as teacher, or that she desired to do so.

It is clearly apparent that the acts of these respective parties are inconsistent with the theory of a continuance of the contract, as claimed by Baker, but are confirmatory of the theory of the school district that the contract was abandoned by concurrence of the parties thereto.

Considering the testimony of Baker and Butcher, the one with the other, and each in connection with the above quoted letter, and with the acts of both parties forming an integral part of the same transaction, there can be but one conclusion arrived at, and that is, that the contract here involved was abandoned by the mutual consent of the contracting parties.

Where a contract is entered into and thereafter each party thereto performs acts inconsistent with its existence, but in each instance the inconsistent act of the one party is acquiesced in by the other, such contract will be treated as abandoned by mutual consent. *Herpolsheimer v. Christopher*, 76 Neb. 352.

It follows that the motion for a directed verdict should have been sustained, and the trial court committed reversible error in not so ruling.

It might be well to state further that the evidence taken subsequent to the overruling of the motion for a directed verdict in no manner changed the foregoing indicated situation, and the verdict of the jury was without support in the evidence.

This renders it unnecessary to consider any other claimed errors presented.

The judgment of the trial court is reversed and the action dismissed, and the costs of both this court and the trial court are taxed to appellee Baker.

REVERSED AND DISMISSED.

PETER S. PETERSON, APPELLANT, V. DEPARTMENT OF PUBLIC WORKS ET AL., APPELLEES.

FILED JANUARY 7, 1931. No. 27472.

1. **Commerce:** MOTOR VEHICLES: REGISTRATION: FEES. Section 60-302, Comp. St. 1929, requiring the owners of motor vehicles to obtain certificates of registration of such vehicles, and section 60-314, Comp. St. 1929, requiring the payment of a fee, graduated as to amount by the carrying capacity of the motor vehicle, for such certificate, do not violate the commerce clause of the federal Constitution.
2. **Automobiles:** REGISTRATION FEES. Motor vehicle registration fees, as provided for by section 60-314, Comp. St. 1929, are not, in fact, an occupation tax, and the designation of them, as such, in said section is a misnomer.

APPEAL from the district court for Lancaster county: ELWOOD B. CHAPPELL, JUDGE. *Affirmed.*

Gaines, McGilton, Van Orsdel & Gaines and *William C. Ramsey,* for appellant.

C. A. Sorensen, Attorney General, and *L. Ross Newkirk, contra.*

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

GOOD, J.

Plaintiff brought this action, seeking a decree enjoining state officials from interfering with him in the operation of his motor truck over the highways of the state of Nebraska. A general demurrer to the petition was sustained. Plaintiff refused to further plead. Judgment of dismissal followed. Plaintiff appeals.

In his petition plaintiff alleges that he is a resident of Underwood, Iowa, the owner of a motor truck bearing Iowa license No. T F 35, used for the transportation of live stock, and that he is chiefly engaged in the transporting of live stock from the vicinity of Underwood, Iowa, to the stockyards in Omaha, Nebraska; that he holds a license giving him a permit to drive said truck on the public roads and highways of said state; that defendants have threatened to

have him arrested, should he fail to take out a license in the state of Nebraska and thereby obtain a permit in the state to operate his said truck upon the public highways of this state. He alleges that the state is attempting to levy an unjust tax upon the property of the citizens of another state coming into this state, and that the proposed collection of a license fee, or automobile tax, is unreasonable, unjust and contrary to the terms of the commerce clause of the Constitution of the United States.

The principal question for determination is the validity of the Nebraska statute imposing upon owners of automobiles and trucks the obligation of obtaining a license or permit to operate their motor vehicles over the highways of this state, and requiring the payment of the fee provided by the statute.

Nebraska, like most of her sister states, has adopted a rather comprehensive motor vehicle law. Experience has taught the necessity of regulating motor traffic over the state highways. It has provided for registration of all motor vehicles, the obtaining from designated officials certificates showing the owner's right to operate the vehicle over the highways; provided for the display of registration numbers on each vehicle, and regulating the speed and use of motor vehicles on the highways. The state is now, and for some years past has been, engaged in improving highways by paving and hard-surfacing them for the use by owners of such means of transportation. It is expending several millions of dollars annually in such work. The law provides for registration fees for the owners of automobiles and of motor vehicles, graduated according to carrying capacity or weight. A small part of this fee, so charged, is used for the administration of the law. The remainder of it is used exclusively to aid in improving and maintaining hard-surfaced highways. The amount of these fees forms only a small part of the total expended by the state in improving and maintaining its highways.

We deem it necessary to quote only such provisions of the law as have been attacked in this action. Section 60-302, Comp. St. 1929, in part, provides: "Every owner of a mo-

tor vehicle shall, for each motor vehicle owned, except as herein otherwise expressly provided, make application for registration on a blank to be furnished for that purpose by the county treasurer of the county of (in) which the owner resides, or if such owner is not a resident of this state, such application for registration may be made to the county treasurer of any county. (Then follows the information which must be contained in the application.) Provided, the provisions of the act relative to registration and the display of registration numbers shall not be construed to apply to any motor vehicles owned by a nonresident of this state, if the owner thereof shall have complied with the provisions of the law of the state of which he is a resident, relative to the registration thereof and the display of registration number plates thereon, and shall conspicuously display his registration number plates as required by the law of this state. The provisions of this section, however, as to the exemption from registration of such nonresident owners shall apply only to the extent that under the laws of the state of his residence like exemption and privileges are granted to motor vehicles, * * * trucks, and motor busses, duly registered under the laws of and owned by residents of this state. A nonresident, within the meaning of the provisions of this chapter, shall be held and defined to mean a person residing in another state, territory or district, and temporarily residing or sojourning within this state for a period of sixty (60) days, or less, in any one year. Provided, further, that none of the exemptions from the requirements of registration shall apply to commercial motor trucks or motor busses."

Section 60-314, Comp. St. 1929, provides the scale of registration fees. For ordinary automobiles the fee ranges from $8 to $12 per annum; and "for motor vehicles equipped to carry more than seven persons the fee shall be twenty-five ($25) dollars plus seven dollars ($7) additional for each person which said car is equipped to carry." It is further provided that motor vehicles engaged entirely in the transportation of passengers for hire shall be subject to the same rates provided for trucks. The registration

fee on trucks is as follows: "On all trucks on which the advertised carrying capacity shall not exceed two thousand (2,000) pounds, eight dollars ($8). On all trucks on which the advertised carry (carrying) capacity is more than two thousand (2,000) pounds but does not exceed three thousand (3,000) pounds, twelve dollars ($12). On all trucks on which the advertised carrying capacity is more than three thousand (3,000) pounds but does not exceed four thousand (4,000) pounds, eighteen dollars ($18). On all trucks on which the advertised carrying capacity is more than four thousand (4,000) pounds but does not exceed five thousand (5,000) pounds, the fee shall be twenty-five dollars ($25). On all trucks on which the advertised carrying capacity is more than five thousand (5,000) pounds, the fee shall be twenty-five dollars ($25) plus ten dollars ($10) for each thousand (1,000) pounds, or fraction thereof, by which the advertised carrying capacity exceeds five thousand (5,000) pounds."

There are other provisions of the statute making it a misdemeanor for one to operate a motor vehicle over the highways of the state without complying with the laws as to registration. We assume that it is the threatened arrest of the plaintiff for noncompliance with the registration laws of the state that is sought to be enjoined.

If the statute does not violate the commerce clause of the federal Constitution, then the demurrer to the petition was rightfully sustained. It is conceded that at this time congress has not occupied the field of regulating interstate traffic by motor vehicles operated over public highways, and, in the absence of such legislation, the state may enact reasonable regulations, provided it does not burden interstate commerce in their enforcement.

The precise question has not heretofore arisen in this state, so far as we are advised. Similar questions under similar statutes, have arisen in a number of the sister states, and have reached the supreme court of the United States for decision. Its interpretation of such laws is controlling.

Plaintiff cites and relies upon a number of decisions of the United States supreme court, involving the question of an occupation tax levied against telegraph, telephone and express companies, engaged in interstate commerce. We do not regard these cases as controlling, since there are other decisions of that court, relating to the exaction of registration fees for motor vehicles under statutes similar to the ones involved in this action.

In *Hendrick v. Maryland,* 235 U. S. 610, the validity of a Maryland statute, providing for registration of motor vehicles operated upon the highways of that state, was involved, and wherein the fees were graduated according to the horse-power of the motors. In the opinion it was said (p. 622): "In the absence of national legislation covering the subject a state may rightfully prescribe uniform regulations necessary for public safety and order in respect to the operation upon its highways of all motor vehicles—those moving in interstate commerce as well as others. And to this end it may require the registration of such vehicles and the licensing of their drivers, charging therefor reasonable fees graduated according to the horse-power of the engines—a practical measure of size, speed, and difficulty of control. This is but an exercise of the police power uniformly recognized as belonging to the states and essential to the preservation of the health, safety and comfort of their citizens; and it does not constitute a direct and material burden on interstate commerce. The reasonableness of the state's action is always subject to inquiry in so far as it affects interstate commerce, and in that regard it is likewise subordinate to the will of congress. * * *

"The prescribed regulations upon their face do not appear to be either unnecessary or unreasonable.

"In view of the many decisions of this court there can be no serious doubt that where a state at its own expense furnishes special facilities for the use of those engaged in commerce, interstate as well as domestic, it may exact compensation therefor. The amount of the charges and the method of collection are primarily for determination by the state itself; and so long as they are reasonable and are fixed

according to some uniform, fair and practical standard they constitute no burden on interstate commerce. *Transportation Co. v. Parkersburg,* 107 U. S. 691, 699; *Huse v. Glover,* 119 U. S. 543, 548, 549; *Monongahela Navigation Co. v. United States,* 148 U. S. 312, 329, 330; *Minnesota Rate Cases,* 230 U. S. 352, 405; and authorities cited. The action of the state must be treated as correct unless the contrary is made to appear. In the instant case there is no evidence concerning the value of the facilities supplied by the state, the cost of maintaining them, or the fairness of the methods adopted for collecting the charges imposed; and we cannot say from a mere inspection of the statute that its provisions are arbitrary or unreasonable.

"There is no solid foundation for the claim that the statute directly interferes with the rights of citizens of the United States to pass through the state, and is consequently bad according to the doctrine announced in *Crandall v. Nevada,* 6 Wall. 35. In that case a direct tax was laid upon the passenger for the privilege of leaving the state; while here the statute at most attempts to regulate the operation of dangerous machines on the highways and to charge for the use of valuable facilities.

"As the capacity of the machine owned by plaintiff in error does not appear, he cannot complain of discrimination because fees are imposed according to engine power. Distinctions amongst motor machines and between them and other vehicles may be proper—essential indeed—and those now challenged are not obviously arbitrary or oppressive. The statute is not a mere revenue measure and a discussion of the classifications permissible under such an act would not be pertinent."

In *Kane v. New Jersey,* 242 U. S. 160, the court had under consideration the validity of the New Jersey motor vehicle law, and in that case it expressly approved the holding in *Hendrick v. Maryland, supra.* In the course of the opinion it was said (p. 168): "The amount of the fee is not so large as to be unreasonable; and it is clearly within the discretion of the state to determine whether the compensation for the use of its highways by automobiles shall be

determined by way of a fee, payable annually or semi-annually, or by a toll based on mileage or otherwise. * * *

"In the *Hendrick* case it did not appear, as here, that the fees collected under the motor vehicle law exceeded the amount required to defray the expense of maintaining the regulation and inspection department. But the Maryland statute, like that of New Jersey, contemplated that there would be such excess and provided that it should be applied to the maintenance of improved roads. And it was expressly recognized that the purpose of the Maryland law 'was to secure some compensation for the use of facilities provided at great cost from the class for whose needs they are essential and whose operations over them are peculiarly injurious.' "

In *Clark v. Poor,* 274 U. S. 554, the court had under consideration the validity of the Ohio motor vehicle law. In the opinion it was said (p. 556): "The plaintiffs claim that, as applied to them, the act violates the commerce clause of the federal Constitution. They insist that, as they are engaged exclusively in interstate commerce, they are not subject to regulation by the state; that it is without power to require that before using its highways they apply for and obtain a certificate; and that it is also without power to impose, in addition to the annual license fee demanded of all persons using automobiles on the highways, a tax upon them, under section 614-94, for the maintenance and repair of the highways and for the administration and enforcement of the laws governing the use of the same. The contrary is settled. The highways are public property. Users of them, although engaged exclusively in interstate commerce, are subject to regulation by the state to ensure safety and convenience and the conservation of the highways. *Morris v. Duby,* 274 U. S. 135; *Hess v. Pawloski,* 274 U. S. 352. Users of them, although engaged exclusively in interstate commerce, may be required to contribute to their cost and upkeep. Common carriers for hire, who make the highways their place of business, may properly be charged an extra tax for such use. *Hendrick v.*

Maryland, 235 U. S. 610; *Kane v. New Jersey*, 242 U. S. 160. Compare *Packard v. Banton*, 264 U. S. 140, 144."

Again, in *Interstate Busses Corporation v. Blodgett*, 276 U. S. 245, the court held: "A state tax of one cent for each mile of highway traversed in the state by any motor bus used in interstate commerce, the proceeds of which are devoted to maintenance of public highways of the state, is not repugnant to the commerce clause of the Constitution, when not unreasonable in amount or discriminatory against interstate commerce." Other decisions of the United States supreme court holding to a like tenor are *Michigan Public Utilities Commission v. Duke*, 266 U. S. 570; *Buck v. Kuykendall*, 267 U. S. 307; and to like effect is the holding in *American Motor Coach System v. City of Philadelphia*, 28 Fed. (2d) 736.

Under the principles announced in these cases we think the law of Nebraska cannot be said to violate the commerce clause of the federal Constitution. There is nothing to indicate that the amount of the fees charged is exorbitant or unduly burdensome; or that it amounts to more than a fair compensation for the use of the facilities afforded those operating motor vehicles over the state's highways.

One other matter remains to be considered. The state legislature designated the registration fee as an occupation tax. This was a misnomer. The fact that the legislature called it an occupation tax does not, in fact, make it such; and, in truth, it is not an occupation tax but is purely a registration fee and exacted for the purpose of paying the expense of administering the law, and for the improvement and maintenance of the highways, and for no other purpose. It is not, in any sense, a general revenue measure. The legislative misnomer does not affect the validity of the act.

Plaintiff's petition does not state facts entitling him to the demanded relief. The judgment of the district court is therefore right, and it is

AFFIRMED.

ELIZABETH BROWN HOGOBOOM V. STATE OF NEBRASKA.

FILED JANUARY 7, 1931. No. 27365.

1. **Criminal Law:** STATUTES OF LIMITATION. Statutes of limitation as applied to criminal procedure need not be pleaded, but may be taken advantage of under the general issue and are to be liberally construed in favor of the defendant.
2. **Embezzlement:** INFORMATION: VERDICT: VALUE OF PROPERTY. The value of the property charged to be embezzled constitutes an essential element of the information charging the offense of embezzlement, under the provisions of section 9629, Comp. St. 1922, as amended by chapter 95, Laws 1923, and the jury on conviction for embezzlement thereunder pursuant to section 10154, Comp. St. 1922, "shall ascertain and declare in their verdict the value of the property * * * embezzled," and, without such definite finding, conviction for such embezzlement cannot be sustained.
3. **Criminal Law:** EMBEZZLEMENT: EVIDENCE: BOOK ACCOUNTS. In a prosecution for embezzlement where the books, records, papers and entries are voluminous and of such a character as to render it difficult for a jury to arrive at a correct conclusion as to amounts, an expert accountant may be allowed to examine them and to testify as to the result of his examination, when such books, records, papers and entries are in the courtroom, subject to inspection by the accused. Provided, however, such books, records, papers and entries must first have been duly identified and proper evidence submitted to establish a sufficient foundation for their own reception in evidence, if offered.
4. ———: EVIDENCE: COPY OF WRITING. Ordinarily, to justify the reception of a copy of a private writing in evidence, it must appear that it is a true copy of some writing, admissible in evidence, which has been lost or destroyed, or which is in the possession of the adverse party, who refuses to produce it on due notice. This rule is controlling in criminal as well as civil causes.
5. **Quære.** May the state under the facts in this case sustain the prosecution under section 9629, Comp. St. 1922?

ERROR to the district court for Frontier county: CHARLES E. ELDRED, JUDGE. *Reversed.*

Prince & Prince and *Kenneth Williams,* for plaintiff in error.

C. A. Sorensen, Attorney General, L. Ross Newkirk and *Lee Basye, contra.*

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

EBERLY, J.

The defendant, Elizabeth Brown Hogoboom, formerly Elizabeth E. Brown, was tried in the district court for Frontier county upon an information first filed in that court on the 6th day of December, 1929, charging: "That Elizabeth Brown Hogoboom * * * in the county of Frontier, and the state, aforesaid, * * * then and there being an officer of an incorporated company, to wit, assistant cashier of the Frontier County Bank * * * and * * * not being an apprentice or person within the age of 18 years, did then and there beginning on or about the 1st day of January, 1925, and continuously thereafter until, and including, the 19th day of April, 1928, by a series of acts during the same employment, wilfully and unlawfully, feloniously, fraudulently and continuously without the assent of her employer, embezzle the sum of $34,870.80 in money of the value of $34,870.80, * * * which money came into the possession and care of said Elizabeth Brown Hogoboom by virtue of and under color of her office as assistant cashier of said corporation, with the intent of her the said Elizabeth Brown Hogoboom to defraud the owner out of the value of the same." The trial resulted in the following verdict: "We, the jury, * * * do find the defendant Elizabeth Brown Hogoboom, formerly Elizabeth E. Brown, guilty as charged in the information; and we further find the amount and value of the property embezzled to be the sum of $1,650."

The record discloses that the plaintiff in error at every stage of the proceeding challenged the sufficiency of the information, the sufficiency of the evidence presented to sustain the information and to warrant the conviction, the sufficiency of the verdict to support the sentence imposed, and also alleges errors in the introduction of evidence specifically set forth in her brief.

The state in this case predicates the information, above set forth, upon and seeks to sustain the same under the

provisions of section 9629, Comp. St. 1922, as amended by chapter 95, Laws 1923. The amendment last referred to was an act entitled: "An act to amend section 9629, Compiled Statutes of Nebraska for 1922, relating to embezzlement, and to repeal said original section." And by its terms added to section 9629, Comp. St. 1922, as theretofore existing the words: "If money or property is so embezzled or converted by a series of acts during the same employment, the total amount of money and the total value of the property so embezzled or converted shall be considered as embezzled or converted in one act."

The defendant challenges the right of the state to charge the offense in the form of continuando, in view of the provisions of the Criminal Code that "No person or persons shall be prosecuted for any felony * * * unless the indictment for the same shall be found by a grand jury, within three years next after the offense shall have been done or committed." Comp. St. 1922, sec. 9931.

It is to be remembered in this connection that the generally accepted rule is that statutes of limitation as applied to criminal procedure need not be pleaded, but may be taken advantage of on the general issue. 1 Wharton, Criminal Procedure (10th ed.) 416, sec. 368. So, too, the construction of this statute is liberal to the defendant, for "Here the state is the grantor, surrendering by act of grace its rights to prosecute, and declaring the offense to be no longer the subject of prosecution. The statute is not a statute of process, to be scantily and grudgingly applied, but an amnesty, declaring that after a certain time oblivion shall be cast over the offense; that the offender shall be at liberty to return to his country, and resume his immunities as a citizen; and that from henceforth he may cease to preserve the proofs of his innocence, for the proofs of his guilt are blotted out. Hence it is that statutes of limitation are to be liberally construed in favor of the defendant, not only because such liberality of construction belongs to all acts of amnesty and grace, but because the very existence of the statute is a recognition and notification by the legislature of the fact that time, while it gradually

wears out proofs of innocence, has assigned to it fixed and positive periods in which it destroys proofs of guilt." 1 Wharton, Criminal Procedure (10th ed.) 415, sec. 367.

In reply to this position the state, in effect, concedes that the statute of limitations has obliterated the offense charged so far as it existed prior to the 6th day of December, 1926, but asserts that the information having been filed on the 6th day of December, 1929, all embezzlements committed since three years prior thereto are properly contained within the terms of the information, and that as to the interval of time between the 1st day of January, 1925, set forth in the information as the commencement of a continuous offense, and the 6th day of December, 1926, being in effect barred by the terms of the statute of limitations, may be treated as surplusage, as time is not of the essence of the offense and therefore the information is good as charging a continuous offense commencing on the 6th day of December, 1926, and culminating on the 19th day of April, 1928. In support of this position the case of *State v. Way*, 5 Neb. 283, is cited. The *Way* case involved a charge of cohabiting in a state of adultery. This court in the opinion say:

"The defendant is charged with the crime from August 10, 1874, until July 15, 1875. According to the import of the words used in the statute, this is a continued offense, and if it should be proved that he wantonly cohabited with the woman in a state of adultery, during any portion of this time, such proof would be sufficient to establish the crime and fix the guilt of the party. We are of the opinion that the continuing offense in this case was properly charged, and the statement of time properly alleged in the indictment.

"The second point made in the argument is not tenable, because no evidence could be received of any acts prior to the passage of the law, as the statutory offense charged did not then exist, and, therefore, as time is not of the essence of the offense charged, the prior time alleged in the indictment may be treated as surplusage, and the indictment, in

its legal effect, be held good as charging the offense from the passage of the law until July 15, 1875."

Is this doctrine announced by our court in *State v. Way, supra,* applicable to the situation here presented? Accepting the *Way* case as controlling as to proper application of the statute of limitations in a case wherein the offense involved is "continuous," and conceding that the information in that case embraced every element essential to the conviction, and the verdict therein established every essential fact necessary to sustain the sentence imposed, do these conclusions obtain in the instant case?

Section 11 of the Bill of Rights provides: "In all criminal prosecutions the accused shall have the right to appear and defend in person or by counsel, to demand the nature and cause of accusation, and to have a copy thereof." Section 9629, Comp. St. 1922, provides, as to the violation of its terms: "Every such person so offending shall be punished in the manner provided by law for feloniously stealing property of the value of the article so embezzled, taken or secreted or of the value of any sum of money payable or due upon any right in action so embezzled." Under the terms of section 9599, Comp. St. 1922, the stealing of money or property of the value of $35 is made a felony to be punished by imprisonment in the penitentiary not more than seven years nor less than one year; but, under the terms of section 9605, Comp. St. 1922, the stealing of any money, goods, or chattels of value less than $35, "Every person so offending shall make restitution to the party injured in two-fold the value of the property stolen or destroyed, and be fined in any sum not exceeding one hundred dollars or shall be imprisoned in the city or village jail subject to such labor on the streets or elsewhere as shall be required by the officer in charge of such jail for any time not exceeding thirty days."

Section 10154, Comp. St. 1922, provides: "When the indictment charges an offense against the property of another by larceny, embezzlement or obtaining under false pretenses, the jury, on conviction, shall ascertain and declare

in their verdict the value of the property stolen, embezzled or falsely obtained."

In order to properly determine the question here presented, it is necessary that the several statutes last referred to be construed together for the purpose of determining the legislative intent. It is quite obvious that by the express terms of the statutes thus construed "the value of the property stolen, embezzled or falsely obtained" constitutes an essential element of the indictment or information charging embezzlement under section 9629, Comp. St. 1922, as well as of the verdict of the jury determining the result of a trial thereunder. Indeed, in absence of such a statute as section 10154, Comp. St. 1922, above quoted, such would be the rule in jurisdictions where the statute relating to embezzlements provides that the punishment shall be regulated by value, as in cases of grand larceny and petit larceny. 12 Standard Encyclopædia of Procedure, 392.

So, too, this court has construed this statute to the effect that the jury shall ascertain and declare in their verdict the value of the property stolen, etc., and requires a definite finding on the part of the trial jury in their verdict, and that an estimate by the jury will not suffice. *McCormick v. State,* 42 Neb. 866; *Hennig v. State,* 102 Neb. 271; *Lee v. State,* 103 Neb. 87. In the *Hennig* case this court not only reaffirmed the rule referred to above, but added: "Upon conviction in such case, the court should look to the verdict for the value of the property to determine the sentence to be imposed."

The statements in the information filed in this case, as already set forth, is a simple charge that, during the time intervening between the 1st day of January, 1925, and the 19th day of April, 1928, there was an embezzlement of $34,870.80 by the defendant, but the defendant in no manner is therein advised as to the amount charged as embezzled between the 6th day of December, 1926, and the 19th day of April, 1928.

Whether it was the intent of the prosecutor to charge the value of $35 or less as the amount embezzled during the period within which the statute of limitations had not run,

the language employed in the information affords not the slightest clue. The jury's verdict in terms that the defendant is "guilty as charged in the information" is in effect a specific finding that between the 1st day of January, 1925, and the 19th day of April, 1928, there was an embezzlement of $1,650. There is, however, no determination of any fact from which it may be inferred that any embezzlement took place from and after the commencement of the 6th day of December, 1926, nor can the verdict, read in connection with the information, afford the slightest clue upon which may be determined the amount, if any, actually embezzled after the 6th day of December, 1926, or whether it amounted to $35 or less. It is manifest that such a verdict is wholly insufficient to sustain a conviction of a felony committed by the defendant within the statute of limitations. There being an essential failure of the prosecution to charge, and on the part of the jury to ascertain and declare in their verdict, the amount of money embezzled between the 6th day of December, 1926, and the 19th day of April, 1928, conviction may not be sustained.

It appears from the record that at the trial of this case an expert was permitted to testify as to his examination of certain books, records, papers and entries. His right to testify was challenged on the ground that no proper foundation for the same had been shown; and that there was no showing that the books and records, the source of the information, were themselves competent evidence. In other words, it was not shown that the books and records were kept in the usual and ordinary manner such as would be essential to a proper foundation for their own introduction in evidence. It is contended that the sole foundation laid by the state was limited to showing that the expert's conclusions were based on an examination of the books and records of the bank which were in the courtroom.

A careful reading of the bill of exceptions discloses that the identification of the source of this expert's opinion was decidedly vague. It appears that certain books and records which were probably made use of by him had been previously properly identified, but this conclusion cannot

be applied to all of the sources from which this expert derived his conclusions taken as an entirety.

The state relies upon the rule announced by this court in *Hankins v. State,* 115 Neb. 350, to sustain the action of the trial court. It is patent that both state and defendant concede the existence of the well-established rule in this jurisdiction, reannounced in this case, that "In a prosecution for embezzlement where the books, records, papers and entries are voluminous and of such a character as to render it difficult for a jury to arrive at a correct conclusion as to amounts, an expert accountant may be allowed to examine them and to testify as to the result of his examination, when such books, records, papers and entries are in the courtroom, subject to inspection by the accused." A careful reading of this opinion, however, discloses that the technical subject of proper foundation for testimony, such as now before us, was also considered in that case and it would seem determined adversely to the contention of the state. The immediate subject for consideration presented by the record in that case was whether a sufficient foundation had been laid for the introduction of the expert's opinion when it was based in part upon a large number of "detail ribbons" which were identified as having been made by the cash register during the course of defendant's employment, as to which the employer testified that they were part of his system of bookkeeping. These "detail ribbons" were not offered in evidence, but were in the courtroom subject to inspection; and a witness, who was an expert bookkeeper and accountant, and who made an audit of the books and accounts, testified that he used the conventional books (naming them) and the cash register ribbons, take-off sheets, and all other records in connection with the business. The defendant claimed that the general rule was departed from in the admission of expert testimony as to what was shown by the detail ribbons, because, he asserts, they were not made by the defendant. In discussing this contention, Goss, C. J., delivering the opinion of the court, says in part: "Defendant does not quarrel with the general rule, but his brief strenuously urges that the evidence

of the auditor was erroneously received on the ground that detail ribbons are hearsay. He asserts they are hearsay, because no single witness, testifying to a single item, says of it that it correctly records a single transaction, or, testifying of a single ribbon, says that he operated the cash register which made the figures on that ribbon. That argument might have efficacy if it applied to a stranger to the ribbons. But the defendant is not such. The cash register was under his dominion. It was a part of the paraphernalia of his office as bookkeeper. * * * We hold that, in the prosecution of a bookkeeper for embezzlement, records for the inspection and keeping of which he was responsible, and which went through his hands in the course of his duties, are admissible against him, though not actually made by him. The evidence on this phase of the case was properly submitted to the jury on the authority of the cases heretofore cited."

In other words, this court in the *Hankins* case, *supra,* carefully considered the subject of technical foundation and expressly found that the evidence offered on this subject was sufficient, and from the discussion contained in the opinion it may be fairly implied that, when expert evidence of the character here challenged is offered, as a prerequisite to its admission, it must fairly appear that the books and records upon which the testimony of the expert is based were themselves properly identified to such a degree as to entitle them to be admitted in evidence. It follows that the trial court erred in admitting, over objection, this evidence in violation of this principle.

Defendant also complains of the admission in evidence by the trial court, over objections, of certain carbon copies of letters purporting to have been written by witnesses and mailed to defendant in reply to defendant's letters. No notice to produce the originals of the copies introduced in evidence by the state has been served on the defendant, nor does it appear that such originals have been lost or destroyed. Defendant contends that the carbon copies were secondary evidence of the originals, and as such were

not admissible in evidence under the foundation contained in the record.

The state, as its sole authority to sustain the action of the trial judge, relies upon *LeMaster v. People,* 54 Colo. 416. The language employed by Justice Hill, who speaks for the Colorado court, as far as it relates to the question under consideration, is: "Complaint is made to the admission in evidence of carbon copies of letters written by witnesses in reply to those received from the defendant's company, either written or dictated by him. Upon his objections to the copies the defendant was requested to produce the originals; he stated his inability to do so and from his counsel's statements it appears that the allowance of time after the request was made would have been of no assistance in this respect. The witnesses testified that the carbon copies were made at the same time and that the originals were properly mailed, etc. Under these circumstances we think the copies were properly admitted."

On the other hand, the rule announced by this court, here applicable, is: "Ordinarily, to justify the reception of a copy of a private writing in evidence, it must appear that it is a true copy of some writing, admissible in evidence, which has been lost or destroyed, or which is in the possession of the adverse party, who refuses to produce it on due notice." *Peycke v. Shinn,* 68 Neb. 343. This court also by fair implication has approved this statement of the rule as applicable to a criminal case. *Knights v. State,* 58 Neb. 225. However, a careful analysis and comparison of the Colorado case with *Peycke v. Shinn, supra,* induces the belief that there is no real conflict between them. Justice Hill, in the *LeMaster* case, does not announce the doctrine that "carbon copies" are primary evidence. His argument, as an entirety in view of the facts recited, tends rather to the conclusion that the facts he enumerates are rather regarded as a sufficient foundation to justify the admission of the carbon copies as secondary evidence in the true sense of that term. If we are correct in this conclusion, we can have no quarrel with the principle of evidence upon which the Colorado case pro-

ceeds. It is to be remembered that all rules of evidence are adopted for practical purposes in the administration of justice and must be so applied as to promote the ends for which they were designed. In *Whitney v. State,* 53 Neb. 287, this court say: "The accused, while on the witness stand, denied the existence of such a deposit slip and of all knowledge thereof. This laid sufficient foundation for the admission of parol proof of the contents of the paper." So, also, Judge Rose, in *Nebraska State Bank v. Walker,* 111 Neb. 203, said: "When all the proofs applicable to the carbon copies are considered, it is sufficiently shown that the originals were not obtainable upon demands duly made therefor and that there was no error in admitting the copies as secondary evidence." In view of the facts appearing in the Colorado case cited, it is quite evident that the doctrine announced therein in no manner conflicts with the determination of this court announced in *Peycke v. Shinn, supra.* At all events, it must be conceded that this court is fully committed to the doctrine that carbon copies, especially when not intended for use as duplicates or executed in contrapart, must be deemed secondary, not primary, evidence. *Reasoner v. Yates,* 90 Neb. 757; *Sheridan Coal Co. v. Hull Co.,* 87 Neb. 117; *City of South Omaha v. Wrzesinski,* 66 Neb. 790. It is true, nevertheless, that the contentions of the state as to the admissibility of carbon copies of letters as presented in the instant case find support in some modern cases. But the early authorities were almost in a unit to the contrary, and it must be conceded that the more modern authorities are divided on the point under consideration. Some, as suggested, support the contention that carbon copies of letters are to be deemed primary or the legal equivalent of primary evidence rather than secondary. Where this conclusion prevails, such carbon copies would, of course, be properly introducible in evidence without the necessity of first accounting for the nonproduction of the original writing. This view obviates the serving of notice to produce even where the loss or destruction of the original is not disclosed by the evidence. It is based in part at least on the

proposition that carbon copies of letters being made at the same time and with identical strokes that produce the originals are unquestionably correct and accurate to a degree that entitles them to consideration as the equivalent of the originals actually signed and mailed. With due deference to these eminent authorities who have so held, we are unconvinced that in principle the distinction of carbon copies of letters, letter-press copies and the like is warranted. It must be admitted that carbon copies are, not infrequently, wholly or in part, at least, illegible and therefore inaccurate. So, also, it must be admitted as to typewritten letters dispatched in the ordinary course of business, possession and control of, or at least access to, the typewriting machine on which the work was done ordinarily remains with the sender of the letters. Under these circumstances, the corrupt substitution of retained carbon copies by "other copies" made at a later date and corruptly changed to comply with the exigencies then facing the original sender would afford the easiest and safest means of accomplishing a fraudulent or criminal alteration of evidence. Indeed, such substitution, though made months subsequent to the actual dates of letters of which they purport to be copies, yet being the products of the machine by which the originals were in fact written, would on their face, to a large degree, in defects of type, of alignment, of lateral and vertical spacing, and indeed in every element which gives to typewriting individuality, bear "unmistakable" and "convincing" evidence of "genuineness." Osborn, Questioned Documents, 581-608. There would indeed under such circumstances be no evidence of alterations within the four corners of each of such purported copies. Each would appear, as in the present case, to be separate, individual, and physically detached, and unrelated copies of original instruments. There would be no related and continuous course of correspondence such as was ordinarily presented by the old time letter-press copy books. From this aspect we find no reason why, on principle, a distinction should obtain by reason of the fact that the carbon copies are presumably made by the same

movement of the writing implement. 2 Jones, Evidence (2d ed.) 1467, sec. 798. Indeed, other considerations appeal strongly for the adherence to the present Nebraska rule, especially as applied to criminal cases. It was well said by Henderson, C. J., almost a century ago: "The object of the notice (to produce) is not *to compel* the party to produce the paper; for no such power is assumed, either directly or indirectly, by placing him under a disadvantage if he does not produce it. Its object is, to enable the prisoner to protect himself against the falsity of the secondary evidence, which the law presumes may be false, as its very name imports. The copyist may make a mistake in transcribing; *he may be corrupt; so may the witnesses who give evidence of the contents.* It is but reasonable, therefore, that the accused should have an opportunity of correcting a falsity in the evidence, if one should exist. Notice is given for that purpose, and that alone; and whatever may be its form in common practice, it is, in substance, a notification that the secondary evidence will be offered." (Italics ours.) *State v. Kimbrough,* 2 Dev. (N. Car.) 431. The conclusion is therefore that in the instant case the usual rule of evidence applicable to secondary evidence is controlling, and that the trial court in receiving in evidence the carbon copies of the letters under the facts in this record, disclosing neither the loss nor destruction of the originals, and also the absence of any notice to produce, erred in so doing.

And, lastly, there is necessarily involved in the case presented here the following: As heretofore stated the information in this case was laid under the general embezzlement statute which appears as section 9629, Comp. St. 1922. In effect this section provides the maximum penalty, on conviction of the crime defined therein, of seven years. Section 9638, Comp. St. 1922, is limited to the subject of embezzlement and frauds by bank officers and provides a maximum penalty for the commission of embezzlement by such of ten years. These sections were first enacted as sections 121 and 135 of an act entitled "An act to establish a Criminal Code," and approved in

1873. In 1921, under the title "An act to amend sections 4, 7, 11, 22 and 51 of article 16, title 5, in chapter 190 of the session laws of Nebraska for 1919, relating to that part of the Civil Administrative Code concerning banks, banking and the word 'bank,' to provide additional sections to said article, to provide a penalty for violation of the act, to declare an emergency and to repeal said original sections," there was enacted: "Section 6. Every president, director, cashier, teller, clerk, officer or agent of any bank who embezzles, abstracts or wilfully misapplies any of the moneys, funds, securities or credits of the bank, or who, with intent to defraud * * * draws any draft or bill of exchange, * * * upon conviction thereof shall be fined not more than five thousand dollars and be imprisoned not more than ten years." Laws 1921, ch. 297. This provision now appears as section 8047, Comp. St. 1922. The law of 1921 in terms does not purport to repeal or in any manner amend the original sections 121 and 135 of the Code of 1873, which, subsequently amended, now appear as sections 9629 and 9638, Comp. St. 1922. A cursory reading of the 1921 act as an entirety might indicate its purpose as limited to providing a penalty for the violation of the Nebraska act providing for the organization and regulation of Nebraska state banks. It is also apparently an act complete within itself, and, so construed, evidences a legislative purpose to create an independent substantive crime as possibly applicable to officers and employees of state banks only and to provide an exclusive penalty therefor.

A situation somewhat similar in principle has heretofore been before this court. Prior to 1907 we had a general statute on the subject of larceny, which now appears as section 9599, Comp. St. 1922. Subsequently, independent acts were passed by the legislature defining and punishing hog stealing and cattle stealing as felonies, without regard to the value of the property stolen. This court held that the subsequent passage of the acts last referred to, in effect, eliminated the offenses of hog stealing and cattle stealing from the provisions of sections 114 and 119 of

the Penal Code (now carried as sections 9599 and 9605, Comp. St. 1922) under which the crimes last referred to were formerly punishable, and to compel the state to prosecute, if at all, under the provisions of the new acts. *Wallace v. State,* 91 Neb. 158; *Griffith v. State,* 94 Neb. 55. In view of the pronouncements of this court thus made, attention is invited to sections 8047, 9629, as amended, and 9638, Comp. St. 1922, and a comparison of their provisions suggested, especially in light of the fact that prior to the enactment of section 8047 the records of this court indicate that embezzlements by bank officers and employees were ordinarily prosecuted under the provisions of section 9638. Are the principles announced in the cases last above cited controlling and applicable in the disposition of the instant case? In view of the situation, we therefore do not determine the sufficiency of the evidence in the present bill of exceptions to sustain the information.

For the reasons heretofore stated, the judgment is reversed and the cause remanded.

REVERSED.

STATE, EX REL. C. A. SORENSEN, ATTORNEY GENERAL, V. NEBRASKA STATE BANK:
CLARENCE G. BLISS, RECEIVER, APPELLANT: VICKERS PETROLEUM COMPANY, INTERVENER, APPELLEE.

FILED JANUARY 7, 1931. No. 27428.

1. **Banks and Banking:** CHECKS. A check is a bill of exchange drawn on a bank requiring payment on presentation of a sum certain in money to order or bearer.
2. ———: ———: PAYMENT. In the absence of an agreement between the parties in interest to accept some other medium of payment, payment of check by drawee bank must be made in money.
3. **Customs:** ALLEGATION AND PROOF. It is incumbent upon one relying on a special custom as a basis of recovery or of defense, 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 with reference thereto.
4. **Banks and Banking:** COLLECTIONS. When a bank receives an instrument for collection and remittance, it becomes the agent

of the sender for such purpose, and in absence of other controlling facts is without authority to accept for its principal anything but that which the law declares to be legal tender or which is by common consent considered as money and passes as such at par.

5. ———: ———: AGENT FOR COLLECTION. Prior to the enactment of chapter 29, Laws 1925, due diligence ordinarily required that the agent for collection of a check must be a person other than the party on whom it is drawn, but by that act it was provided that a collecting bank "may forward such instrument for collection directly to the bank on which it is drawn," which by fair implication authorizes the drawee bank to act as agent of the sender and the assumption by it of a double capacity in the collection, payment and discharge of the instrument thus placed in its hands, but without eliminating any otherwise essential step to the completion of the transaction.

6. ———: ———: TRUST FUNDS. Where there is transmitted to a drawee bank for collection and remittance the check of its depositor for an amount covered by such deposit and such bank then possesses cash in an amount sufficient to pay the same and proceeds to complete the transaction by canceling such check and charging the account of such depositor, in the absence of a special agreement, it is required to allocate a sufficient amount of its cash on hand to the payment of such check, which moneys thereupon and thereafter constitute a trust fund in its possession.

7. ———: ———: ———. Where one bank sends to another for collection and remittance a check, the latter bank holds the same and the proceeds thereof when collected as trustee for the former, which upon failure of the collecting bank is entitled to a prior lien therefor upon the assets of such failed bank to the extent the assets of such bank have been augmented by such trust funds, provided such assets have been traced into some existing assets of such failed bank.

8. ———: ———: PAYMENT. The acceptance by a collecting bank of a check or draft drawn on another bank, in the absence of a specific agreement that such check or draft is to be accepted in payment of an instrument placed in the hands of such bank for collection, is presumed in law to be on condition that such check or draft is good. If the check or draft is dishonored, no payment is effected, and the rights of the respective parties in interest as existing prior to the issuance of such dishonored instrument are ordinarily unaffected thereby.

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

C. M. Skiles, I. D. Beynon and *John Wiltse,* for appellant.

F. A. Hebenstreit, contra.

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

EBERLY, J.

This is an appeal growing out of the failure of the Nebraska State Bank, of Humboldt, Nebraska. It may be said that the controlling facts are not in dispute and may be epitomized as follows: The Vickers Petroleum Company, doing business at Wichita, Kansas, in consideration of merchandise furnished, received on the 12th day of April, 1929, a check of $610.70 drawn by its debtor, the Star Oil Company of Humboldt, Nebraska, on the Nebraska State Bank of Humboldt (herein designated as Humboldt bank), wherein it is conceded the drawer was a depositor and had ample credit to cover the check. In due course this check was by the payee transmitted direct to the Humboldt bank for collection and return. On receipt of this instrument it appears that the latter institution charged it to the account of the Star Oil Company. It is evident that some delay ensued, but on April 24, 1929, there was issued by the Humboldt bank, to cover the amount of the check, a draft drawn by it on its correspondent, the Drovers National Bank of Kansas City, Missouri. When this draft was presented in due course, payment was refused by the drawee, though there was then a credit balance in favor of the drawer of $1,275.57; the Humboldt bank, it appears, having been taken over in the meanwhile by the department of trade and commerce as an insolvent institution. It affirmatively appears in the record, not only that the drawer of the check had at all times a sufficient credit balance to cover the same, but at the time of receipt of this check, as well as on April 24, 1929, the Humboldt bank possessed approximately $10,000 actual cash, which thereafter continuously increased until it attained the sum of $16,000, exclusive of exchange, which it possessed when it was placed in receivership. It may further be noted that in neither pleading nor evidence

is there any reference to the existence of any general, or special, custom or usage in banking claimed to be applicable to the transaction at hand. The claimant prosecuted this proceeding as in the nature of a suit in equity to establish its claim to a trust fund forming a part of the cash in possession of the receiver. The district court determined the issues in favor of the claimant and allowed its claim to the extent of $610.70 as a trust fund in the hands of the receiver of the Humboldt bank and awarded priority as such. The receiver appeals.

Prior to the act of 1925 (Laws 1925, ch. 29) the cause of action would probably never have arisen, and since the enactment of chapter 41, Laws 1929, an adequate remedy for all interests concerned is provided. The act of 1929 was not approved until April 30, 1929, and did not go into effect until July following, and issues presented in this case must be determined without reference to this legislation.

It is to be remembered that, commencing with the establishment of the national banking system, during the civil war, the practice among bankers became current to accept out of town checks as deposits, giving immediate credit therefor, with the attendant privilege of drawing against such credit at once. Such items so received were then usually collected by what is usually referred to as the "circuitous routing" plan through a wide-spread network of correspondent banks, each of which would ordinarily handle such collections, at least of those embraced in the chain, without charge.

This course of business necessarily involved the shunting of collection items back and forth across the country for days, and even weeks, before being finally presented for payment, and for like reason there was also involved a similar delay in the ultimate payment of the draft of the drawee, when such draft was employed by it to transmit the proceeds of such collections. While this course of business was slow, costly, and, fraught with the risk of the additional handling, increased the chance of error, and necessarily increased loss through bank failures, still the

drawee bank, especially in normal times, in the transaction indicated, "earned some profit by using the depositor's money during the period (sometimes weeks) in which the check was traveling the often circuitous route, with many stops, from the payee's bank to its own, and also while the exchange draft was being collected." *American Bank & Trust Co. v. Federal Reserve Bank,* 262 U. S. 643.

Truly circuitous routing, to a certain extent, was necessary to the exercise of proper diligence on the part of the collecting bank. Direct routing of such collections to the drawee bank involved a liability for negligence on part of the sender. For whatever may have been the usual custom between banks as to sending checks direct to the drawee thereof, the general rule that obtained in the absence of special legislation was: "In this country the party who is to pay a check is not a suitable agent for its collection. The sender (to such a party) is guilty of negligence, and custom is no defense." 1 Morse, Banks and Banking (6th ed.) 582, sec. 236a. See *Western Wheeled Scraper Co. v. Sadilek,* 50 Neb. 105.

However, by chapter 29, Laws 1925, passed and approved March 24, 1925, it was expressly provided that as to a check forwarded for payment the collecting bank "may forward such instrument for collection directly to the bank on which it is drawn: * * * Provided, however, such forwarding bank shall have used due diligence in other respects in connection with the collection of such instrument." Thus, in Nebraska, there is a legislative approval of the direct, as distinguished from circuitous, routing of collections as between banks. This statute, however, though remedial, is limited to this clearly expressed purpose.

In their last analysis, the facts in the instant case present the issue as between the owner of the proceeds of a collection item, an ordinary check, and the general creditors and depositors of the insolvent drawee thereof, now represented by the guaranty fund. It must not be forgotten, however, that had the item been presented to the drawee by another local bank, or other agency at Humboldt, the

amount would have been separated from the assets of the failed bank. In the absence of the act of 1925 this would probably have occurred. It therefore should not be regarded as in any sense inequitable to the depositors or to the guaranty fund, subrogated by law to the latter's rights, that when, for reasons of general efficiency, the additional collection steps necessitated by circuitous routing is in legal effect eliminated, and the payment is made and received by the drawee in a dual capacity and for direct remittance which is still retained when insolvency intervenes, the general creditors and the depositors of the failed bank represented by the guaranty fund are in no worse position if a preferred claim is given the forwarder. In fact, if a preferred claim is to be denied, the result would be to improve the condition of the depositors represented by the guaranty fund, merely because of a statute governing collection practice which they had no part in bringing about, and would wholly ignore the increased risk forced upon nonresident holders of negotiable paper by the direct routing practice authorized by the act in question.

True, a trust fund is the creation of equity and is dependent upon equitable considerations. But do not the latter appear in the instant case?

An analysis of the facts in the present transaction disclose there are but two legal questions presented for determination: First, payment of the check involved; second, transmission of the funds realized from the check.

It is to be remembered that the check as issued was a negotiable instrument which contained, and under the provisions of the Nebraska negotiable instrument law must contain, an unconditional order to pay a sum certain in money. Comp. St. 1929, secs. 62-101, 62-901, and 62-1602. See *Swenson Bros. Co. v. Commercial State Bank*, 98 Neb. 702. In the absence of an agreement between the parties in interest to accept some other medium of payment, payment therefor must be made in money. 8 C. J. 574. And this statute further contemplates that "The instrument must be exhibited to the person from whom payment is

demanded, and when it is paid must be delivered up to the party paying it." Comp. St. 1929, sec. 62-605.

This court is also committed to the doctrine that the Humboldt bank in this transaction must be deemed to have acted in a dual capacity and as having represented the plaintiff as his agent in the transaction. This result is supported by the fact that in this jurisdiction we have definitely adopted the Massachusetts rule as distinguished from the New York rule applicable to the subject before us. *First Nat. Bank of Pawnee City v. Sprague,* 34 Neb. 318; *Henefin v. Live Stock Nat. Bank,* 116 Neb. 331.

Indeed, we have definitely declared: "Where a bank receives an instrument for collection and remittance, it becomes the agent of the sender for such purpose." *Omaha Nat. Bank v. Brady State Bank,* 113 Neb. 711; *Henefin v. Live Stock Nat. Bank,* 116 Neb. 331. It is also true that an agent to collect a debt has not, by virtue of his general employment, authority to release a debtor, except upon payment of the full amount of debt in money. *Smith v. Jones,* 47 Neb. 108; *Cram v. Sickel,* 51 Neb. 828. In view of the express provisions of our negotiable instruments law, it is contemplated that a check sent for collection shall be paid by the use of money and in the manner as therein stipulated. Indeed, the rule thus announced, in substance, has been the rule in transactions between banks and their customers and patrons since time immemorial. Thus, in the early case of *Ward v. Evans,* 2 Ld. Raymond, 928, Holt, Chief Justice, said: "When a servant is sent to receive money on a bill, he cannot accept a note instead of money, without the particular directions of his master. Suppose the servant in this case had brought Wallis' note home to the plaintiff, and the plaintiff had sent him back with it, refusing to accept it, and insisting to have money, then it would not have been a payment beyond all doubt. But indeed if the master does give his consent subsequent to the taking of the note, that will amount to an authority precedent. But then I am of opinion, and always was (notwithstanding the noise and cry, that it is the use of Lambard-Street, as if the contrary opinion would blow up

Lambard-Street) that the acceptance of such a note is not actual payment. I agree the difference taken by my brother Darnall, that taking a note for goods sold is a payment, because it was part of the original contract; but paper is no payment where there is a precedent debt. For when such a note is given in payment, it is always intended to be taken under this condition, to be payment if the money be paid thereon in convenient time."

And in the case arising out of the fact that a collecting bank sent to the drawee bank a draft for collection and remittance, as to the legal effect of a tender by such drawee of its own draft in payment thereof, the supreme court of the United States announced the rule: "A collecting agent is without authority to accept for the debt of his principal anything but 'that which the law declares to be a legal tender, or which is by common consent considered and treated as money, and passes as such at par.'" And further determined that the bank draft tendered in the case then before it did not constitute money in the sense here employed. *Federal Reserve Bank v. Malloy,* 264 U. S. 160. With reference to the contention presented in the case last cited that a custom existed among bankers which sustained it as such, that court further suggests: "But the proof shows that the alleged custom was not known to plaintiffs; and they could not be held to it without such knowledge." And in further discussion of the subject of bankers' customs says: "It is said, however, that there is a custom among banks to settle among themselves by means of drafts so well established and notorious that judicial notice of it may be taken. But the usage here invoked is not that, but is one of special application to a case where the collection of a check is intrusted to the very bank upon which the check is drawn and where payment is accepted in a medium which the contract, read in the light of the law, forbids. The special situation with which we are dealing is controlled by a definite rule of law which it is sought to upset by a custom to the contrary effect." And the supreme court of the United States thereupon denied the contention thus made. This court, on the

subject of bankers' customs and usages, seems to be in harmony with the position last stated. In *Harrison State Bank v. First Nat. Bank,* 116 Neb. 456, Thompson, J., in delivering the opinion of the court said: "One claiming under an exception to a general rule carries the burden of alleging and proving facts which would bring him within such exception." And also: "It is incumbent upon one relying on a special custom as a basis of 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." See, also, *Shambaugh v. City Bank of Elm Creek,* 118 Neb. 817.

In the instant case the oil company had a credit in the form of a check account with the Humboldt bank in amount sufficient to pay the check which it drew. When this check was presented the drawee bank had cash in its till ample to pay it. It was its duty to pay in cash and in the manner contemplated by section 62-605, Comp. St. 1929. Prior to the enactment of the act of 1925, referred to, due diligence would have ordinarily necessitated the presentment of the check over the counter and would have required the participation in the transaction of two persons, the drawee bank and the representative of the holder of the check. The act of 1925, in effect, merely approved the assumption by the drawee bank of a double capacity. Under its terms it might as drawee bank and at the same time as representative of the holder of the check itself complete the entire transaction. In legal contemplation the provisions of the act of 1925 made no change whatever as to the essentials of the transaction, save and except as to form. After its passage duties theretofore imposed upon two parties might now be performed by one, the drawee bank. The law still contemplated the use of cash in the transaction, which involved the allocation of the necessary amount of the cash in its till by the drawee bank to the discharge of the obligations being paid, accompanied by a full compliance with the essentials of section 62-605, Comp. St. 1929.

Appellant contends that the doctrine announced by this court in the Gering bank case (*Central Nat. Bank v. First*

Nat. Bank, 117 Neb. 161; 115 Neb. 444; 115 Neb. 451; 115 Neb. 457; 115 Neb. 472; 115 Neb. 478) precludes the application of the trust fund theory in this case. This court is not of that opinion. Two reasons at least render it inapplicable. First, in these cases there was involved the assets of an insolvent national bank in possession of a federal receiver appointed by the comptroller of currency of the United States under the provisions of the federal statutes. The majority opinion, as finally announced (117 Neb. 161), merely determined that under the facts presented the federal statutes were applicable and conclusive and as to the construction of which the rule announced by the federal decision cited was controlling. The closing sentence of this opinion by Howell, J., limiting the scope of the commitments therein made, is quite significant. Then, too, in the Gering bank case the record therein discloses that the claimant of the preference neither alleged nor proved that at the time of the collection by the Gering bank of the obligations, which formed the foundation of its claim and which were satisfied by checks drawn by such depositors of the Gering bank upon their deposits therein, there was in possession of that bank cash available and sufficient to have paid their checks at the time of the several transactions. In fact, it was at least tacitly conceded in that case that even the small amount of cash which actually reached the possession of the receiver was practically all absorbed in the liquidation of other preferred demands against that institution. It is to be noted that the gist of the decision in the Gering bank case as made by the majority opinion was not that the fiduciary relations did not exist between the claimant, the Central National Bank and the Gering bank, but rather that the former failed in its endeavor to trace the trust funds and identify the same as entering into certain assets of the insolvent institution. It must be conceded that in the instant case the federal rule, in view of the identities of the parties, could not in any manner be invoked, and the conceded possession by the Humboldt bank of approximately $10,000 in cash at the time of the transaction in question which

was not thereafter substantially diminished is amply sufficient to differentiate the Gering bank case from the case now before us.

True, in the instant case there is no evidence that the cash was actually counted out or otherwise physically appropriated to the payment of the oil company's check. The record is silent on this subject. But it affirmatively appears that when that check was presented the drawee's cash was there, and the duties in reference to the same are such as are enjoined by law. Under these circumstances the exactions of equity are not to be denied by mere failure, laches, or even of criminality of the agent in default, when the plaintiff has in no manner been negligent and comes into court with clean hands. "The maxim that equity regards as done that which ought to be done has been said to be equity's favorite maxim. The principle of it is the basis for many forms of equitable relief, and it has been said to be the foundation of all distinctively equitable property rights, estates, and interests. * * * The broad meaning of this maxim is that where an obligation rests upon a person to perform an act equity will treat the person in whose favor the act should be performed as clothed with the same interest and entitled to the same rights as if the act were actually performed." 21 C. J. 200. It follows that upon the conclusion of this transaction when the check was actually paid and canceled the Humboldt bank, in contemplation of equity, had in its possession, as part of its cash, a trust fund equivalent in amount to the face of the check satisfied and paid in the transaction. It also possessed, as its own, only the amount of cash it then had on hand, less the cash which, in contemplation of equity at least, had been allocated to the payment of the check. So long as it retained this trust fund its assets were augmented to that extent, for equity regards the substance and intent and not the form. The record further discloses without question that these funds were actually retained by the bank, maintained intact, and were, together with other assets, taken over by the receiver, appellant herein. The trial court did not err,

therefore, in awarding preference. "Where one bank sends to another, for collection and remittance, notes of third parties, the latter bank holds the same and their proceeds as trustee for the former, which, upon failure of the collecting bank, is entitled to a prior lien therefor upon the assets of the failed bank to the extent that they have been augmented by the trust funds, provided such augmented assets are traced into the possession of the receiver, and into some existing asset of such bank." *State v. Citizens State Bank,* 117 Neb. 359. The principles announced in the *Citizens State Bank* case preclude the necessity for any discussion of the proposition that the agency relation of a collecting bank ends upon collection, and debtor-creditor relation takes its place. In support of the application of the principles of law here made reference may be had to the following cases from other jurisdictions: *Goodyear Tire & Rubber Co. v. Hanover State Bank,* 109 Kan. 772; *Holder v. Western German Bank,* 136 Fed. 90; *Andrew v. People's Savings Bank,* 207 Ia. 948; *Bank of Poplar Bluff v. Millspaugh,* 313 Mo. 412; *Farmers Bank of Bowling Green v. Cantley,* 16 S. W. (Mo. App.) (2d) 642; *Thomas v. Mothersead,* 128 Okla. 157; *Union State Bank v. People's State Bank,* 192 Wis. 28; *Foster v. Rincker,* 4 Wyo. 484.

The receiver insists, however, that the Humboldt bank issued a bank draft or cashier's check which was accepted by the correspondent bank acting as collection agent in behalf of the Petroleum company and forwarded by it for collection, though it was never paid, and that the general rule that the purchaser of a bank draft or cashier's check is not entitled to a trust fund or a preference is applicable. Conceding the statement of the general rule as made to be true, yet neither the petroleum company nor its collecting agencies may be deemed "purchasers" within the meaning of that term as employed in the above rule. The present action is not founded upon the draft that was issued, or indeed upon a draft which was purchased. Here the drawee bank, to transmit a trust fund that it then held, issued a paper which was received by the payee, but when tendered for payment was not paid. Ordinarily,

trust funds may not be transferred or transmitted by use of bad paper. We are indeed on this subject committed to a rule exactly to the contrary to the contention of appellant. "The acceptance by a collecting bank of a check drawn on another bank, in the absence of a specific agreement that such check is to be accepted in payment of an instrument placed in the hands of such bank for collection, is presumed in law to be on condition that the check is good. If the check is dishonored, no payment is effected." *Omaha Nat. Bank v. Brady State Bank*, 113 Neb. 711. No payment being in fact effected in view of the condition which the law attached to the transaction, it was a mere nullity and the creditor may, upon the happening of this breach of condition, pursue his original remedy in equity against the receiver of the Humboldt bank to establish the existence of its trust fund in the assets under the receiver's control.

It follows that the decree of the trial court in awarding to the claimant a preference was proper and is

AFFIRMED.

FARMERS STATE BANK OF YORK ET AL., APPELLANTS, V. J. R. BROCK ET AL., APPELLEES.

FILED JANUARY 7, 1931. No. 27227.

1. Guaranty: BENEFICIARIES. A general guaranty signed by stockholders of a corporation guaranteeing payment of obligations of said corporation is valid and enforceable only by creditors of the corporation having knowledge of it and extending credit on the faith and credit of it.
2. ———: ———. It is not essential to the validity of a general guaranty that obligees be named therein. A general guaranty does not purport to be a contract with specific creditors, present or prospective, but is an open invitation which may be accepted and acted upon by any one having knowledge of it.
3. ———: ———. An agreement among stockholders of a corporation, who signed a general guaranty guaranteeing the indebtedness of the corporation, that there should be no liability against said signers until certain other stockholders signed said guaranty, is not binding on creditors who had no knowledge of such agreement and subsequently extended credit to the corporation on the faith and credit of said guaranty.

APPEAL from the district court for York county: LOVEL S. HASTINGS, JUDGE. *Reversed, in part, and remanded, with directions.*

C. E. Sandall, C. M. Skiles, Prince & Prince, W. W. Wyckoff and *J. L. Riddell,* for appellants.

C. A. Sorensen, Attorney General, Flansburg & Lee, Corcoran & Sprague, Benton Perry, Gilbert & Perry, George M. Spurlock and *W. L. Kirkpatrick, contra.*

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

LESLIE, District Judge.

This is an action brought by Farmers State Bank of York, Jens P. Nelson, Ethel Towle, Administratrix of the estate of William C. Towle, deceased, Paxson-Davis Company, and Peter C. Friesen on a guaranty signed by 36 stockholders of the Allied Unions Cooperative Association of York, Nebraska, and a number of other defendants, mainly creditors of said Allied Unions Cooperative Association. The guaranty reads as follows:

"York, Nebraska. February 2, 1921.

"For and in consideration of one dollar to us paid and for other good and valuable consideration, we, the undersigned, jointly and severally hereby guarantee unconditionally and at all times, the payment when due of any and all indebtedness or liability to the amount of twenty-five thousand dollars ($25,000), * * * including renewals and extensions of any such indebtedness or liability in whole or in part, to which we hereby consent, and as to any and every such indebtedness or liability we hereby waive notice of the acceptance of this guaranty and waive demand of payment, protest and notice of nonpayment and protest.

"This guaranty is an open and continuing one, guarantees to the creditors of the Allied Unions Cooperative Association of York, Nebraska, at all times indebtedness to

the full amount above specified and is to remain in force and effect until written notice of revocation shall have been delivered to the creditors of said association.

"This contract to be left with the Farmers State Bank of York, Nebraska, for the use of all creditors of said association. A statement of said association to be issued by them when called for by interested parties."

The petition alleges, in substance, that on and prior to the date of the execution of the guaranty the Allied Unions Cooperative Association, a corporation, was engaged in the mercantile business; that it was unable to meet its financial obligations; and that it was desirable something be done to protect its creditors and at the same time enable the association to get further extension of credit; that for this purpose it was agreed between the signers of the guaranty that it would be executed and deposited with the Farmers State Bank for the use and benefit of the bank and all other creditors of the association and other persons and concerns subsequently extending credit.

The prayer of the petition is for an accounting and an adjudication of amounts due creditors of the association and for judgment on said guaranty.

The defendants Dimig, Tilden, Barker, Volz, Beishline, Houston, Doell, Pfenning, Stevens, Wing, Haberman, Dietrick, Staley, and Bose answer and admit the execution of the guaranty, but allege that it was executed by the signers with the understanding that it related only to obligations of the association entered into subsequent to the execution of the guaranty; that said guaranty was never delivered to, nor accepted by, the plaintiffs; that the Farmers State Bank held collateral for the payment of its loan, which it did not diligently attempt to liquidate; that there was no consideration for said guaranty; that it was executed with the understanding that it should not become effective until two-thirds of the stockholders of the association had signed it, and that said Farmers State Bank was advised of this subsequent to the date of the delivery of the guaranty.

Defendants Nelson, Romsdal, and Barr filed their separate answer, and so far as the issues in this case are concerned it is substantially the same as the answer of the other answering defendants.

The other signers of the alleged guaranty filed no answers, and default judgments were rendered against them.

The other defendants named in the petition, creditors of the association, filed cross-petitions setting forth their claims as creditors of the association.

The judgment of the lower court dismissed the petition of the plaintiffs and the cross-petitions of defendants as to the guarantors who appeared and answered, and rendered judgment by default against those guarantors who were served with summons and failed to answer the petition.

Motion for a new trial was overruled, and from this the following parties, who were plaintiffs, appealed: C. J. Bliss, Receiver, Farmers State Bank, Paxson-Davis Company, and Peter C. Friesen; and the following, who were defendants and cross-petitioners, also appealed: Henry Klone, Henry Bose, Brinn & Jensen Company, Dolan Fruit Company, Old Dutch Mills, H. J. Heinz Company, Hills Bros., Marsh & Marsh, W. F. McLaughlin Company, E. A. Pegler, Raymond Bros. Clarke Company, Ridenour-Baker Grocery Company, Gooch Mill & Elevator Company, and H. T. Ingalls & Sons.

The trial court found that there was no liability on the part of Ethel Towle, Administratrix of the estate of William C. Towle, and also that she was not entitled to contribution from the other guarantors. From this part of the decree appellants do not appeal, nor is there a cross-appeal.

The pleadings are somewhat voluminous and involved, but the sole question for consideration is whether the signers of the guaranty in question are liable to the creditors of the Allied Unions Cooperative Association. None of the signers deny having signed the guaranty, and so far as we are able to ascertain from the record the amounts due the creditors of the association are not in dispute.

The contention of the defendants that the guaranty was executed with the understanding that it guaranteed only payments of obligations of the association to be incurred in the future, and that there was no acceptance of the guaranty by the creditors, is disposed of by the language of the guaranty, which expressly provides that the signers, "jointly and severally hereby guarantee * * * the payment when due of any and all indebtedness * * * to the amount of * * * $25,000, now or hereafter owing by the Allied Unions Cooperative Association * * * and as to any * * * such indebtedness * * * we hereby waive notice of the acceptance of this guaranty."

The evidence does not substantiate the claims of the guarantors that the bank held collateral for the security of its loan which it did not diligently attempt to liquidate.

This leaves but three questions to consider: First. Was the guaranty signed with the understanding among the signers that it should not become effective until two-thirds of the stockholders signed it, and, if so, is it binding on the creditors? Second. Was there a delivery of the guaranty to the bank by one authorized to make such delivery? Third. Was there sufficient consideration for the guaranty?

It may be advisable to discuss the circumstances of the execution of the guaranty. The Allied Unions Cooperative Association was, as its name implies, a cooperative merchandising concern, incorporated, and was at the time of the execution of the guaranty in question apparently insufficiently financed. Its condition was such that it had not been able to meet its obligations at the bank and elsewhere as they became due, and it seems that it was the belief of those who were in active control of the management of the store, as well as many of the other stockholders, that it could not continue as a going concern unless by some means or other it could be refinanced, or arrangements made by which further extension of credit could be obtained from the banks and others. To this end a meeting of stockholders was had, and, after considerable discussion, the guaranty was presented by the president

and secretary of the association, and signed by the 36 stockholders whose names appear thereon. Not all, however, signed at the meeting; several signed later at the store, and at least one did not sign until the instrument was in the possession of the bank. It seems to have been in the minds of the stockholders that, if the creditors could have assurance that individual stockholders would guarantee the payment of the association's obligations up to $25,000, the store could be conducted cooperatively for a few years without loss to the stockholders, and, perhaps, in course of time put on a financial basis that would make it revenue producing to its owners.

It is not necessary to consider the capitalization of the association more than to say that there were 160 individual stockholders, largely farmers of York county.

There is considerable testimony in the record as to the so-called understanding relative to the number of stockholders who were to sign. Some of the witnesses fix the number at two-thirds of the whole number, others at fewer than that, and still others seem to think that it was not to become effective until signed by all of the stockholders. The instrument itself is silent as to this. In the circumstances we think it cannot be said that any agreement was reached. We can only conclude from the evidence that it was discussed in the meeting. However, whether there was an agreement as to the number of stockholders who should sign is of small importance, as we view it. Whatever the discussion, or understanding, none of the creditors was a party to it; none of them was there or represented. Obviously an agreement such as is sought to be established by the defendants, and to which the creditors were not parties, and of which they had no knowledge, could not be operative as to them. *Kansas City Terra-Cotta Lumber Co. v. Murphy*, 49 Neb. 674.

It is further contended by the defendants that the guaranty is not effective because it was not delivered to the officers of the bank by some one authorized to deliver it. There is some evidence in the record to the effect that neither Brock nor Dietrick, president and secretary, re-

spectively, of the association, delivered it to the bank. In the circumstances, however, we are of the opinion that it is not of vital importance who delivered the guaranty to the bank. It was delivered presumably by some one authorized to do so. All of the defendant signers knew that it was with the bank, and that others making loans and extending other forms of credit to the association were relying upon the guaranty as security. It is true that several of the signers testified that they verbally told the president of the bank that it was not to have been delivered until others had signed it. Some of the signers testified that they went farther and verbally notified the bank that they were not or would not be liable. It is not necessary to consider the effect of these notices, since we have determined that there was no understanding between the stockholders as to how many should sign it, and have also held that the evidence on behalf of the defendants is not sufficient to overcome the presumption that the bank was legally in possession of the guaranty.

The remaining question has to do with consideration.

The guaranty is a general one, broad, impersonal, and unambiguous. It was executed by 36 of the stockholders of the Allied Unions Cooperative Association, incorporated. Being a general guaranty, it does not purport to be a contract with certain creditors, but is an open invitation which may be accepted and acted upon by any one to whom knowledge of it comes. Therefore, it is valid to those creditors who had knowledge of it and extended credit to the association on the faith and credit of it. As to those creditors, however, who did not have knowledge of the guaranty, and consequently could not have relied upon it, there is no consideration.

From a careful review of the evidence there is sufficient consideration shown to support the claims of the Farmers State Bank of York, Peter C. Friesen, Henry Klone, Dolan Fruit Company, and Raymond Bros. Clarke Company. There is insufficient evidence of consideration as to the other claims, however.

Reasoning as we have, it is not necessary to consider the plea of estoppel urged by plaintiffs.

It follows that the judgment of the trial court is reversed and the cause remanded, with instructions to enter judgment for the Farmers State Bank of York, Peter C. Friesen, Henry Klone, Dolan Fruit Company, and Raymond Bros. Clarke Company, against the defendants who signed the guaranty, and upon whom service of summons was had, except William C. Towle, and to enter judgment for said guarantors against all other claimants, and for judgment for Jens P. Nelson against said signers of said guaranty for contribution.

REVERSED IN PART, AND REMANDED, WITH DIRECTIONS.

THOMAS LIMMERICK V. STATE OF NEBRASKA.

FILED JANUARY 7, 1931. No. 27179.

Criminal Law: CONVICTION: ADMISSIONS: CORROBORATION. One charged with a felony cannot be convicted solely upon his own voluntary admissions to police officers, yet where, in addition thereto, strong circumstantial evidence consistent with the defendant's guilt is shown and slight evidence even remotely consistent with his innocence is produced in opposition thereto, the evidence may be sufficient to warrant a conviction.

ERROR to the district court for Douglas county: JAMES M. FITZGERALD, JUDGE. *Affirmed.*

C. E. Walsh, for plaintiff in error.

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

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

PAINE, District Judge.

Defendant was tried in Douglas county upon an information charging him with stealing an automobile, in the first count, upon which the jury found him not guilty; but the jury found him guilty on count two, which charged him with receiving a stolen automobile, knowing it to have

been stolen. He was given a sentence of seven years in the penitentiary, which term he is now serving, and brings the case here on a petition in error.

The evidence disclosed by the bill of exceptions may be stated briefly as follows: William N. Gladfelter parked his Chevrolet sedan in front of the Omaha Gospel Tabernacle on Douglas street at 7:45 p. m. January 14, 1929, leaving it with the doors and ignition locked. When he came out of the service at 9:15 p. m. the automobile was gone, and Reverend R. R. Brown notified the police at 9:20 p. m., and at 10:00 p. m. three vigilant officers of the Council Bluffs force saw the stolen car, of which they had received notice, pass them at the east end of Council Bluffs on the Lincoln Highway. Pursuit was made of the fleeing car and, with an officer on the running board calling for them to halt, it was necessary to head the car off the highway some hundred feet, where it crashed into the police car, bending a front axle.

The defendant was driving the stolen car and gave his name as Clark when first arrested. His brother Earl pointed a shot gun at the arresting officers, and the other two in the car were Campbell and Hunt. After defendant got out of the car and turned around, a revolver was found on the ground at his feet and shells to fit it were found in his pocket.

While being taken to Omaha the next morning by two Omaha officers, the defendant stated that he had rented the stolen car of a man named Blackie at the Capitol pool hall on Fourteenth and Douglas streets in the city of Omaha, and after so renting the car he had driven it over to Council Bluffs, and when the officers ran the car down he was found at the wheel.

Careful investigation disclosed that "Blackie" was an imaginary person, neither the proprietor nor others having heard of such a man. The defendant testified that he and his brother Earl left their home in Omaha by street car at 7:30 p. m., and in going to Council Bluffs passed close by the place where the stolen car was parked. He said that Campbell, driving the car in question, called for them

in Council Bluffs, and that Campbell was driving when they were apprehended, and on the trial denied that he had told the Omaha officers that he had rented the car in Omaha.

Sixteen errors are set out in the petition in error. The principal ones relied on for reversal are: Failure to prove intent; failure to prove the defendant received the car, knowing it to have been stolen; failure to lay a foundation and show that his admissions to the police officers were made voluntarily and without inducement of any kind; and because the court failed to instruct the jury as to the law of alibi.

It is strongly contended that no one can be found guilty until it is first shown that a crime has been committed and the *corpus delicti* proved beyond a reasonable doubt. *Chezem v. State,* 56 Neb. 496; 17 R. C. L. 64, sec. 69. And it has been held that a confession is not sufficient evidence of the *corpus delicti. Priest v. State,* 10 Neb. 393. But the later trend of authority is away from the strict holdings of the earlier cases.

The rule that the *corpus delicti* cannot be proved by the confession of the defendant is true as a general proposition, yet confessions or admissions may be considered in connection with the other evidence to establish the *corpus delicti.* It is not necessary to prove the *corpus delicti* by evidence entirely independent and exclusive of the confession or admissions. *Groover v. State,* 82 Fla. 427; 26 A. L. R. 380; 17 R. C. L. 64, sec. 69.

Guilty men would often escape just punishment if the rule prevailed, as in early times, that a conviction could not be obtained in a homicide case unless the *corpus delicti* was proved by direct evidence which necessitated the finding of the victim's body in every case. 2 Hale, Pleas of the Crown, 290. This rule made murderers safe if the body of the victim was burned or placed in the bottom of the sea. *United States v. Gibert,* 2 Sumn. (U. S. C. C.) 19, 27.

Our court has recently held: "But, while a voluntary admission tending to prove a crime is insufficient standing alone to prove the *corpus delicti,* it is competent evidence,

and may with slight corroborating circumstances be sufficient to warrant a conviction." *Egbert v. State,* 113 Neb. 790.

One charged with a felony cannot be convicted solely upon his own voluntary admissions to police officers, yet where strong circumstantial evidence consistent with the defendant's guilt is shown and slight evidence even remotely consistent with his innocence is produced in opposition thereto, the evidence may be sufficient to warrant a conviction.

The defendant claims that the failure of the trial court to give an instruction on alibi is a vital error. The assistant attorney general in his brief gives a sufficient answer to this objection by his statement that the defendant's witnesses testified that he was elsewhere at the moment the automobile was stolen, and as the jury acquitted him on the count which charged him with stealing the car, the failure to give the instruction on alibi is a moot question and need not be considered.

In regard to the other questions presented we do not regard them of sufficient importance to show prejudicial error.

The judgment of the district court is

AFFIRMED.

JOHN KERSENBROCK, APPELLANT, V. SECURITY STATE BANK OF OSMOND ET AL., APPELLEES.

FILED JANUARY 16, 1931. No. 27487.

1. **Malicious Prosecution:** PROBABLE CAUSE. In an action for damages for malicious prosecution, on the element of probable cause, the question is not whether a defendant was guilty, but is whether those who charged him with an offense, which had been committed by some one, had probable cause to believe him guilty.
2. ———: ———: QUESTION OF LAW. "Whether the facts and circumstances established by uncontradicted evidence amount to probable cause in an action for malicious prosecution is a question of law for the court, and not an issue of fact for the jury." *McHugh v. Ridgell,* 105 Neb. 212.

3. ———: ———. "Such facts and circumstances as would lead an unprejudiced person of ordinary prudence and intelligence to believe that accused is guilty of a crime which some one has in fact committed constitute probable cause for a criminal prosecution." *McHugh v. Ridgell*, 105 Neb. 212.
4. ———: ———: DIRECTION OF VERDICT. "In an action for malicious prosecution where there is sufficient undisputed evidence to show probable cause, the trial court should direct a verdict for the defendant." *Bechel v. Pacific Express Co.*, 65 Neb. 826.
5. ———: ———: QUESTION OF LAW. The undisputed facts and circumstances outlined in the opinion, *held* to show probable cause as a matter of law and, therefore, a question for the court, and not an issue of fact to be submitted to the jury.

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

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

M. H. Leamy, contra.

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

GOSS, C. J.

Plaintiff appeals from a judgment dismissing his cause of action against the defendants for malicious prosecution. On October 31, 1927, the defendant, Joseph Cizek, who was president and managing officer of the defendant bank, signed a complaint in the county court charging Kersenbrock and two others with stealing 12 hogs belonging to the bank. Kersenbrock was bound over to the district court, was tried, and was acquitted. He sued herein for damages. No question has been raised as to the pleadings. At the conclusion of all the evidence the defendants moved for a directed verdict in their favor. This was granted, and the record shows such a verdict, shows the filing of a motion for new trial, the overruling thereof, and a judgment of dismissal at plaintiff's costs.

The briefs of plaintiff appellant, contain no distinct and definite assignment of errors. The text states in effect

that the court erred in deciding that the defendant was protected because there was probable cause justifying the complaint against Kersenbrock; the plaintiff contending that this was a question of fact for the jury.

The following things are established by uncontradicted evidence. The hogs belonged to the defendant bank and the defendant Cizek was the president and managing officer of the bank. The hogs were on a farm owned by Cizek and occupied by Walter H. Hauswirth, about a mile east and a mile and a half south of Plainview. The morning of October 25, 1927, Hauswirth telephoned Cizek these hogs were missing and had been taken the night before. Cizek went out to the farm that morning and found the 12 hogs were missing; "found automobile tracks, the imprint of a Diamond tread tire," followed the tracks from that point to the highway and a mile and a half north to highway No. 20, and from there followed them two miles east until they were lost, and there were tracks also going west with the same tread; investigated without success different trucks, doing a hauling business, to see what kind of tires they had; about 4 o'clock that afternoon a man informed him a truck had been standing near Moeller's place, about a mile and a half north and a mile east of Hauswirth's, the evening before; went with that informant to Moeller's place and found the identical tracks of the truck where informant had seen the truck parked. Mr. Moeller stated he had gone out with a lantern the night before to aid a doctor whose car had stalled about a hundred yards west of his place the night before and, after he got him fixed up, this truck was standing on the corner north. The doctor drove up, stopped near the truck and threw his lights on it, thinking perhaps the truck was in some trouble. Moeller stopped also with his lantern. The driver was questioned by Moeller "about where he was going and he said he was going to Sioux City after some calves for somebody at O'Neill, but when the truck left his place it evidently went east only another mile;" so, about 10 o'clock that night, the brother of defendant left for O'Neill, returned about 10 the next morning and re-

ported he found the same tracks at the stock-yards at O'Neill that same morning, that Mr. Preuss had bought from John Kersenbrock 12 hogs that morning, but, as the brother did not know the hogs, he came home to report. Cizek went up the following day with a witness and found that Jim Connolly had bought the hogs, had them on his farm, was told they belonged to the bank, and agreed to keep them for the time being. Then Cizek went to O'Neill and talked to Kersenbrock, who told him Hauswirth had told him to come and get the hogs. Cizek told Kersenbrock he would see Hauswirth the next morning, and if he denied Kersenbrock's story the witness would ask Kersenbrock to come down so Kersenbrock and Hauswirth could "thresh it out." The next day, Sunday forenoon, he called Kersenbrock, who said he would be down. Instead of coming his attorney telephoned and asked Cizek to come to O'Neill on Monday morning. After some negotiations it was arranged for Kersenbrock and Hauswirth to be brought together in the bank at Osmond, on Monday. They met there. Cizek, Kersenbrock with one of his attorneys, and Hauswirth were present. Kersenbrock stated that Hauswirth told him to get the hogs. "And Hauswirth got on his feet and called him a damned liar and they both got up and that settled it. That is as far as the discussion went between them as to who was the guilty one of getting the hogs." Both Hauswirth and Kersenbrock left the room. That was on the 31st day of October, 1927. Cizek then went down to see the county attorney, to whom he had talked about a week earlier, before he had located the hogs or learned who took them. He told the county attorney all the facts above narrated and, under the county attorney's advice, a complaint was signed by Cizek, and on that day filed in the county court, charging Hauswirth, Kersenbrock, and John Abbott with stealing the 12 hogs belonging to the bank. Abbott was Kersenbrock's trucker, who had taken his truck and had accompanied Kersenbrock, who drove his own car, and had taken the hogs from the Hauswirth place. The county attorney had advised that, inasmuch as Kersenbrock contended one way

and Hauswirth the other, "the best thing to do would be to file a complaint against all three because it was almost certain that some one of the three had stolen his hogs." This is the only complaint Cizek signed, though an amended complaint was made in the county court a week or so later and sworn to by the county attorney, containing another count against Kersenbrock, charging him with receiving stolen hogs, knowing them to have been stolen. Kersenbrock and Abbott were bound over to the district court and informed against on the charge of stealing the hogs and in due time Kersenbrock was tried and acquitted. O'Neill is west of Plainview. The Diamond truck marks were traced east of any point necessary to reach in going from Hauswirth's to O'Neill.

In *Bechel v. Pacific Express Co.*, 65 Neb. 826, a suit for malicious prosecution, "the chief question raised," says Pound, C., "is whether there was probable cause for the prosecution. * * * The question now is not whether he was guilty, but whether those who charged him with the offense which had undoubtedly been committed, at the time and under all the circumstances, had probable cause to believe him guilty. * * * Whether the facts adduced to that end show or fail to show want of probable cause, is a question for the court. If there is sufficient in undisputed evidence to show probable cause for the prosecution, the trial court should direct a verdict for the defendant. *Dreyfus v. Aul*, 29 Neb. 191; *Turner v. O'Brien*, 11 Neb. 108. It cannot matter that some or many of the facts bearing on the issue as to probable cause are in dispute, if there are still enough established and undisputed to determine the question in point of law. The facts being determined, the question is one for the court; and if there are enough on which to base a determination without leaving anything that may be in dispute to the jury, there is nothing for the jury to pass upon. We are unanimously of opinion that such is the situation in the case at bar."

That case is cited by Judge Rose in *McHugh v. Ridgell*, 105 Neb. 212, as stating the law correctly. We quote:

"Whether facts and circumstances established by uncontradicted evidence amount to probable cause for a criminal prosecution is a question of law for the court, and not an issue of fact for the jury. This is not only the law of Nebraska, but is a generally accepted rule. *Turner v. O'Brien,* 5 Neb. 542; *Dreyfus v. Aul,* 29 Neb. 191; *Nehr v. Dobbs,* 47 Neb. 863; *Bechel v. Pacific Express Co.,* 65 Neb. 826; *Bank of Miller v. Richmon,* 68 Neb. 731; *Clark v. Folkers,* 1 Neb. (Unof.) 96; and other cases cited in note in L. R. A. 1915D, 5, 8 (*Michael v. Matson,* 81 Kan. 360). The principle of law applicable has been stated in this form:

" 'In an action for malicious prosecution where there is sufficient undisputed evidence to show probable cause, the trial court should direct a verdict for the defendant.' *Bechel v. Pacific Express Co.,* 65 Neb. 826."

To the same effect, see 18 R. C. L. 58, sec. 39, and 38 C. J. 504, sec. 194.

"As a general rule, the test as to whether or not probable cause for instituting a criminal prosecution existed is to be applied to the facts and circumstances as they existed at the time the prosecution was commenced." 38 C. J. 504, sec. 34.

It is true there was some evidence brought to Cizek's notice before he signed the complaint, which evidence, if believed, would indicate that Kersenbrock was not guilty and ought not to be prosecuted. Kersenbrock said he was authorized by Hauswirth to take the hogs. Cizek did not act until he brought the parties together and Hauswirth emphatically denied the statement. Moreover, Cizek had learned that Kersenbrock had taken the hogs away in the nighttime, when Hauswirth was absent, had taken them to a salesyard and, later, had sold them, although they were under weight, instead of taking them to his own yards; and Cizek believed it a suspicious circumstance that Kersenbrock immediately sold the hogs for 10 cents a pound, whereas a day or two later Cizek sold those that were left at 14½ cents a pound. Kersenbrock admitted on cross-examination that his buyer sold the 12 hogs to Connolly for $15 a hundred. Without further analyzing the undisputed evidence, it is sufficient to say that it was such as to war-

rant one who was unprejudiced and of ordinary prudence and intelligence to believe that the defendant complained against was guilty of the crime which it is conceded had been committed by some one. There was, therefore, sufficient probable cause for the prosecution.

In a malicious prosecution case, the necessary elements for the plaintiff to establish are: (1) The commencement or prosecution of the proceeding against him; (2) its legal causation by the present defendant; (3) its *bona fide* termination in favor of the present plaintiff; (4) the absence of probable cause for such proceeding; (5) the presence of malice therein; (6) damage, conforming to legal standards, resulting to plaintiff. If any one of these elements is lacking, the result is fatal to the action. 38 C. J. 386, sec. 5. When, as here, the plaintiff has failed to establish that there was no probable cause for the complaint against him and for the prosecution thereof, his cause of action for malicious prosecution fails. *Cobbey v. State Journal Co.*, 77 Neb. 626, and cases there cited. This renders it unnecessary for us to go into the element of malice and other matters discussed in the briefs.

The rules invoked by the defendant and applied by the district court are founded upon a great public policy. They are essential to the welfare of organized society and to the orderly processes of government. Those who have knowledge relating to felonies should not be made to fear that a disclosure to officers, whose duty it is to enforce the law by prosecution of offenders, may result in mulcting the informer in damages, if perchance this information or a complaint by the informer based thereon may not result in the conviction of the defendant. A complainant is not a guarantor of the conviction of one complained of. The undisputed facts reported by the defendant to the county attorney and made the basis of the prosecution of plaintiff, as shown by the evidence in this case, raised a question of law to be decided by the court, and not an issue of fact to be submitted to the jury. In so deciding, the district court did not err.

For the reasons stated, the judgment of the district court is AFFIRMED.

CLARENCE G. BLISS, SECRETARY OF THE DEPARTMENT OF TRADE AND COMMERCE, APPELLEE, V. CONTINENTAL NATIONAL BANK OF LINCOLN, NEBRASKA, APPELLANT.

CLARENCE G. BLISS, SECRETARY OF THE DEPARTMENT OF TRADE AND COMMERCE, APPELLEE, V. CONTINENTAL NATIONAL BANK OF LINCOLN, NEBRASKA, APPELLANT.

FILED JANUARY 16, 1931. NOS. 27460, 27461.

1. **Banks and Banking:** DEPARTMENT OF TRADE AND COMMERCE. The department of trade and commerce and the guaranty fund commission were created by statute as governmental agencies of the state and as trustees for the beneficial owners of trust funds coming into the custody of such agencies.
2. ———: BANK GUARANTY FUND. The bank guaranty fund and the bankers' conservation fund in the custody of the secretary of the department of trade and commerce are trust funds belonging to the proper distributees as determined by courts of competent jurisdiction in judicial proceedings.
3. ———: DEPOSIT OF TRUST FUNDS. A bank accepting deposits in the name of a trustee, knowing they belong to the equitable owners or beneficiaries, cannot legally apply the trust funds so deposited to an individual indebtedness of the depositor or make them the subject of a set-off against him as such.

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

Max V. Beghtol and *J. Lee Rankin*, for appellant.

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

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

ROSE, J.

Clarence G. Bliss, secretary of the department of trade and commerce of the state of Nebraska, and Clarence G. Bliss, secretary of the department of trade and commerce of the state of Nebraska, successor to the bank guaranty fund commission of the state of Nebraska, plaintiff, brought two lawsuits against the Continental National Bank of Lin-

coln, Nebraska, defendant, to recover unpaid balances of deposits subject to check.

Defendant was organized as a national bank March 22, 1929, and as such succeeded to the property and rights, and incurred the liabilities, of the Continental State Bank. On a checking account, plaintiff had on deposit with defendant, June 3, 1929, a balance of $4,708.36. The account stood on the books of the bank in favor of the "Department of Trade and Commerce—Administration Fund." In the first of the actions, plantiff demanded judgment for this balance.

April 30, 1929, the guaranty fund commission had on deposit with defendant subject to check a balance of $8,741.24. On that date the legislature abolished the guaranty fund commission and transferred the deposit to plaintiff. Laws 1929, ch. 38, sec. 8. It was to recover this latter balance that plaintiff brought the second action. On the bank books the accounts for plaintiff's deposits were subsequently charged with claims of defendant against the bank guaranty fund, showing nothing due. Demands for the amounts in controversy were rejected and payment of checks therefor was refused.

Admitting the deposits and the balances pleaded by plaintiff, defendant alleged, in defense, that they belonged to the bank guaranty fund, and that the latter, through loans to the bankers' conservation fund, became indebted to defendant in an amount equal to the balances in the two accounts for the deposits, or $13,449.60, which, according to the answer, were lawfully credited on the indebtedness of the bank guaranty fund to defendant and thus paid in full. Unadmitted matter in the answer was put in issue by a reply.

The cases were consolidated. Upon a trial below the district court found the issues in favor of plaintiff and in each case entered judgment against defendant for the full amount of the claim with interest. Defendant appealed.

There is no error in the proceedings and judgments below. There is nothing substantial to support the set-off or defense that the funds deposited by plaintiff in defendant's

bank belonged to the bank guaranty fund. There is no dispute about any fact essential to a proper determination of the issues. In connection with the statutes relating to the bank guaranty fund, to the department of trade and commerce, to the winding up of insolvent banks and to the distributing of their assets among their depositors and other creditors, the plaintiff and the defendant stipulated the controlling facts.

Plaintiff did not consent to the set-off. Defendant knew the sources from which the deposits came and the purposes for which the deposited funds were intended. The department of trade and commerce and the guaranty fund commission were governmental agencies of the state and as such were trustees. The funds in their hands for safekeeping and distribution and the bankers' conservation fund were trust funds belonging to the equitable owners or beneficiaries in proportion to their interests and not to any governmental agency of the state. Plaintiff is temporary custodian for the purposes of collecting, conserving and disbursing the trust funds pursuant to statutory duties and judicial orders. Money for which the guaranty fund commission and plaintiff were answerable as trustees were not subject to arbitrary distribution or set-off by defendant. If the deposit in favor of the "Department of Trade and Commerce—Administration Fund" did not come from a source that made it available for the payment of salaries and expenses, as argued by defendant, a question not decided, plaintiff is nevertheless entitled to the custody thereof as trustee for the purposes of distribution to the equitable owners or beneficiaries pursuant to judicial orders. A bank accepting deposits in the name of a trustee, knowing they belong to the equitable owners or beneficiaries, cannot legally apply the trust funds so deposited to an individual indebtedness of the depositor. In a different form this principle was stated as follows:

"A bank that appropriates a deposit made by a customer to reduce his indebtedness due the bank, knowing the deposit, or a part thereof, to be a trust fund, is liable to the true owner for a conversion of his money, and an action at

law to recover the amount can be maintained." *Globe Savings Bank v. National Bank of Commerce*, 64 Neb. 413.

This rule is universally recognized. See annotations in 13 A. L. R. 324; 31 A. L. R. 756; 50 A. L. R. 632.

Both judgments are

AFFIRMED.

IN RE ESTATE OF MARY PEACH.
J. J. NOVAK, SPECIAL ADMINISTRATOR, ET AL., APPELLEES, V. H. H. CHALOUPKA ET AL., APPELLANTS.

FILED JANUARY 16, 1931. No. 27413.

1. **Executors and Administrators:** APPOINTMENT. In the absence of statutory provision, where the person named executor in a will dies before the testatrix, and no other executor has been named in the will, it is the duty of the county court to commit administration of the estate to those who are legally competent and to whom the property will revert when the estate is administered.
2. ———. The right to administer the estate of a decedent should, so far as possible, remain in the hands of those having a direct personal interest therein, if qualified therefor, thereby keeping the property, its control, and its distribution in the hands of those entitled to share therein.

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

Bartos, Bartos & Placek and *Hall, Cline & Williams*, for appellants.

J. J. Grimm and *George Hager, contra.*

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

DEAN, J.

Mrs. Mary Peach, a long-time resident of Saline county, died October 21, 1929, leaving an estate valued at $100,000, or approximately that sum. She bequeathed her entire estate to her husband, John Peach, but with a proviso in the will that he give $1,000 thereof to a sister, Anna Chaloupka, and $2,000 to the Sunnyside Cemetery Association at Wil-

ber. Mrs. Peach named her husband as executor of her estate, but he died some time before her death. Mrs. Peach did not, however, name another executor to take the place of her husband. Soon after the death of the testatrix the county court, on the recommendation of the above named cemetery association, appointed J. J. Novak special administrator of the will and of the estate. Four of the five children of Anna Chaloupka, since deceased, namely, Adolph, Fred, Henry, and Leonard Chaloupka, were dissatisfied with the appointment of Novak and prosecuted an appeal to the district court to have him removed, and to have two of their number, namely, Adolph and Leonard Chaloupka, appointed joint administrators in his place. Upon submission, the district court dismissed the appeal, on the ground, as stated in the decree, that no abuse of discretion appeared on the part of the county judge in the appointment of Novak as administrator. The objectors have appealed to this court to have the record and the proceedings reviewed.

The main question presented by the record is whether, after the death of Mrs. Peach, her next of kin have a lawful right, as herein pointed out, to nominate an administrator, with the will annexed, where the person formerly nominated in the will predeceased the testatrix, and where the next of kin are entitled to the major portion of the estate in suit. It is not questioned that the persons so nominated by the objectors are suitable and proper persons to assume the office of joint administrators.

In support of their argument that the court should have sustained their objections to the appointment of Novak and should have appointed a nominee of their choice as administrator, the objectors cite and rely upon section 1285, Comp. St. 1922, which they contend provides the controlling principle applicable to the situation presented by the present case. Section 1285 follows:

"If a person named executor in any will shall refuse to accept the trust, or shall, for a space of twenty days after the probate of the same, neglect to give bond as required by law, the county court may grant letters testamentary to the

other executors, if there be any who are capable and willing to accept the trust, and if there be no such other executor who will give bond, the court may commit administration of (the) estate, with the will annexed, to such person as would have been entitled to the same if the testator had died intestate."

In the administration of the estate of a person dying intestate, section 1293, Comp. St. 1922, provides:

"Administration of the estate of a person dying intestate shall be granted to some one or more of the persons hereinafter mentioned, and they shall be respectively entitled to the same in the following order:

"First. The widow, or next of kin, or both, as the judge of probate may think proper, or such person as the widow or next of kin may request to have appointed, if suitable and competent to discharge the trust;

"Second. If the widow, or next of kin, or the persons selected by them, shall be unsuitable or incompetent, or if the widow or next of kin shall neglect, for thirty days after the death of the intestate, to apply for administration, or to request that administration be granted to some other person, the same may be granted to one or more of the principal creditors, if any such are competent and willing to take it;

"Third. If there be no such creditor competent and willing to take administration, the same may be committed to such other person or persons as the judge of probate may think proper."

The very general rule appears to be that the right to administer an estate should, so far as possible, remain in the hands of those, or some of them, having a direct personal interest in the estate, if qualified therefor, thereby keeping the property, its control, and its distribution more nearly in the hands of those entitled to share therein.

In the case before us, however, the administrator appointed by the court is an experienced business man and, as pointed out in the objectors' brief, they concede that no reflection is intended to be cast upon his honesty or his ability to properly administer the estate. And it also appears

that, soon after the funeral obsequies, Novak reminded the beneficiaries that it would be necessary that some one take charge of the estate, and he testified that none of the beneficiaries would then consent to have anything to do with the administration. The objectors, however, severally contend that, when Novak was orally requested to take charge of the estate, they knew little or nothing about the provisions in the will, nor did they know that their mother had been named therein as a beneficiary, and this from the fact that she and the testatrix had not been friendly for several years.

"The rule, when uncontrolled by statute, is to grant administration with the will annexed to the claimant having the greatest interest under the will, for which reason the residuary legatee is preferred to mere next of kin." 3 Schouler, Wills (6th ed.) sec. 1569. And section 1573, of the same work, contains this provision, namely: "Upon the refusal or inability of the residuary legatee to fill the vacancy under the will, administration with the will annexed has been granted most commonly to the next of kin. * * * In some states the next of kin has the same preferential right to administer as though the decedent was intestate."

And another recognized authority advances this thought:

"The right of administration is not inherent, but statutory. But aside from the statutory regulations, which in every state determine what persons are entitled to the administration, and which of course must be observed in appointing an administrator to office, the discretion vested in probate courts in this respect is to be governed by well-known general principles. The most important of these is, that administration should be committed to those who are the ultimate or residuary beneficiaries of the estate—those to whom the property will go after administration. To secure to them the right to administer is the paramount object of the statutes fixing the order of preference, and constitutes the aim and intention of courts in the exercise of such discretion as is vested in them. It is obvious that those who will reap the benefit of a wise, speedy, and economical administration, or, on the other hand, suffer the conse-

quences of waste, improvidence, or mismanagement, have the highest interest and most influential motive to administer properly." 2 Woerner, Law of Administration (3d ed.) sec. 235.

In view of the facts before us, we think the court erred in overruling the objections of the next of kin to the appointment of Novak as administrator. Under the statute, the person most "suitable" to administer the estate would be one or more of the heirs of Mrs. Peach. Clearly, for reasons that are obvious, the appointment should be made, both with a view to the relation of the nominee to the estate, and a view to his competency to administer the estate. And there is no contention that the objectors are incompetent to manage the estate in every particular. In the absence of statutory provision, where the person named executor in a will dies before the testatrix, as in the present case, and no other executor has been named in the will, it is the duty of the county court to commit administration of the estate to those who are legally competent and to whom the property will revert when the estate is administered.

The judgment of the district court is reversed, with directions that a decree be rendered in conformity with the views expressed in this opinion.

REVERSED.

WILLIAM MORTON V. STATE OF NEBRASKA.

FILED JANUARY 16, 1931. No. 27519.

1. **Embezzlement:** BANKS: AGENCY. Where a defendant, formerly an assistant cashier in a state bank, retains his position as assistant to the receiver during the time the bank was being conducted as a going concern by the guaranty fund commission, such defendant was, to every purposeful intent, an agent of the bank, and the fiduciary relationship between the defendant and the bank was thereby established.
2. ———: SUFFICIENCY OF EVIDENCE. The evidence examined, discussed in the opinion, and *held* to sustain the finding that the defendant wilfully, and with intent to defraud, embezzled money of the bank, within the meaning of section 8047, Comp. St. 1922.

3. **Witnesses:** CROSS-EXAMINATION. A witness may be interrogated on the cross-examination for the purpose of testing the credibility and accuracy of his evidence as to the reputation of an accused.

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

F. J. Reed, for plaintiff in error.

C. A. Sorensen, Attorney General, and *L. Ross Newkirk, contra.*

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

DEAN, J.

William Morton, defendant, was informed against October 17, 1929, in Scotts Bluff county, and there charged with the embezzlement, on or about April 1, 1928, of $2,107.20 alleged to be the money of Nellie Crounse Shrewsbury, Thomas Sanderson, and the Mitchell State Bank. The jury found the defendant guilty and the court thereupon sentenced him to serve a term of from one to ten years in the penitentiary. The defendant has appealed.

The Mitchell State Bank, a corporation, was engaged in the banking business several years before the present banking laws of Nebraska were adopted. January 9, 1928, the bank then being in failing curcumstances, was taken over by the guaranty fund commission and operated as a going concern until April 30, 1929, when, being unable to meet its obligations, the doors of the bank were closed and a receiver was appointed May 31, 1929, to take charge of its affairs.

For almost ten years preceding January 9, 1928, Morton was the assistant cashier of the Mitchell State Bank; and A. E. Torgenson was appointed special agent by the guaranty fund commission to assume charge of the bank while it was being operated by the commission and, while acting in this capacity, he retained the services of Morton to assist him in the conduct of the bank's affairs. Subsequently Morton was employed as a bank clerk and assistant

and was apparently its active manager under Torgenson's supervision. Torgenson, however, appears to have made only occasional visits to the bank during the above period. The evidence tends to prove that, during all of the time here in question, there was no change in the locks nor in the combination of the vault. And it also appears that Morton had free access to the bank and the bank vault and was familiar with both.

In 1920 Norman Crounse, a bank patron, deposited $3,000 in the bank, but this money was reduced by withdrawals from time to time until but $2,000 remained in the Crounse account. The bank continuously paid the annual interest on the deposit and all of the transactions in respect of the withdrawals and interest payments were taken care of by the defendant Morton. Norman Crounse died in 1921 and his heirs, namely, Ola Crounse and Nellie Crounse Shrewsbury, took charge of the estate, including, of course, the remaining depository rights of Crounse in the Mitchell State Bank.

Torgenson testified that, with the exception of a deposit slip dated in 1920, there was no record of a Crounse account in the bank, and that when the bank was taken over an inventory of the deposits was made in Morton's presence, but that he did not mention the Crounse account. Torgenson further testified that Ola Crounse inquired about a dividend payment that she said was due her, but that, after searching the record, he found no trace of an account other than that $3,000 had been originally deposited in the bank. And in respect of another account, namely, the Sanderson account, Torgenson testified that he found no record of such account when inquiry was made in respect of the dividend payment thereon.

There is a letter in the record, dated March 9, 1927, which tends to prove that Morton was aware of the Crounse account in the bank. In the letter Morton stated that he was inclosing a check for $700 requested by Nellie Crounse, with accrued interest, and that there remained a balance of $2,000 in the bank.

Immediately upon learning that the bank was closed, Ola Crounse went to the Mitchell bank and inquired of Mr. Torgenson in respect of the condition of their bank account. But it appears that no record of a Crounse account could be found in the bank. She testified that she first talked with defendant Morton at the office of his counsel, and that Morton asked her to go to Mitchell and look up the status of the Crounse account. She also testified that Morton called on her at her sister's home at Alliance to make a settlement, and that he wanted her to accept his note, dated September 1, 1927, in payment thereof. Her evidence is corroborated by that of county attorney P. E. Romig, whose advice was sought when defendant Morton proposed that she accept his note in payment of the money involved herein. Romig testified that Morton informed him that he had prepared an ante-dated note that represented the amount of money which was in the bank account of Ola and Nellie Crounse, and that "he had to have this note in order to protect himself from a fellow named Jones, and that 'Jones was hot on his trail,' those are the words he used."

Morton testified that, while he was searching for some papers in an unrented safety deposit box in the vault, he found a package of currency in the deposit box in which there was $2,000 in bills. But he told no one about finding the currency and was unable to find any record that would tend to identify the person to whose account it belonged. He testified that he issued a draft to Ola Crounse for $380 from money taken out of the deposit box, and that he also offered her the balance of the money belonging to her deposit, and that he at the same time told her that her account had somehow been "segregated" and that he wanted to straighten it out for her. On the cross-examination, Morton testified that he had received positive instructions from the guaranty fund commission that no money was to be paid on old or stale deposits, under any circumstances. But he testified that he did not think he was violating any instructions, for the reason that the Crounse account did not appear as a deposit on the books. In offering Ola

Crounse a note in payment of her deposit, Morton testified that what he "had in mind was something that would give me (Morton) a receipt and at the same time something that she (Ola Crounse) would be able to explain if she were called on at any time."

Defendant contends that the state failed to prove fiduciary capacity between himself and the bank, and that he was employed by the guaranty fund commission and not the bank. He also contends that the Mitchell State Bank ceased to function as a bank on January 9, 1928, and that his relationship with the bank terminated at that time and that he was employed thereafter solely by the guaranty fund commission. In respect of the dissolution of a bank by being taken over by the guaranty fund commission, we have held to this proposition, namely: "The taking over of the assets of a banking corporation by the department of trade and commerce of this state for the purpose of managing or liquidating such bank does not effect a dissolution of the corporation." *Svoboda v. Snyder State Bank,* 117 Neb. 431.

Clearly, the defendant's position is not tenable. The bank was conducted as a going concern for some time after it was taken over by the guaranty fund commission, and while the bank was controlled by the commission Morton retained his position through his connection with the Mitchell State Bank. To every purposeful intent he was an agent of the bank, and the fiduciary capacity, or relationship, between Morton and the bank was thereby established.

The defendant also contends that the verdict is not supported by sufficient evidence, and that if he is guilty of any offense it is that of concealment of the funds of the bank. But we think there is sufficient evidence tending to prove that the defendant wilfully embezzled the money within the meaning of section 8047, Comp. St. 1922. As pointed out in the record, Morton handled a large part or nearly all of the transactions between the Crounses and the bank, and at no time, even after the finding of a considerable amount of currency in an unrented safety deposit box, did he inform his supervisor in respect of the money so found, nor of

the status of the Crounse account. And the defendant's willingness to give his note in settlement of the amount that was originally a part of the Crounse account that came into his hands justified the jury in its finding that defendant was guilty.

The defendant also complains that the court did not instruct the jury that, to constitute the crime of embezzlement, the adverse use or holding of the property embezzled must be felonious. But we think that the mere absence of the word "felonious" does not constitute reversible error. The jury were instructed that, if they found defendant guilty, they must find that he intended to injure or to defraud the bank and Nellie Crounse Shrewsbury and Thomas Sanderson, and that the embezzlement was committed with wilful intention.

The defendant introduced the evidence of witnesses as to his good character. But, on the cross-examination, the witnesses were interrogated as to the defendant's reputation as an alleged gambler. The defendant contends that the questions so propounded prejudiced the minds of the jury against him. But the rule has been announced that a witness may be interrogated on the cross-examination for the purpose of testing the credibility and accuracy of his evidence as to the reputation of an accused. 5 Jones, Commentaries on Evidence (2d ed.) secs. 2345, 2346.

Finding no reversible error, the judgment is

AFFIRMED.

HARRY HILES V. STATE OF NEBRASKA.

FILED JANUARY 16, 1931. No. 27502.

1. **Criminal Law**: GRAND LARCENY: EVIDENCE OF VALUE. In a prosecution for grand larceny of a second-hand or used airplane propeller, a witness who does not know the condition of the article may not testify as to its value, and it is error to permit him to testify to its value "if in good condition," in the absence of evidence showing such a condition.
2. ———: ———: ———. In a prosecution for grand larceny, a witness is incompetent to testify as to the value of the prop-

erty alleged to have been stolen, unless shown to have knowledge of the property and its value.

3. Evidence examined and *held* insufficient to sustain the verdict.

ERROR to the district court for Dawson county: J. LEONARD TEWELL, JUDGE. *Reversed.*

F. E. Edgerton and *A. A. Mann,* for plaintiff in error.

C. A. Sorensen, Attorney General, and *F. L. Bollen, contra.*

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

GOOD, J.

Plaintiff in error, hereinafter referred to as defendant, was convicted of the larceny of an airplane instrument board and propeller, of the value of $40. He brings the record of his conviction to this court for review.

From the record it appears that defendant undertook to organize an aeronautical school, and associated with him a number of persons who contributed to the purchase of an airplane for the company's use. Apparently, the school did not prosper. Other members, charging that defendant was misapplying the funds of the partnership and was not making the proper use of the airplane, instituted an action for the dissolution of the partnership, sale of the airplane and the distribution of the proceeds among those lawfully entitled thereto. Pursuant to an order of the court, the sheriff, on August 30, 1929, took possession of the airplane, placed a chain, with padlock, around the engine and propeller and left it on the premises of defendant. Pursuant to a subsequent order of the court, notice was given that the airplane would be sold on the 24th of January, 1930. A few days before the time fixed for the sale, it was discovered that the instrument board, or rather the instrument panel which fits into the instrument board, was not in place, and that the propeller then on the plane was missing. Thereupon the defendant was charged with the larceny of these two articles.

It appears that about the first of November defendant and his attorney suggested to the judge of the district court that the airplane was exposed to the weather and deteriorating in value, and asked permission to place it under cover. Oral permission was given to defendant, who then detached the wings and struts and placed the fuselage in a barn under his control.

There is evidence tending to prove that defendant had removed the instrument panel from the airplane prior to the time the sheriff levied thereon, but it also appears without dispute that the instrument panel was later placed under the cowl, back of the engine, in the airplane, and, for aught that appears, it was still there at the time complaint was filed against defendant.

We think it appears from the evidence that the instrument panel was within the fuselage and subject to the control of the sheriff. In any event, there is a total want of evidence to show any intent on the part of defendant to appropriate the panel to his individual use, or to deprive the sheriff of the possession and right to sell the same with the airplane.

The evidence as to value, if competent, indicated that the instrument panel, with the accompanying instruments, was of the value of $140 to $145, and that the value of the propeller was $40 to $50. The fact that the jury found the value of the property, alleged to have been stolen, to be $40 indicates, as suggested by counsel for the state, that the jury considered only that the propeller had been taken.

There are numerous assignments of error, but it will be unnecessary to consider more than three of them.

Several of the instructions of the court are criticised, and particularly No. 4, as assuming certain facts to exist. Instruction No. 4 merely outlined the essential elements of the complaint and informed the jury that they must be convinced from the evidence, beyond a reasonable doubt, of the truth of all of these elements before a conviction could be obtained. The instruction is not subject to the criticism made. We find no error in any of the instructions given.

Complaint is made of the admission of certain testimony as to the value of the property charged to have been stolen, in that the witnesses were not competent to testify as to such value. One witness testified as to the value of the propeller. He had not seen it for several months previous, did not know the condition it was in at the time, and stated that he did not know its value, but he was permitted to testify as to the value of such a propeller if in good condition. There was no competent evidence to show that the propeller was in good condition, and there was some evidence tending to show that it was cracked and imperfect in another respect.

In a prosecution for grand larceny of a second-hand or used airplane propeller, a witness who does not know the condition of the article may not testify as to its value, and it is error to permit him to testify to its value "if in good condition," in the absence of evidence showing such a condition. A sufficient foundation for the witness to testify as to the value of the propeller in question was not laid. Another witness was permitted to testify as to the value of the property, new at the factory. His information as to such value was simply gleaned from reading magazine advertisements. In a prosecution for grand larceny, a witness is incompetent to testify as to the value of the property alleged to have been stolen, unless shown to have knowledge of the property and its value. The witness was not shown to have been competent to testify as to value. His evidence should have been excluded.

Another assignment of error is that the verdict is not sustained by the evidence. No witness testified to having seen the defendant take the propeller from the airplane. The propeller and other parts of the airplane were, early in January, 1930, found by third parties, covered with weeds, by the side of an irrigation ditch on premises not belonging to or under the control of the defendant. No witness testified to having seen the defendant place them there, or to having seen him in the vicinity of that location. There is but a single circumstance which in any way points to the guilt of the defendant. There was evidence that the pro-

peller on the plane at the time it was levied upon was known as a California propeller; that a different propeller, known as a Hartsell propeller, was on the airplane shortly before the time it was advertised for sale, and that this propeller had been in the possession of and belonged to defendant. No witness testified that the defendant ever placed this propeller upon the airplane after it was levied upon, and there is evidence tending to show that this particular propeller had been stored in a building, under the control of the defendant; that there were three doors to this building, only one of which was locked. This fact alone is wholly insufficient to justify a finding that defendant removed the California propeller from the plane and secreted it on some one else's premises. The evidence is wholly insufficient to justify the verdict rendered.

We deem it unnecessary to consider any of the other assignments of error. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

FRANK PILGER V. STATE OF NEBRASKA.

FILED JANUARY 16, 1931. No. 27497.

1. **Embezzlement:** EXECUTORS AND ADMINISTRATORS. The common law, so far as the same relates to executors and administrators of the estates of decedents in this state, has been so modified by our statutes as to render it without application to this record.
2. ———: ———. "An executor of the estate of a deceased person is amenable to the embezzlement statute applicable to 'any individual or company or association,' if money (or other personal property) in his possession as such executor is embezzled by him." *Kronberg v. State*, 114 Neb. 393.
3. ———: CONVICTION. Record examined, and found to reflect evidence amply sufficient to sustain the conviction of an executor for embezzling, or converting to his own use with felonious intent, the property of his trust; further found that the verdict reached in this case was the only verdict that could reasonably have been returned.

ERROR to the district court for Pierce county: CHARLES H. STEWART, JUDGE. *Affirmed.*

Fred H. Free and *H. F. Barnhart,* for plaintiff in error.

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

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

THOMPSON, J.

The plaintiff in error, hereinafter called defendant, was convicted upon two counts of an information filed against him in the district court for Pierce county, Nebraska, charging him as executor of the estate of George Vinson, deceased, with embezzlement of certain promissory notes belonging to such estate. The prosecution is had under section 9629, Comp. St. 1922, as amended by ch. 95, Laws 1923, now section 28-544, Comp. St. 1929, our general embezzlement statute, which, so far as here material, provides: "If any executor, administrator, guardian or assignee for the benefit of creditors shall embezzle or convert to his or her own use any money, property, rights in action or other valuable security or effects whatever belonging to any individual or company or association, that shall come into his or her possession by virtue or under color of his or her relation as officer, executor, administrator, guardian or assignee, every such person so offending shall be punished in the manner provided by law for feloniously stealing property of the value of the article so embezzled, taken or secreted or of the value of any sum of money payable or due upon any right in action so embezzled."

Among the various claimed errors assigned as grounds for reversal, it is insisted by the defendant that at common law the executor held the full title and *jus disponendi* of the personal estate, and that such situation still remains. This statement is not forceful. Executors and administrators in Nebraska are creatures of statute. In *Henry v. Henry,* 73 Neb. 746, we held: "An administrator appointed under the statute is not in any sense an agent of his intestate, but is a public trustee, of defined and limited powers." Thus, as held in *Murphy v. Crouse,* 135 Cal. 14: "Both

real and personal property descend * * * to the beneficiary named in the will, with a qualified right in the personal representative, who holds it, for the purposes of administration, more like a receiver than a common-law executor. The title is not in him, nor has he the power of disposal, save by order of court," or by lawful direction in the will. As stated in 24 C. J. 203, sec. 711: "The representative (executor or administrator), as such, takes no beneficial interest in the personalty, but takes it only for the purpose of administration and distribution to those entitled, and as to the surplus remaining after the payment of debts he is a mere trustee for those beneficially entitled." These quotations are in harmony with our holding in *Edmondson v. State,* 89 Neb. 797, which was a prosecution of a guardian for the embezzlement of the funds of his ward, but was under the same statute as the one here being considered. In the course of such opinion (page 800) we said: "It thus appears that it is not the failure of the guardian to make settlement or pay over to his wards the amount of money found due them which constitutes the offense; it is the fact of his conversion of such money to his own use which renders him guilty of the crime defined by the statute upon which the information in this case was founded. It is the use by the guardian, as his own, of the trust fund committed to his care which renders him criminally liable and for which a criminal prosecution may be maintained." The material facts which formed the basis of the foregoing quotation are quite similar to, if not identical with, those disclosed by the record now before us.

An executor should at all times act in good faith toward the estate, he being a trustee thereof. *Carden v. McGuirk,* 111 Neb. 350.

In *Kronberg v. State,* 114 Neb. 393, we held: "An executor of the estate of a deceased person is amenable to the embezzlement statute applicable to 'any individual or company or association,' if money (or other personal property) in his possession as such executor is embezzled by him."

Reference is here made to the case of *Thompson v. Pope,* 77 Neb. 338, wherein will be found a partial history of our statutory law of descent and distribution of property.

Thus, it will be seen that the common-law rule contended for by the defendant has been modified by our statutory enactments, and therefore, while such ancient rule may be instructive, it is without application here. By section 49-101, Comp. St. 1929, our legislature has designated when the common law may be said to apply. This section provides: "So much of the common law of England as is applicable and not inconsistent with the Constitution of the United States, with the organic law of this state, or with any law passed or to be passed by the legislature of this state, is adopted and declared to be law within the state of Nebraska."

The evidence reflected by this record is voluminous, and largely of an uncontradictory nature, hence a comparison and analysis thereof would be of but little value. However, it may be said that to read it is to be persuaded that the verdict of the jury is warranted by the evidence and the law applicable thereto; in fact, that under this record no other verdict than the one returned could reasonably have been arrived at. This defendant, as executor of this estate, became possessed of the notes referred to in the aforesaid two counts of the information, and, in utter disregard of his duties, and with fraudulent intent, converted the same to his own use without the consent of the owner in any manner having been first obtained.

As indicated at the beginning of this opinion, numerous claimed errors are urged. Owing to the importance of the case to the defendant, and to the general public, these have had our careful consideration, and are found to be without merit.

The defendant has had a fair trial, and the record being free from reversible error, the judgment of the district court is

AFFIRMED.

PETER DAMICUS, APPELLEE, V. PATRICK H. KELLY ET AL., APPELLANTS.

FILED JANUARY 16, 1931. No. 27381.

1. **Pleading.** A demurrer to the petition is not, by the provisions of our Code of Practice, a proper part of the answer filed in a case, and should be disregarded.
2. **Fraudulent Conveyances:** SALES IN BULK. One who obtains possession of a stock of merchandise pursuant to a purchase thereof in bulk, without having complied with the provisions of section 36-501, Comp. St. 1929, commonly known as the "Bulk Sales Law," will be held to be a trustee for the benefit of the creditors of his vendor and liable as garnishee.

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

D. J. Gross, Harry L. Welch and *Montgomery, Hall, Young & Johnsen,* for appellants.

Ziegler & Dunn and *George W. Becker, contra.*

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

EBERLY, J.

This appeal involves the interpretation of the provisions of the Nebraska "bulk sales" statute. Comp. St. 1929, sec. 36-501. It appears that certain actions were brought by one Peter Damicus to recover the rental accruing to him under the terms of a written lease with one Nelson and one Smith for the period January to November, 1928, inclusive. Judgments were entered for the plaintiff. Subsequently garnishment proceedings in aid of execution were had in which Patrick H. Kelly and Edward J. Kelly appeared and were examined as garnishees. Thereafter, challenging the answers of these parties thus made, this action was brought against them under the provisions of section 20-1030, Comp. St. 1929.

It also appears that, during the period covered by the written lease referred to, Nelson and Smith were the proprietors of a stock of drugs and carried on a retail drug business in Omaha, Nebraska. In the month of November,

1928, they sold the stock of drugs to the defendants Kelly "in bulk" and "otherwise than in the ordinary course of trade and in the regular and usual prosecution of the seller's business." The present action was prosecuted by the plaintiff on the theory that the Kellys had failed, in the purchase of the drug stock so made, to comply with the provisions of section 36-501, Comp. St. 1929, and were therefore to be deemed trustees in possession of the stock by them purchased for the benefit of the creditors of Nelson and Smith, of whom plaintiff was one. There was judgment for plaintiff in the district court, from which the defendants appealed.

As their first contention, the defendants challenge the sufficiency of the plaintiff's petition. It does not appear that this point was properly presented to the trial court. True, in the amended answer on which the case was tried, as part thereof, the substance of a demurrer is incorporated, but joined to paragraphs containing a general denial and other facts constituting a defense pleaded specially. However, the controlling rule of pleading applicable to the question presented by this record is that, in this jurisdiction, "A demurrer to the petition is not, by the provisions of our Code of Practice, a proper part of the answer filed in a case, and should be disregarded." *Fidelity & Deposit Co. v. Parkinson,* 68 Neb. 319; *Kyner v. Whittemore,* 90 Neb. 188; *Pine-Ule Medicine Co. v. Yoder & Eply,* 91 Neb. 78. The bill of exceptions discloses no demurrer *ore tenus* was interposed by the defendants prior to or during the introduction of the evidence. After the introduction of evidence had been completed and all parties had rested, the defendants moved for an instructed verdict, stating, as one reason for the application, "plaintiff's petition does not state a cause of action against the defendants, or either of them." This motion the district court denied. We are of the opinion that it did not err in so doing. So far as the quoted challenge to the petition is concerned, it was tantamount to a general demurrer *ore tenus* interposed at the conclusion of the evidence. Thus considering it, the language employed by commissioner Albert in *National Fire*

Ins. Co. v. Eastern Building & Loan Ass'n, 63 Neb. 698, is controlling and as applied to the instant case approved. Judge Albert, in the case referred to, said in part: "It is first urged that the court erred in overruling the defendant's demurrer *ore tenus.* This demurrer was interposed after both parties had rested. * * * It will suffice, perhaps, to say that had the demurrer been interposed before the introduction of any testimony, or before the parties had developed their respective theories of the case, it should have been sustained. But coming, as it did, at the close of the testimony, we cannot ignore the construction placed upon the petition by the parties to the suit, as evidenced by the answer and the nature of evidence introduced. Interposed at so late a day, the pleading assailed should be scanned in the light of the entire record, and the court should give it such construction as the parties themselves have seen fit to place upon it, although, standing alone, it might not admit of such construction. Viewed in that light, the demurrer, in our opinion, was properly overruled." See, also, *Punteney-Mitchell Mfg. Co. v. Northwall Co.,* 66 Neb. 5. While not intending to create the inference that the petition in the instant case was subject to successful challenge by demurrer at any time, nevertheless the reasons set forth by Judge Albert are otherwise applicable and convincing, and we are of the opinion that no error was committed in sustaining the pleading assailed in the district court.

In the instant case, both plaintiff and defendants moved for instructed verdicts at the close of the evidence. The defendants' motion was denied and the plaintiff's sustained.

It seems conceded that in November, 1928, Nelson and Smith were proprietors of a stock of drugs located in Omaha and carried on a retail drug business at that place. This stock they sold to defendants Kelly in bulk. Under the terms of the Nebraska bulk sales law, such a sale is void as to creditors of the sellers, "unless the purchaser demands and receives from the seller a written list of names and addresses of creditors of the seller, with the amount of indebtedness due or owing to each, and certified by the

seller, under oath, to be, to the best of his knowledge and belief, a full, accurate and complete list of his creditors and of his indebtedness; and unless the purchaser shall, at least five days before taking possession of such merchandise, or paying therefor, notify personally or by registered mail, every creditor whose name and address are stated in said list * * * and of the price, terms and conditions thereof." Comp. St. 1929, sec. 36-501. It seems a list of certain creditors was furnished to the buyers by Nelson and Smith. It did not contain the name of Damicus as an existing creditor, although he was one in fact. It was also expressly by its terms limited to "a complete, full and itemized statement and description of all the creditors, the amounts due said creditors, and the addresses of said creditors, having bills and obligations legally due and unpaid under the bulk sales law of the state of Nebraska, against the drug store owned and operated by said affiants, located at 220 South Fortieth street in the city of Omaha, Douglas county, Nebraska." It is obvious that this language is indefinite; that its true intent and purpose is ascertainable, not alone from the results of a legal expert's investigation, but dependable in part upon facts and circumstances surrounding the transaction which in turn are subject to change and may involve elements not within the control of either party. The words quoted, in connection with the context in which found, contain and express with certainty a limitation which necessarily excludes certain possible classes of creditors, a fact which in itself constitutes fair notice to the purchaser that the creditors therein enumerated and verified might not be "all of the creditors of the seller." The terms of this instrument do not purport to enumerate, in fact, all creditors of the seller, but only to include such of these, whose "bills and obligations" in view of the source of their creation were such as were then enforceable against the drug stock involved, and "each of which was then due and unpaid." Creditors having unmatured bills and obligations were therefore expressly excluded, and nowhere within the limits of the four corners of the instrument un-

der consideration appears anything from which it may be inferred that there were no creditors then possessing unmatured bills and obligations. The statute involved plainly contemplates, and its provisions are mandatory, that the seller shall furnish to the purchaser and the purchaser shall require and exact a list of all the seller's creditors, whether the obligations involved are matured or unmatured and irrespective of the source thereof, all properly verified as such by the seller's oath. Admittedly this was not complied with in the present case.

While the question is not discussed at length in the opinion of this court in *Cech v. Costello,* 117 Neb. 224, it was in fact determined that all creditors (of the sellers) were within the purview and protection of the Nebraska bulk sales act, without reference to the origin or source of their indebtedness. In the case last cited this court awarded relief to a farm hand whose indebtedness was created by his labor on a farm and had no relation to nor connection with the stock of merchandise involved, save and except the owner and seller of the stock of merchandise was the same individual who was indebted to Cech for farm work. It follows, therefore, in the instant case that the terms of our statute in effect require that all creditors of the sellers be so listed and verified as such by the oath of the sellers. The language of the affidavit quoted above contains in effect a limitation which operates to exclude certain possible classes of creditors from the list submitted. The evidence, therefore, unmistakably discloses that the sellers in the instant case gave and the purchasers accepted, as a written list of names and addresses of creditors of the sellers, a list in fact bearing on its face evidence that it was not a complete list, and that all creditors of the sellers were not therein or thereby purported to be listed. Due to the defects thus appearing on its face, this list, as verified by the sellers' oath, cannot be accepted as a compliance with the requirements of the statute to sustain the sale. It was the purchasers' duty in this respect to demand and require a full performance of the sellers' duties under the statute, which would have necessitated the submission by such sell-

ers of a list of their creditors in proper form, with their affidavit showing that they were all of their creditors irrespective of source or maturity of obligation and were in truth and in fact all of the parties to whom they were indebted. It also follows that, the bulk sales act not having been substantially complied with, the purchaser derived no rights therefrom. *Cech v. Costello,* 117 Neb. 224; *Fitzhugh v. Munnell,* 92 Or. 47; *Interstate Shirt & Collar Co. v. Windham,* 165 Mich. 648; *Butler Bros. v. Mason,* 47 S. Dak. 308; *Hronik v. Warty,* 205 Ia. 1111; *Lemen v. Leffringhouse,* 127 Kan. 501.

Nor does the knowledge that Damicus obtained through current rumor as to the fact the sale had been effected, nor the delay which characterized the bringing of this action as disclosed by the record before us, in any manner impair the right of the plaintiff to maintain it. *Cech v. Costello,* 117 Neb. 224.

It would also seem that the form of the notice to creditors which was employed by the Kellys was insufficient under the terms of the statute, in that it wholly omitted reference to or information of "price, terms and conditions" of said sale. However, admittedly no notice of any kind was in fact given Damicus of this sale, so this point is not determined.

In view of the entire record, it would seem that the defendants wholly failed to establish a substantial performance of the requirements of section 36-501, Comp. St. 1929, and that they are therefore to be regarded as having obtained possession of a stock of merchandise pursuant to a purchase thereof in bulk, without having complied with the provisions of section 36-501, Comp. St. 1929, commonly known as the bulk sales law, and as trustees for the benefit of the creditors of their vendors and liable as garnishees. *Home Pattern Co. v. Gore,* 113 Neb. 535; *Cech v. Costello,* 117 Neb. 224.

The judgment of the trial court is therefore

AFFIRMED.

WILLIAM A. BURKE, APPELLEE, V. DAVID C. DENDINGER, APPELLANT.

FILED JANUARY 16, 1931. No. 27446.

1. **Appeal:** MOTION TO DISMISS. "A motion of an appellee to dismiss an appeal because of the payment by appellant of the judgment from which an appeal had been taken must be overruled when it is shown that such payment was not voluntary, but was made to avoid a sale of appellant's property on an execution issued for the satisfaction of the aforesaid judgment." *Green v. Hall*, 43 Neb. 275.
2. **Proceedings** of the trial court and evidence before it examined and approved.

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

Q. Scott Millard, McCarthy & McCarthy and *C. W. Peasinger*, for appellant.

H. E. Burkett, contra.

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

EBERLY, J.

This is an appeal from a judgment for damages in favor of the plaintiff, appellee herein, and against the defendant, appellant herein, growing out of an assault charged by the former to have been committed by the latter. There was trial to a jury; verdict for $1,000 awarded against defendant; motion for new trial overruled; and judgment entered upon the verdict. Thereafter, the defendant failing to supersede under section 20-1916, Comp. St. 1929, execution was issued to the sheriff of Cedar county who, armed with his writ, enforced payment by the judgment debtor prior to the filing of the transcript on appeal in this court. This payment, however, was made by the judgment debtor to prevent seizure and sale of his property.

Thereafter, in due course, the defendant perfected his appeal to this court. The plaintiff, appellee, challenges the right of appellant to be now heard in this tribunal because

of the fact that the judgment appealed from has been fully satisfied.

This court is not in agreement with this contention. Our jurisdiction in this case is based upon the filing, as provided by law, of the transcript of proceedings of the district court containing the judgment sought to be reversed. Comp. St. 1929, sec. 20-1912. Supersedeas of judgments on appeal, it is true, is provided for by section 20-1916, Comp. St. 1929, but the terms of this section do not expressly make a compliance with the provisions thereof a prerequisite to review by this tribunal, nor does that result follow as a necessary implication.

Section 24, art. I of the Constitution, provides: "The right to be heard in all civil cases in the court of last resort, by appeal, error, or otherwise, shall not be denied." All provisions of our laws relating to the subject of appeals or error proceedings must be read in the light of the constitutional provision quoted. Indeed, under the provisions of our Code of Practice, in many civil cases prompt compliance with the supersedeas statute would be wholly ineffective to secure the right of appeal, if appellee's contention is true, that a judgment must be superseded so as to justify appellate proceedings, and that satisfaction of a judgment by process of lawful execution destroys the right of review. Section 20-1934, Comp. St. 1929, expressly provides: "In an action arising on contract for the payment of money only, notwithstanding the execution of an undertaking to stay proceedings, if the defendant in error or appellee give adequate security to make restitution in case the judgment is reversed or modified, he may upon leave obtained * * * proceed to enforce the judgment." Then, too, section 20-1541, Comp. St. 1929, plainly contemplates the existence of a right of review of a judgment after its due enforcement by execution. So it would seem that, in view of the express provisions of our statutes, as well as the necessary implication which the terms thereof justify, under the facts in this case the defendant's right of appeal was in no manner prejudiced by the coerced payment made in the manner disclosed by the evidence. Indeed, we are

expressly committed to the rule that—"A motion of an appellee to dismiss an appeal because of the payment by appellant of the judgment from which an appeal had been taken must be overruled when it is shown that such payment was not voluntary, but was made to avoid a sale of appellant's property on an execution issued for the satisfaction of the aforesaid judgment." *Green v. Hall,* 43 Neb. 275.

The conclusion follows that the motion of appellee to dismiss this appeal is overruled.

On consideration of the merits, we find there are three questions presented. After a careful consideration of the record, and in the light of the same as an entirety, we have reached these conclusions: (1) That on the question of self-defense the instructions of the trial court as given are approved, and that no error was committed by the trial court in refusing to give the instructions tendered; (2) that the action of the trial court in excluding evidence of the previous altercation between the parties to this lawsuit, which occurred on May 11 prior to the assault here in controversy, was proper; (3) that the evidence in the record is ample to sustain the verdict of the jury in favor of the plaintiff, as well as the amount therein awarded.

It follows, therefore, that the judgment entered in this case is right, and it is

AFFIRMED.

JOHN C. SCHMIDT, APPELLEE, V. AMELIA SCHMIDT, APPELLANT.

FILED JANUARY 16, 1931. No. 27454.

Divorce: EXTREME CRUELTY: PROOF. In a suit by a husband for a divorce from his wife on the statutory ground of extreme cruelty, the burden is on him to prove unjustifiable conduct on her part, which so grievously wounds his mental feelings, or so utterly destroys his peace of mind, as to seriously impair his bodily health or endanger his life, or such as utterly destroys the legitimate ends and objects of matrimony. *Kerker v. Kerker,* 113 Neb. 653.

APPEAL from the district court for Lancaster county: LINCOLN FROST, JUDGE. *Reversed, petition dismissed, and cause remanded, with directions.*

W. B. Comstock and *John H. Comstock,* for appellant.

T. F. A. Williams and *Perrin & Kier, contra.*

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

EBERLY, J.

Plaintiff, the husband of defendant, brought this suit against her for a divorce on the statutory ground of extreme cruelty, charging her, among other things, with unjustifiable conduct and a series of humiliating acts prompted by a stubborn, quarrelsome, irascible, complaining disposition and moody temperament. Among the complaints were protracted displays of ill temper, lack of frankness, and the making of untrue remarks about her husband, and nagging him. As a result of the cruelty pleaded by plaintiff, he alleged his health has been seriously impaired; that he is nervous and is living under unendurable stress and strain, both mental and physical; that his home life and peace are wrecked.

In an answer to the petition, defendant denied the charges of cruelty. The answer contained also a cross-petition, praying for separate maintenance and for other equitable relief.

The trial in the district court resulted in a decree granting plaintiff a divorce. Defendant appealed.

Extreme cruelty is a statutory ground for a divorce. The burden was on plaintiff to prove unjustifiable conduct of his wife, which so grievously wounded his mental feelings, or so utterly destroyed his peace of mind, as to seriously impair his bodily health or endanger his life, or such as utterly destroyed the legitimate ends and objects of matrimony. *Kerker v. Kerker,* 113 Neb. 653.

The parties were married June 1, 1922, and lived together as husband and wife for a number of years. They have no children. Their living expenses were paid from the earn-

ings of each. Plaintiff left defendant and refused to live with her. She entreated him in vain to renew with her the relations of husband and wife. The evidence is voluminous. An analysis thereof would not benefit the parties or add anything new to the rules of law and equity. Upon a trial *de novo,* the unanimous finding is that plaintiff did not meet the burden of proof essential to a divorce in his favor. His proof is wholly insufficient to show "extreme cruelty" as that term is used in the statute and defined in our opinions. The evidence fails to show that the unhappy situation in which plaintiff finds himself is the result of his wife's unjustifiable conduct amounting to extreme cruelty. She does not seek a divorce. There should be a decree in her favor for separate maintenance. Considering the earning capacity, the station in life, and the property of each, $50 a month is found to be an equitable allowance for her.

The judgment of the district court is reversed, the petition of plaintiff dismissed and the cause remanded, with instructions to enter a decree in favor of defendant for separate maintenance of $50 a month beginning February 2, 1931, for costs in both courts, and for an attorney's fee of $250. REVERSED.

R. T. COOPER V. STATE OF NEBRASKA.

FILED JANUARY 16, 1931. No. 27372.

1. **Criminal Law:** TIME FOR PREPARATION FOR TRIAL. Every person accused of crime and his attorney are entitled to a reasonable time in which to prepare for trial after the prosecution is commenced. The trial judge must determine from all the facts and circumstances of a particular case what is a reasonable time for such preparation.
2. ———: CONTINUANCE: DISCRETION OF COURT. In overruling a motion for a continuance in a criminal case, the trial court exercises its discretion, and its ruling will not constitute reversible error unless there is an abuse of discretion.
3. ———: INSTRUCTIONS: REASONABLE DOUBT. One accused of a criminal offense is entitled to the benefit of any doubt arising from the lack of evidence. It is the duty of the trial court, if requested, to so instruct the jury. To omit said instruction, if not requested, is not necessarily prejudicially erroneous,

where that right of the defendant is fairly protected by the instructions as a whole.

4. ———: CONDUCT OF PROSECUTOR. "It is the duty of the prosecuting attorney to conduct the trial in such a manner as will be fair and impartial to the rights of the accused, no matter how guilty, in his opinion, defendant may be; and this rule applies to special counsel assisting the prosecuting attorney." 16 C. J. 886.

5. ———: ———. The argument of the special counsel, assisting the county attorney in this case, as set forth fully in the opinion, is such misconduct that it requires a reversal.

6. ———: DUTY OF JUDGES AND PROSECUTORS. Trial judges and public prosecutors are charged with the duty of conducting criminal trials in such a manner that the accused may have a fair and impartial trial, uninfluenced by prejudice, passion and public clamor.

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

Bartos, Bartos & Placek, for plaintiff in error.

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

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

DAY, J.

The plaintiff in error, R. T. Cooper, who will hereinafter be designated as defendant, was charged with forging the name of "George Vana" on the back of three checks and with uttering the three forgeries. He was convicted of the three forgeries, but was found not guilty of uttering the forged indorsements. At the time of the alleged offenses and for a number of years prior thereto, the defendant was employed by Black Brothers Milling Company, as agent and manager of their elevator at De Witt. As such agent and manager he had authority to buy grain and to pay for the same with their checks, and he is charged with issuing three checks to one "George Vana," which represented no actual transaction, and forging "George Vana" upon said checks. The defendant entered a plea of not guilty and upon a trial he was convicted of the forgeries as above

stated. The plaintiff in error presents to this court for review the record of his conviction.

The defendant urges a reversal of the judgment of the trial court for that it was prejudicially erroneous for it to refuse to grant a continuance of ten days for the defendant to prepare for trial. Summarized, the reasons urged for a continuance by the defendant were: His inability to raise money to pay his attorneys; their refusal to proceed without their fee; and his inability to secure other counsel. It is also shown that, although diligent in his efforts, only two days were left after procuring counsel to prepare for trial. The record also discloses that the complaint was filed in the county court on November 18, 1929, and that on November 23, 1929, he was arrested and taken before said court; that, represented by the same attorney who represented him upon the trial, he sought and was granted a continuance until November 27, 1929, to prepare for the preliminary hearing; that upon the hearing numerous witnesses were examined. The record further discloses that the books of Black Brothers, which were made by him, and which he complains he was unable to properly inspect and examine, were in court at that time. It does not appear that he was prevented from an examination of them at any time. From November 27, 1929, defendant was at liberty on bond and his trial did not occur until January 13, 1930. He did not appear for trial at this session of the court as required by his bond, neither on December 20, 1929, nor on January 6, 1930, and his bond was forfeited. Upon giving a new bond on the same day, the forfeiture was vacated and his trial set for January 13. He did not then apply for the appointment of an attorney as provided by statute for indigent persons charged with criminal offenses.

Every person accused of crime and his attorney are entitled to reasonable time in which to prepare for trial after the prosecution is commenced. What is a reasonable time in which to prepare for trial after the prosecution is commenced must be determined from all the facts and circumstances of the particular case. 16 C. J. 449. The trial

judge in a criminal prosecution must determine in each case, from the facts and circumstances presented therein, what is a reasonable time for such preparation. In overruling a motion for a continuance in such a case, the trial court exercises a discretion, which is not reversible error unless it appears that there was an abuse of discretion. *Dilley v. State,* 97 Neb. 853; *Becker v. State,* 91 Neb. 352; *Welsh v. State,* 60 Neb. 101; *Taylor v. State,* 86 Neb. 795; *Hanks v. State,* 88 Neb. 464; *Ringer v. State,* 114 Neb. 404. Applying the rule herein stated to the facts delineated in the instant case, it is obviously apparent that the trial court did not abuse its discretion in overruling the motion for a continuance, and that the defendant was not prejudiced thereby.

There is criticism of the instruction of the court to the jury on the question of reasonable doubt. The defendant asserts that the instruction as given limits the reasonable doubt to the evidence adduced and excludes reasonable doubt arising from the lack of evidence. It is true that the defendant was entitled to the benefit of any reasonable doubt arising from the lack of evidence. However, the jury were instructed by other instructions that evidence was required to prove defendant guilty beyond a reasonable doubt before they could find him guilty. This would indicate to the jury that a lack of evidence would create this doubt. Heretofore we have said: "The court did not say that a reasonable doubt, to authorize an acquittal, must be one arising from the evidence alone, but merely told the jury that to produce an acquittal it must be a reasonable doubt arising from a candid and impartial investigation of all the evidence in the case. If the jury did that, it would reveal to them any lack of evidence to sustain a conviction, and if any such want of evidence was found there could be no conviction." *Bartley v. State,* 53 Neb. 310, 360. The omission of which complaint is made in the present instance is not necessarily reversible error. *Hiller v. State,* 116 Neb. 582. In a recent opinion it was said: "It is not incumbent upon the court in every case to instruct the jury that a reasonable doubt may arise from want of evidence

in the case, though, if requested so to do, such instruction should be given." *Trimble v. State,* 118 Neb. 267. In this case the defendant did not request an instruction covering this phase of the question and the instructions as a whole fairly protect the rights of the defendant. For the same reasons the other assignments of error predicated upon the failure of the trial court to give requested instructions is without merit, because the instructions given by the court covered the entire case and properly submitted the issues to the jury.

Misconduct of the assistant county attorney in his argument to the jury is assigned by the defendant as reversible error, because he contends the statements were prejudicial and not warranted by the evidence. The argument in question was made by an attorney appointed by the court to assist the county attorney. The judges of this court are unanimous in their opinion that the argument of the attorney was misconduct on his part. There is a difference of opinion as to whether or not the misconduct of counsel was prejudicial to the defendant. It is necessary to a discussion of the question that we set out the statements and argument of counsel to which defendant excepts. In the course of the state's closing argument to the jury, the special assistant to the county attorney spoke as follows:

"As you go along here, to arrive at your verdict, gentlemen, you are going to do one of two things; you are going to convict Bob Cooper of forgery and uttering this forged instrument on every count, or else you are going to convict Mr. Sherman, that fine old gentleman here, of perjury, lying from this witness-stand. You are either going to convict Bob Cooper of forgery, or else you are going to convict Frank Havlovic of perjury. You are either going to convict Cooper of forgery, or else you are going to convict all of these witnesses that we had on the stand of perjury."

The writer is of the opinion that the remarks quoted are not justified by the evidence; that they were prejudicial and inflammatory. We do not find it justified in the books. In fact, there is no justification for the above language. It was not the province of the jury, either directly or indirect-

ly, to find that the above mentioned witnesses were guilty of perjury. To acquit the defendant would not have so found. Even taking the most favorable view possible, the credibility of the witnesses is only one element to be considered by the jury. It is also their duty to determine their accuracy in observing and remembering; to consider whether they are biased or prejudiced in connection with the case; and their means of knowing the matters concerning which they testify. The state's attorney knew this and his conduct in making said argument was reprehensible and unfair. It was his duty as well as the duty of the trial court to surround the trial with an atmosphere of fairness, undisturbed by prejudice, passion or ill will. *Bourne v. State,* 116 Neb. 141. "It is the duty of the prosecuting attorney to conduct the trial in such a manner as will be fair and impartial to the rights of the accused, no matter how guilty, in his opinion, defendant may be; and this rule applies to special counsel assisting the prosecuting attorney." 16 C. J. 886.

Let us consider the fairness and impartiality of the special counsel assisting the county attorney. The foregoing quotation was soon followed in the same argument by this: "Now, why does Bob Cooper lie about that if he is this little ignorant farmer boy?" To which timely objection was made by defendant's counsel. Thereupon the court rules as follows: "The word 'lie' isn't a very pleasant word, it doesn't sound very well, but counsel is permitted to use any argument that is adduceable from the evidence, and if he happens to use a word that doesn't sound particularly euphonious, it is not grounds for objection if it is based on the evidence, of course." The evidence does not justify the statement, augmented and strengthened by the ruling of the court. The evidence was in conflict and presented a question of fact for the jury. Then followed with some intervening sentences this statement: "This man came in here and he needed cash, and so Bob digs down in his pocket, this man that is working for a hundred dollars a month, understand, and, my gracious! he has unlimited cash. You could tell that by the clothes he wore up here. I

wear the same suit all week, and he comes in with a fine brown suit on Monday and the next day a suit of dark blue. Mrs. Cooper takes the stand, she has furs on, a fine coat and dress. He is ready with everything on this hundred dollars a month. And so Bob—" Timely objection was made to the remarks about dress, for that it was prejudicial, which was overruled by the court. Can it be that in this state the kind of clothes a man and wife wear should be reason to convict him of forgery? Certainly not, unless there is some connection shown by the record between the forgery and the clothes. The record in this case does not reveal any such connection.

From this we pass to the impassioned peroration of the state's attorney. Here it is: "You are going to say, 'Bob Cooper, you are guilty on count one; Bob Cooper, you are guilty on count two; Bob Cooper, you are guilty on three and four and five and six,' or else you are going to publish to all the people in this courtroom and to Bob Cooper's neighbors around there in that county that Fred Sherman, that fine old gentleman, committed perjury from this witness-stand, that Frank Havlovic committed perjury from this witness-stand, that Louis Skrdla, who is one of Bob Cooper's best friends, committed perjury from this witness-stand, and that George Vana, another friend, committed perjury from that witness-stand, or that his good friend, William Kreuscher, committed perjury from that witness-stand—one of the most infamous crimes that a man can commit. Now, take your choice, gentlemen, convict Bob Cooper who has been plainly shown guilty by this evidence, or convict these innocent men, among the very salt, the very best, we have in Saline county, of testifying falsely under oath from this witness-stand." The defendant's attorney objected to this last statement as prejudicial and not warranted by the evidence. Thereupon the court rules as follows: "It may reasonably be deduced. I suppose counsel is allowed considerable latitude." Timely and almost continual objection was made to this line of argument, but it continued throughout the trial, with the apparent acquiescence and approval of the court. The court should have

stopped this line of argument, reprimanded the attorney, and at least have instructed the jury to disregard it. See *Argabright v. State,* 62 Neb. 402.

This court has recently reversed the judgment and remanded civil cases for retrial for the misconduct of the attorney in his argument to the jury. In *Hall v. Rice,* 117 Neb. 813, this was done. Judith Hall had brought action against defendants Rice and the Liggett Company, a corporation, for damages for false imprisonment and slander. A judgment on the verdict for $5,000 was reversed because plaintiff's attorney referred to the defendant company as "a corporation without any feeling or soul," as a "big corporation," as consisting of 440 stores, as "rich clients," and to the witnesses for the defendant as "New Yorkers." The language of that opinion is so applicable here that we quote at length, beginning with the quotation from *Ashland Land & Live Stock Co. v. May,* 59 Neb. 735, which is as follows: "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." The court then continues in the application to the case under consideration, as follows:

"In the trial of every contested lawsuit, there is abundance of opportunity, growing out of the material facts and circumstances of the case, for the display of extraordinary talent and the exercise of adroitness and finesse without resort to illegitimate methods tending only to arouse the passion and prejudice of the jury. It is of greater importance that the administration of justice be regular and orderly, than that counsel be afforded an opportunity to exhibit their peculiar prowess in the use of questionable methods.

"We are not able to determine what influence, if any, the improper argument of counsel had upon the jury, but it was well calculated to distract their attention from the real issues, and the refusal to grant a new trial on this ground was prejudicial error."

See, also, *Lewis v. Beckard,* 118 Neb. 533, and *Johnson v. Jensen,* 118 Neb. 1. The more recent cases are in line with the decisions of this court. *Hershiser v. Chicago, B. & Q. R. Co.,* 102 Neb. 820; *Hansen v. Mallett,* 101 Neb. 339; *Young v. Kinney,* 79 Neb. 421; *Courier Printing & Publishing Co. v. Wilson,* 3 Neb. (Unof.) 136; *Chicago, B. & Q. R. Co. v. Kellogg,* 54 Neb. 127, 55 Neb. 748; *Stratton v. Nye,* 45 Neb. 619; *Patterson v. Hawley,* 33 Neb. 440; *Cleveland Paper Co. v. Banks,* 15 Neb. 20. In the case of *Hansen v. Mallett, supra,* the court quotes the following language, with approval, from *Birmingham Railway, Light & Power Co. v. Drennen,* 175 Ala. 338: "Where, in argument, the plaintiff's counsel makes statements that are prejudicially erroneous, and the court, although sustaining the defendant's objection to the statements, does not exclude them or reprimand the counsel for using them, and the counsel does not retract the statements after the objection is sustained, the trial court should grant a new trial." In *Patterson v. Hawley, supra,* this court, by Maxwell, J., said: "All appeals to the jury upon matters outside of the case tend to defeat the due administration of justice, and any statement of an alleged fact outside of the evidence prejudicial to one of the parties may be sufficient to cause a reversal of the judgment. A court of justice does not condemn unheard, nor upon *ex parte* statements of opposing counsel, and it will not permit one of its officers to abuse his position by such unauthorized statements." In *Cleveland Paper Co. v. Banks, supra,* this court said, in the opinion by Maxwell, J.: "The rights of parties are to be determined from the evidence, and an attorney in arguing a case to a jury must confine the discussion of facts to those proved. If he can be permitted to make assertions of facts, or insinuations of the existence of facts, not supported by the proof, there is danger that the jury will lose sight of the issues or be influenced by misstatements to the prejudice of the other party. Where such statements are improperly made *prima facie* they are prejudicial, and may be sufficient to cause the reversal of the case. * * * In our opinion, therefore, the statement was so far prejudicial as to demand a new trial."

The misconduct of counsel in the above cited cases was mild compared to the flagrant and reprehensible misconduct in this case. In a criminal case, the defendant is presumed innocent until he is proved guilty beyond a reasonable doubt. This presumption of innocence is a matter of evidence in favor of the defendant, and continues throughout the trial until he is found guilty from the evidence beyond a reasonable doubt, after a trial surrounded with an atmosphere of fairness, undisturbed by prejudice, passion or ill will. If the rule as to misconduct of counsel was properly applied in the recent cases of *Hall v. Rice, supra,* and *Lewis v. Beckard, supra,* which were civil cases to recover damages, then it ought to be applied with equal force to criminal cases wherein life and liberty are at stake. We assume that, in the above cited cases, the jury were properly instructed, since the opinion of the court does not pass upon any question as to the propriety of instructions. It is urged by the state that, since the jury were properly instructed as to the issues, the verdict must have been based upon the evidence considered in the light of the instructions, uninfluenced in their conclusion by the misconduct of counsel. To the charge of the information, the defendant entered a plea of not guilty. He took the stand and contradicted the testimony of witnesses for the state. The guilt or innocence of a defendant in a criminal case is a question of fact to be determined by the jury. *Hall v. Rice, supra.* We are unable in this case to determine what influence, if any, the improper argument of counsel had upon the jury, but it was well calculated to distract their attention from the real issues. It was intended to influence them, or at least to distract their attention from the real issues. The record establishes that it was a deliberate, persistent attempt on the part of the state's attorney to prejudice the jury against the defendant. It was capable of fulfilling its intended purpose.

It is regretted that the judgment of the trial court must be reversed, necessitating another trial of this case. Violators of the criminal laws should be vigorously prosecuted, but there is a vast difference between legitimate prosecu-

tion and appealing to prejudice and passion and popular clamor to obtain a conviction. Trial judges and public prosecutors are charged with the duty of conducting criminal trials in such a manner that the accused may have a fair and impartial trial, uninfluenced by prejudice, passion and public clamor. The defendant in this case did not have such a trial and the judgment is

REVERSED.

ROSE, J., dissenting.

I concur in the admirable exposition of the majority opinion which shows there was no prejudicial error in the record from the beginning of the long trial below until the assistant prosecuting attorney made his argument to the jury, but I take radical exception to the reversal on the ground of his misconduct.

Without perversion of the truth and the law a conviction was inevitable. Setting aside the only just and proper verdict that could have been rendered under the evidence does not inflict punishment on the offending attorney who abused his privilege in addressing the jury but does visit his misconduct on the innocent public and does cast reflections on the administration of justice.

It is a strange anomaly of the law, as administered by the majority, that juries are permitted to determine from evidence the momentous issues of liberty and imprisonment and at the same time and in the same prosecution are not trusted to discriminate between mere argument containing intemperate and unwarranted language of a prosecuting attorney and truthful testimony of disinterested witnesses under oath.

Where the entire record of a criminal prosecution clearly shows that misconduct of the prosecuting attorney in addressing the jury did not mislead them in arriving at their verdict of guilty or prejudice accused, the reviewing court should treat such misconduct as harmless error as directed by the statute which declares:

"No judgment shall be set aside, or a new trial granted, or judgment rendered, in any criminal case on the grounds of misdirection of the jury, or the improper admission, or

rejection of evidence, or for error as to any matter of pleading or procedure, if the supreme court, after an examination of the entire cause, shall consider that no substantial miscarriage of justice has actually occurred." Comp. St. 1929, sec. 29-2308.

I made "an examination of the entire cause," and I say with conviction there was no prejudicial error or miscarriage of justice in the proceedings and sentence. Under the evidence a verdict of not guilty would have been a travesty on justice and a reproach to the law.

Defendant, R. T. Cooper, was charged with forging the name of "Geo. Vana" on the back of each of three bank checks which were drawn by "Black Bros. Flour Mills Elevator, by R. T. Cooper," in favor of "Geo. Vana," on the "Farmers & Merchants Bank, DeWitt, Nebraska," and were payable at the "First National Bank, Beatrice, Nebr." The dates of the checks and the amounts were respectively as follows: October 22, 1928, $55.80; October 29, 1928, $55; November 15, 1928, $59.16. For a number of years, including those dates, defendant was an agent of Black Brothers and in that capacity managed for them an elevator at DeWitt. He had authority to buy grain for them there and to pay for it with their checks. The truth of the charges was proved beyond a reasonable doubt. Defendant testified in his own behalf and admitted that he drew the checks; that he indorsed Vana's name on the back of each; that he banked the checks in his own name; that he received the proceeds. In explaining these remarkable transactions he testified in effect that Vana delivered three loads of wheat at the elevator and that each check represented the price of a load; that two of the loads were received in payment of feed or grain formerly purchased by Vana who received payment for the third load in cash from defendant personally; that defendant indorsed the name of Vana with the latter's consent; that it was defendant's custom, known to his employers, in these and other like transactions, to indorse on the back of the check the name of the payee; that he did so without any attempt to imitate the payee's handwriting; that he

settled with his employers for what he owed them. Tested by business standards the defense was preposterous and from the standpoint of the law it was a device to defeat justice. Existence and knowledge of such a custom were disproved. Attempts to imitate handwriting in making indorsements were evidenced by comparison with genuine signatures. The loss fell on defendant's employers and not on Vana who became a disinterested witness. He testified positively that he never bought or delivered grain at the De Witt elevator; that the checks did not represent the price of wheat sold or delivered by him and that they were not issued or used in any actual transactions with him; that he did not authorize the indorsement of his name on the checks. Moreover, the De Witt elevator was approximately five miles from his farm, while he was served by another elevator near his home. To prove criminal intent several other disinterested witnesses, whose names had been likewise indorsed by defendant on checks, testified in substance that they did not authorize the indorsements and that the checks were not connected with any actual transaction in which the fictitious payee and indorser participated.

In the light of evidence that proves guilt with unerring certainty, as it does in this case, why should jurors be suspected of resorting to obvious unfair argument in arriving at their verdict? The unwarranted statements reproduced in the majority opinion and the cruel remarks concerning the faithful wife who appeared in court on behalf of her husband in a time of peril reacted against the prosecution without harming the accused. Indignation that moved reviewing judges did not escape the jurors. The trial court not only treated the objectionable statements of counsel as argumentative matter, as shown by the rulings on objections, but the jury were instructed in writing that, in coming to any conclusion, they should be governed alone by the evidence in the light of the instructions; that they had no right to indulge in speculations, conjectures or inferences not warranted by the evidence. They were also directed to entirely disregard any remarks of counsel not warranted by the evidence. The misconduct condemned by the majority had nothing to do with the verdict.

On the record for review, "after an examination of the entire cause," as required by statute, I "consider that no substantial miscarriage of justice has actually occurred." The statutory rule was enacted in 1921 to prevent reversal of righteous convictions for harmless, technical errors. Laws 1921, ch. 157, sec. 1. In justifying the reversal by citing and following the old practice which the legislature changed, the majority, in my opinion, have impaired, if not destroyed, remedial legislation essential to the safety of the law-abiding public in the present state of lawlessness. Entertaining these views, I solemnly protest against the adoption of the majority opinion and the reversal of the conviction in this case.

THOMAS J. ALLEN V. FRED D. TALLON, APPELLEE: AMERICAN EMPLOYERS' INSURANCE COMPANY, APPELLANT.

FILED JANUARY 16, 1931. No. 27583.

1. Costs: ATTORNEY'S FEES. In determining the value of services rendered by attorneys to be taxed as costs under section 7811, Comp. St. 1922, the court will consider the nature of the litigation, the amount involved in the controversy, the result of the suit; the length of time spent on the case, the care and diligence exhibited, and the character and standing of the attorney.
2. ———: ———. The value of attorney's fees in such a case is solely a question of fact.
3. ———: ———: PROCEDURE. Under section 7811, Comp. St. 1922, attorney's fees are taxed as a part of the costs. They constitute no part of the judgment in the action and are subject to exceptions and review in like manner as the taxation of other costs. An order to tax such costs does not require the opening or modification of the judgment and the court has jurisdiction to act upon the motion at a subsequent term of court to that at which the judgment was rendered, unless there are intervening equities.
4. ———: ———. In such a case, the attorney's fees are to be taxed as costs in addition to the amount of the recovery. The fact that the recovery was obtained upon a counterclaim does not defeat such an allowance.

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

Kennedy, Holland, De Lacy & McLaughlin and *Raymond & Fitzgerald,* for appellant.

R. C. Clarke and *Mothersead & York, contra.*

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

DAY, J.

This is an appeal from an order entered by the district court for Scotts Bluff county, allowing Fred D. Tallon, appellee, the sum of $1,350, covering attorney's fees for trial of the above entitled action. Allen was engaged in the construction of a swimming pool for one Tallon. The plaintiff had agreed to construct this pool for the sum of $11,743. The defendant, Fred D. Tallon, required a performance bond and one was signed by the American Employers' Insurance Company. Originally, the suit was brought by Thomas J. Allen, the principal in said bond, for the balance due on his contract. The defendant, Fred D. Tallon, counterclaimed for damages on account of certain defects in construction, and caused the American Employers' Insurance Company of Boston, Massachusetts, to be brought in as a party. Certain other defendants also filed liens and these were foreclosed in the same transaction. The court found in the trial of the case that Tallon had been damaged in the sum of $6,853.97, and that the insurance company was liable to Tallon for that amount. Tallon had, however, in accordance with the provisions of the bond, and for the protection of the bonding company, refused to pay Allen any more money after he discovered that Allen was not performing the contract faithfully, and thus he had on hand $3,019.16, so judgment was rendered for the difference, $3,834.91. Allen and the insurance company appealed from the judgment of the district court to this court. The judgment of the lower court was affirmed for want of briefs. Back in the district court again, appellee Tallon filed a motion for the allowance of attorney's fees to be taxed as costs for the services of his attorneys in the district court, only, in his litigation with the insurance company. Objections to the hearing on motion for allow-

ance and taxation of attorney's fees were filed. There are eight assignments of error urged for reversal of the order of the district court. There are three questions presented and argued in the brief of the appellant: The amount allowed as attorney's fees is excessive and exorbitant; application for attorney's fees was made too late; and the court erred in making any allowance of attorney's fees.

The judgment in this case was for $3,834.91. However, the claim was for $3,000 on contract price which the court applied to the claim, thereby reducing it to $3,834.91. There was no dispute as to the contract price. The holding back of this money obviously inured to the benefit of the appellant herein. The recovery of the appellee herein must, therefore, be considered for the purpose of this appeal as $6,834.91. The amount of the allowance, $1,350 was almost 20 per cent. of the recovery. The undisputed evidence taken upon the motion proves that this was a case which was complicated and involved. There were many items involved in claims for damage which it was necessary to establish by evidence; several mechanic's liens were tried in the same action, and the trial occupied six days, aside from the time apparently necessary for preparation to present this case. The defendant does not offer any evidence as to the value of the services. The trial court also had the advantage of trying the original case, of knowing the work performed, and the character of the litigation.

In determining the value of the services rendered by the attorneys, it is competent to show by the evidence, the nature of the litigation, the amount involved, the result of the suit, the length of time spent on the case, the care and diligence exhibited, and the character and standing of the attorney. This allowance was admittedly made under section 7811, Comp. St. 1922, which provides that the court shall allow a reasonable sum as an attorney's fee to be taxed as a part of the costs. In the recent case of *First Nat. Bank v. Lincoln Grain Co.*, 116 Neb. 809, it was said:

"It is solely a question of fact. The plaintiff's evidence

as to the actual services performed by its attorneys in carrying on this litigation to the conclusion of the trial in the district court, including the nature, extent and value of the same, sustains without question that 'a reasonable sum as an attorney's fee' for the services rendered was not less than $7,500. The defendant submitted no evidence whatever on this subject in the court below. We find nothing in the record, as an entirety, that in any manner discredits the competency, qualifications or character of any of plaintiff's witnesses on this point or tends to controvert the conclusion they expressed in their testimony.

"It may be conceded that a substantial portion of the services which were the subject of this testimony was actually performed in the presence of the trial judge and subject, therefore, to his personal observation; and that in the determination of this question there was necessarily involved the exercise of judicial discretion."

From a perusal of the cases, we come to the conclusion that the court has fixed attorney's fees in the various cases in accord with the facts and circumstances of each case and there is no mathematically exact rule by which the same can be determined. In the instant case, although a substantial portion of the services was performed in the presence of the trial judge, and although there is other evidence upon the question, nevertheless the district court has a general knowledge of the value of legal services, and attorney's fees are often allowed for services performed in that court without calling witnesses. The same practice prevails in this court. The court is unanimously of the opinion, after a careful consideration of the matter, that the amount allowed in this case was excessive and that the district court erred in the exercise of its discretion in the allowance; that the sum of $850 is a reasonable attorney's fee which should have been taxed in the district court.

Was the application for an allowance of attorney's fees made too late? Section 7810, Comp. St. 1922, provides, in so far as applicable to the present problem: "The

court, upon rendering judgment against the insurance company, * * * shall allow the plaintiff a reasonable sum as an attorney's fee, to be taxed as part of the costs." In the instant case the judgment was rendered on June 10, 1929, and thereafter the case was appealed to the supreme court. It was affirmed by the court for that the appellant failed to file briefs. The mandate of the supreme court went down, and shortly thereafter, but at a subsequent term, a motion was filed for the allowance of attorney's fees. The order involved in the appeal was entered at the term in which the motion was filed. In *Wirtele v. Grand Lodge, A. O. U. W.*, 111 Neb. 302, the court held that an attorney's fee taxed as costs under this section of the statute constitutes no part of the judgment in the action, and is subject to exceptions and review in like manner as the taxation of other costs. In *Barkley v. Pool*, 105 Neb. 203, this court held that, in case of a motion for an order to the clerk to tax costs, it does not require the opening or modification of the judgment, and the court has jurisdiction to act upon the motion at a subsequent term of the court from that at which the judgment was rendered, unless there are intervening equities. Under section 7811, Comp. St. 1922, attorney's fees are taxed as a part of the costs. They constitute no part of the judgment in the action and are subject to exceptions and review in like manner as the taxation of other costs. An order to tax such costs does not require the opening or modification of the judgment and the court has jurisdiction to act upon the motion at a subsequent term of court to that at which the judgment was rendered.

The appellant has neither cited cases to support its contention, nor demonstrated the soundness of its contention. The services of the attorneys were rendered, the appellant was legally liable for the payment thereof, and has not been prejudiced by the delay in making application for taxing attorney's fees as costs.

The contention of appellant that the attorney's fees should not be allowed because the appellee did not com-

mence the action but recovered on a counterclaim is untenable. It was necessary for the appellee to litigate to secure his rights and the appellant was contesting his claim at all times. Other assignments of error not argued in the brief are not considered nor discussed.

The order of the district court in taxing attorney's fees in this case is affirmed as modified.

AFFIRMED AS MODIFIED.

EGBERT PANDOLFO V. STATE OF NEBRASKA.

FILED JANUARY 23, 1931. No. 27466.

1. **Indictment and Information:** SUFFICIENCY. "Where a statute states the elements of a crime, it is generally sufficient, in an information or indictment, to describe such crime in the language of the statute." *Cordson v. State*, 77 Neb. 416.
2. ———: STATUTE: EXCEPTIONS. "An information need not negative the exceptions of a statute, which are not descriptive of the offense." *Sofield v. State*, 61 Neb. 600.
3. **Statutes:** CONSTITUTIONALITY. The provisions of section 14, art. III of the Constitution, should be liberally construed so as to uphold a provision in a legislative act which, though not specifically expressed in the title, is germane to the subject-matter, and comprehended within the objects and purposes, of the act.
4. ———: ———. Section 2, ch. 32, Laws 1925, amending section 8115, Comp. St. 1922, is not unconstitutional by reason of the fact that the burden of proof as to exemptions, fixed by that section of the amendment, was not specifically stated in the title of the act; it was germane to exemptions, which was the subject of the act.

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

Victor Westermark and *L. S. Harvey*, for plaintiff in error.

C. A. Sorensen, Attorney General, and *L. Ross Newkirk, contra.*

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

GOSS, C. J.

The defendant was charged jointly with others with violating what is commonly called the "Blue Sky Law," by selling securities without first having obtained a permit. This defendant obtained a separate trial, was convicted and sentenced to two years in the penitentiary.

He assigns error on several grounds, the first of which is that the information does not state a crime. The information is laid under title V, art. XXI (sections 8114-8144) Comp. St. 1922, now chapter 81, art. 54, Comp. St. 1929. The term "securities" is defined under section 8114, Comp. St. 1922, now section 81-5401, Comp. St. 1929; the securities exempted from the act were defined in section 8115, Comp. St. 1922, as amended by section 1, ch. 32, Laws 1925, now section 81-5402, Comp. St. 1929; the application and permit are prescribed in section 8116, Comp. St. 1922, now section 81-5404, Comp. St. 1929; and the penalty for violation is found in section 8137, Comp. St. 1922, now section 81-5425, Comp. St. 1929.

In substance the information charged that on February 3, 1930, Egbert Pandolfo, in Dundy county, Nebraska, did wilfully, purposely, unlawfully and feloniously sell, negotiate for the issuance and sale of and take subscriptions for and promote the offering, issuance and sales of certain securities to K. L. West, residing in the state and not a dealer in such securities, the securities being known as Sque-e-ks-n-rattles of St. Cloud, Minnesota, which securities are not specifically exempt from the provisions of the statutes of 1922, without either the said association or defendant having first obtained a permit therefor from the department of trade and commerce.

It is assigned that the information does not state facts sufficient to constitute a crime. It is laid in the language of the statute and this is enough. *Cordson v. State,* 77 Neb. 416; *Goff v. State,* 89 Neb. 287; *Philbrick v. State,* 105 Neb. 120. Nothing in our statutes requires the information to state a multiplicity of sales. It is urged that the information was defective by reason of its failure to

refer to the amendment of the statutes of 1922, made in the session of 1925. The exemptions under the old law, so far as they affected the type of securities here, were not changed by the 1925 amendment. "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." *State v. Bemis,* 45 Neb. 724. In accord therewith are *Schneider v. Davis,* 109 Neb. 638; *Gooch Milling & Elevator Co. v. Chicago, B. & Q. R. Co.,* 109 Neb. 693. The information need not specifically negative the exemptions set out in the statute as such. The answers to this claim of defective information are: (1) The information does negative the exemptions in general terms; (2) as already shown, the information follows the statute and is sufficient; and (3) "An information need not negative the exceptions of a statute, which are not descriptive of the offense." *Sofield v. State,* 61 Neb. 600; *People v. Love,* 310 Ill. 558; *McKelvey v. United States,* 260 U. S. 353.

Perhaps the most serious error assigned arises out of instructions by the court that the burden was upon the defendant to establish that the securities offered by him were within the exemptions allowed by the law. It is argued that instructions No. 3 and No. 7 which so stated that burden are based upon an unconstitutional law; that is, that when chapter 32, Laws 1925, so amended section 8115, Comp. St. 1922, by adding that burden of proof as shown in section 2, the act was unconstitutional because that particular burden was not clearly stated in the title of the act and was not germane to the subject, in contravention of that provision of section 14, art. III of the Constitution, which says: "No bill shall contain more than one subject, and the same shall be clearly expressed in the title." It is true that the title in chapter 32, Laws 1925, did not expressly refer to the subject of burden of proof, as to exemption of securities, which was stated in the amendatory act as a defense to be established by the issuer or seller of securities. But the item was germane

to the subject of exemptions which was the entire subject of the section amended and of the title and text of the amendatory act. The amendatory section deals exclusively with the object and purpose of exemptions. The provisions of the Constitution relating to titles are to be "liberally construed, and so construed as to admit of the insertion in a legislative act of all provisions which, though not specifically expressed in the titles, are comprehended within the objects and purposes of the act as expressed in its title; and to admit all provisions which are germane, and not foreign, to the provisions of the act as expressed in its title." *Affholder v. State*, 51 Neb. 91. An illustration of an amendment analagous to that under consideration is found in *Van Duzer v. Mellinger*, 66 Neb. 508. We are of the opinion that the amendment was germane, and that the section as amended is not unconstitutional for any reason presented.

It is assigned that the evidence was not sufficient to support the judgment. We are not impressed with the point, which is not stressed in the argument. It would be of no value to state the evidence. There was ample evidence to justify the trial court in refusing to direct a verdict for the defendant, to support the verdict of the jury, and to sustain the judgment of the district court.

For the reasons stated, the judgment of the district court is

AFFIRMED.

LOUIS NEIDEN V. STATE OF NEBRASKA.

FILED JANUARY 23, 1931. No. 27639.

1. **Statutory Provision.** "Whoever aids, abets or procures another to commit any offense may be prosecuted and punished as if he were the principal offender." Comp. St. 1929, sec. 28-201.
2. **Criminal Law:** ACCESSORIES. Section 28-201, Comp. St. 1929, has been construed to mean: "That the same rule as to the information, conduct of the case, and punishment, heretofore applicable to a principal, should thereafter govern his aider, abettor, or procurer, and that no additional facts need be al-

leged in an information against such accessory before the fact than are required against his principal." *Scharman v. State*, 115 Neb. 109.

3. ———: RECEIVING STOLEN GOODS: ACCOMPLICES. One who steals personal property and sells it to another may, under a proper state of facts, be considered an accomplice of the buyer of the stolen property.

4. ———:. ACCOMPLICES: TESTIMONY: CAUTIONARY INSTRUCTION. It is prejudicial and therefore reversible error to refuse to give to the jury a cautionary instruction as to the testimony of accomplices when the evidence justifies such an instruction.

5. ———: ———: ———: ———. Record examined and *held* to require an instruction on the subject of accomplices.

ERROR to the district court for Lancaster county: LINCOLN FROST, JUDGE. *Reversed.*

Mockett & Finkelstein, Claude S. Wilson, Roy F. Gilkeson, Hymen Rosenberg and *Sanden, Anderson, Laughlin & Gradwohl,* for plaintiff in error.

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

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

GOSS, C. J.

The plaintiff in error was convicted of receiving stolen goods valued by the jury at $100. The information charged that these goods, being cigars and cigarettes, were stolen from the owner, Pepperberg Segar Company, were received by Neiden, knowing them to have been stolen, and with intent to defraud the owner. Comp. St. 1922, sec. 9601, Comp. St. 1929, sec. 28-513.

There was ample evidence to submit to the jury and upon which the jury might have found that the goods were stolen by Walter Mohr and Kenneth Burley from the owner and sold and delivered by them to Neiden. Mohr and Burley had been convicted of stealing these particular goods, and were brought from the state reformatory, to which they had been committed, and testified

against Neiden on his trial for receiving the stolen goods. The effect of their testimony was that Neiden had procured them to steal the goods. This he strenuously denied; and showed that the first of his dealings with these witnesses arose by reason of the fact that Mohr sold Neiden some similar stock out of the stock of Mohr's brother, a druggist who was closing out his business. This was an innocent transaction. As witnesses for the state, Mohr and Burley gave plausible and circumstantial testimony relating to the sale charged and to other instances in which they had stolen and sold to him these and other goods. In this state of the evidence the defendant requested the court to instruct the jury in relation to the law as to accomplices: That Mohr and Burley were what is known in law as accomplices, and that, while a person accused of a crime may be convicted upon the testimony of an accomplice, yet the jury should act upon such testimony with great care and caution and subject it to careful examination in the light of other evidence in the case. The court refused the instruction tendered and gave no cautionary instruction as to the testimony of these witnesses. This is the first error assigned.

The state's brief does not go so much to the form as to the substance of the instruction requested; that, "by the weight of authority, the thieves are not accomplices of the receiver."

Many cases are abstracted in Words and Phrases, illustrating what is meant by the term "accomplices," and holding that the test, or a general test, to determine whether a witness is an accomplice is whether he himself could have been indicted or informed against for the offense for which the accused is being tried. It is probably true that the general rule established and sustained by the great weight of authority is that the thief is not an accomplice of the receiver of the stolen goods. Where a different rule prevails, it is usually because of statutory control or influence.

In 1907 one was charged and found guilty of stealing hogs, but the judgment was reversed by this court because the evidence showed that he was not a principal but merely an accessory before the fact. The opinion recites that the common-law distinction between principals and accessories still persists in this state, that aiding, abetting or procuring another to commit a felony is a substantive and independent crime, and that one cannot be convicted of larceny when the evidence shows he is merely an accessory. *Skidmore v. State,* 80 Neb. 698. Sixteen years later, the same ruling was set forth in the reversal of the conviction of one charged with stealing an automobile. *Francis v. State,* 111 Neb. 580. Both opinions were written by Judge Letton, who calls attention to the fact that, since the automobile was stolen and became the subject of the last named case, the legislature, by chapter 89, Laws 1923, had made a change in the substantive law which, fortunately for the defendant at the bar, was not in effect until some months after his offense had been committed. That change is now embodied in section 28-201, Comp. St. 1929, and reads as follows: "Whoever aids, abets or procures another to commit any offense may be prosecuted and punished as if he were the principal offender."

Section 28-201, Comp. St. 1929, has been construed to mean: "That the same rule as to the information, conduct of the case, and punishment, heretofore applicable to a principal, should thereafter govern his aider, abettor, or procurer, and that no additional facts need be alleged in an information against such accessory before the fact than are required against his principal." *Scharman v. State,* 115 Neb. 109. *In re Resler,* 115 Neb. 335; *State v. Girt,* 115 Neb. 833. The very purpose of the act was to remove the inhibition against uniting in a prosecution two persons who formerly had to be prosecuted for separate substantive offenses.

There is testimony by Burley and Mohr from which the jury might infer that the defendant induced them to steal

the cigars and cigarettes. If the jury believed that, then the defendant procured them to commit the offense; he could have been charged as a principal, under the authority of section 28-201, Comp. St. 1929, and therefore was an accomplice of theirs in the larceny or burglary by which the goods were obtained. On the other hand, there was testimony from them from which the jury might find that the defendant did not procure them to steal these particular cigars and cigarettes from the particular owner, Pepperberg Segar Company, but purchased them from Burley and Mohr, knowing they had been stolen by them from some one. In other words, if that inference from the evidence be adoptable, then these two witnesses aided, abetted and procured Neiden to purchase these stolen goods, and under section 28-201, Comp. St. 1929, were principals with him in that offense; for it is now a crime for any one to aid, abet or procure one to buy or receive stolen property. The statute makes an accessory guilty of the substantive offense.

New York also has a penal statute making an aider, abettor or procurer a principal. The court of appeals held that the receiver of stolen goods cannot take with guilty knowledge unless aided by the thief in delivery, and that the thief is, therefore, an accomplice concerned in the crime of receiving as a principal. *People v. Kupperschmidt,* 237 N. Y. 463. So, also, *Moynahan v. People,* 63 Colo. 433; *People v. Coffey,* 161 Cal. 433; *State v. Coroles,* 277 Pac. (Utah) 203.

"An accomplice is a person who knowingly, voluntarily, and with common intent with the principal offender, unites in the commission of the crime." Wharton, Criminal Evidence (10th ed.) sec. 440. So, under the facts in this case, Burley and Mohr were presented as witnesses by the state as accomplices of Neiden, being confessed aiders in his buying of the stolen goods. While he denied by his plea of not guilty and by his oral testimony as well that he knew the goods were stolen, yet he was entitled

to a cautionary instruction as to these alleged accomplices, who were proved by the state to be accomplices so far as the state could prove such a fact.

Was the refusal to give such an instruction prejudicial? The failure to give it was emphasized by the trial court in this: The court added to its general instruction as to the credibility of witnesses a short paragraph, in the same numbered instruction, directing the jury to weigh with more than ordinary care "the testimony of police officers, sheriffs, and detectives." From *Preuit v. People,* 5 Neb. 377, down, we have held that a defendant is entitled to a cautionary instruction as to the evidence of detectives, informers, and police engaged to hunt evidence against him. *Sandage v. State,* 61 Neb. 240; *Fruide v. State,* 66 Neb. 244. Although, it should be noted, in *Keezer v. State,* 90 Neb. 238, the court held that the rule announced in *Preuit v. People, supra,* would not ordinarily apply to a county attorney, a sheriff, or to his deputy. This later rule was affirmed in *McMartin v. State,* 95 Neb. 292. And, recently, in *Flanagan v. State,* 117 Neb. 531, it was held that the rule did not apply to private parties not detectives nor employed as such, whose acts are prompted solely by the public good and who are uninfluenced by pecuniary interest in the prosecution. Whether the special instruction as given was exactly applicable to the facts here is unimportant because the defendant requested such an instruction and is not complaining of it. It would seem to be as of great, if not of greater, importance to a defendant in the situation of the defendant here to have the court instruct the jury specially on the credibility of accomplices as upon the subject of police officers. We think the error was so prejudicial as to be reversible error.

The state criticizes the form of the instruction requested because it stated as a fact that Burley and Mohr are what are known in law as accomplices, whereas the state argues it should have been submitted to the jury whether or not they were accomplices. The defendant would have been prejudiced more by the wording chosen by his counsel in

the proffered instruction than by that suggested by the state. Evidently it was not refused on the ground of form but because of the subject-matter. As we have shown, the instruction contained within it the correct rule of law on the subject of accomplices. In such a situation, even if the exact and entire form was objectionable, it was the duty of the court to give a proper instruction upon the subject. *Karnes v. State,* 111 Neb. 435, and cases cited.

Complaint is made of instruction No. 3, where the statement of the statute relating to buying stolen goods in some way became confused with the concealment of a robber, denounced in the same section, and where the intent to defraud the owner was not clearly stated in its proper place, or correctly related by the punctuation or lack thereof. This is not likely to occur again.

On the motion for new trial, an affidavit by one of the attorneys for defendant set up certain statements alleged to have been made by the county attorney in the closing argument to the jury but not found in the reporter's notes. On another trial counsel will doubtless be prepared to make objection if and when such a thing occurs and to get a timely ruling from the court thereon. Other grounds for new trial need not be discussed.

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

REVERSED.

HENRY S. WESTBROOK V. STATE OF NEBRASKA.

FILED JANUARY 23, 1931. No. 27525.

1. **Banks and Banking:** RECEIVING DEPOSITS: INSOLVENCY: PROOF. When an officer of a bank is charged with having received a deposit of money with knowledge of the bank's insolvency at the time of its acceptance, it is competent to admit evidence in respect of the assets of the bank, if any, and its liabilities, if any, at and before the time when the deposit was made, to the end that the fact of such officer's knowledge of the bank's insolvency may be established.

2. ———: ———: ———: ———. A defendant's association in an insolvent bank, as vice-president, and his control of its affairs at times, in the absence of the president, *held* to charge such vice-president with knowledge of the bank's insolvency.
3. **Statutes:** TITLE. "Where the title of an act fairly gives expression to the general subject-matter contained in the act, such act will not be held invalid as being broader than its title." *Mehrens v. Bauman, ante,* p. 110.

ERROR to the district court for Otoe county: JAMES T. BEGLEY, JUDGE. *Affirmed.*

Pitzer & Tyler and *Lloyd E. Peterson,* for plaintiff in error.

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

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

DEAN, J.

Henry S. Westbrook was informed against in the district court for Otoe county and there charged with having knowingly, unlawfully, and feloniously received and accepted a draft in the sum of $1,482.60 from Henry Kasbohm, March 24, 1927, for deposit in Kasbohm's account in an insolvent bank, namely, the Dunbar State Bank, of which defendant was then vice-president, and which defendant then well knew was insolvent. But the insolvency of the Dunbar bank was then unknown to Kasbohm. Upon submission of the evidence the jury found the defendant guilty and the court thereupon sentenced him to serve an indeterminate term of not less than one nor more than two years in the penitentiary. The defendant has prosecuted error.

The defendant, as alleged grounds for reversal, contends that he was not aware of the insolvency of the Dunbar State Bank when he accepted the Kasbohm draft for deposit. The Dunbar bank was declared insolvent April 4, 1927, and was then taken over by the department of trade

and commerce. The active personnel of the bank some time before that now in question consisted of Thomas Murray, the president, the defendant Westbrook as vice-president, and a bookkeeper. That Murray knew of the bank's condition is disclosed in a letter addressed by him to the defendant after he, Murray, disappeared. In this letter Murray left directions in respect of the proposed disposition of certain of the bank's business, but he therein informed the defendant that he did not expect to return.

Evidence was introduced tending to prove that the defendant was not a novice in the banking business and that he had for many years been acquainted with the affairs of the Dunbar bank. At the time in question he was over 50 years of age. The bookkeeper of the bank produced records of stockholders' and directors' meetings from 1914 to 1927 that were attended by the defendant. But the defendant contends that he was not in the bank every day. The bank records, however, disclose that he was there much of his time and that, in Murray's absence, he was in charge of the bank. And it is disclosed that the defendant often signed papers connected with the bank's business and that he was then and for many years had been familiar with its condition.

In view of the present record, it is inconceivable that the defendant did not know of the insolvent condition of the bank at the time in question here, as he now contends. And besides he testified that it was his duty to take care of and to handle the correspondence, and, in view of this admitted fact, it follows that defendant must have had knowledge of the then untoward condition of the bank through the letters, and other written items of bank correspondence and procedure generally, that were received by the bank from time to time, including, of course, those received by the bank from the department of trade and commerce. In some of the department letters the bank was informed that it was carrying too many unsecured loans and that the bank's reserve fund was too low to com-

ply with the legal requirements. It also appears that the defendant knew that ineffectual efforts had been made by those interested in the bank to secure more loans, and that many notes were being carried as a part of the bank's assets, notwithstanding the significant fact that the makers of such notes were, in many instances, unable to meet the payments of their matured obligations, as shown by the record. In fact, the evidence of one of the bank examiners disclosed that the insolvency of the bank amounted to about $194,000 at the time the deposit in question here was received by the defendant.

Mr. Kasbohm, whose draft was accepted by defendant for deposit, testified: "Why, I asked Mr. Westbrook—I met him on the street there and I says, 'Mr. Westbrook,' I says, 'Didn't you know that bank was insolvent when you took that deposit of mine?' He says, 'Yes; I did.' I says, 'What did you take that deposit for?' He says, 'Because we needed the money.' I says, 'I want my money, and I don't believe I am going to get it.' He says, 'If you know how to get it, go ahead and get it.' "

The insolvency of the bank at all times material to this inquiry is clearly established. And it is elementary that evidence in respect of the amount of valid deposits, and also the number of notes, both good and worthless, in a bank at a time such as prevailed in the present case, is admissible to show insolvency. *State v. Shove,* 96 Wis. 1.

Defendant's association with the bank and his control of its daily affairs in the absence of the president as above noted, was such as clearly to charge him with knowledge of its insolvency at the time material to this inqury. In *State v. Cadwallader,* 154 Ind. 607, it was held that a defendant who had been president of the bank there in question for three years was charged with the duty of knowing the condition of the bank at the time he received a certain deposit, and that, if at that time the bank was insolvent, the inference or presumption would arise that he, as such president, had knowledge of the insolvency. And, in the present case, where the defendant is charged with having

received a deposit with knowledge of the bank's insolvency at the time of its acceptance, it is competent to admit evidence in respect of the assets and liabilities of the bank, at and before the time in question here, to the end that the fact of defendant's knowledge of such insolvency may be established. See *Parrish v. Commonwealth,* 136 Ky. 77.

Defendant also contends that section 8010, Comp. St. 1922, under which he was convicted, violates the provisions of section 14, art. III of the Nebraska Constitution, which provides: "No bill shall contain more than one subject, and the same shall be clearly expressed in the title." The title to the act of which section 8010 is a part appears to be a part of chapter 190, Laws 1919. The title, so far as applicable, follows: "An act to adopt and establish a Code of laws for the state of Nebraska relating to the civil government of the state and to provide for their administration and enforcement to be known as the Civil Administrative Code."

We think the title is broad enough to cover and clearly to include provisions for the regulation of the banking business as contained in the above cited section 8010, and that such regulations are clearly relevant to the subject-matter contained therein. In *Mehrens v. Bauman, ante,* p. 110, we held: "Where the title of an act fairly gives expression to the general subject-matter contained in the act, such act will not be held invalid as being broader than its title."

We have examined the instructions and conclude that the objections thereto are without substantial merit. No verdict other than that returned by the jury should have been rendered under the facts. The evidence supports the verdict and it follows that the judgment must be and it hereby is

AFFIRMED.

LILA M. GRAHAM, APPELLANT, V. PANTEL REALTY COMPANY ET AL., APPELLEES.

FILED JANUARY 23, 1931. No. 27335.

This case is ruled by, and the judgment is reversed, with like directions, on the authority of, *Gentle v. Pantel Realty Co.*, p. 630, *post*.

APPEAL from the district court for Morrill county: EDWARD F. CARTER, JUDGE. *Reversed, with directions.*

Morrow & Morrow, for appellant.

Mothersead & York, contra.

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

EBERLY, J.

The questions presented by this appeal are identical with those presented in the case of *Gentle v. Pantel Realty Co.*, p. 630, *post*; and pursuant to the written stipulation of the parties, and upon the authority of such *Gentle* case, the judgment in the present case is reversed and the cause remanded, with like directions.

REVERSED.

WILLIS G. GENTLE, APPELLANT, V. PANTEL REALTY COMPANY ET AL., APPELLEES.

FILED JANUARY 23, 1931. No. 27336.

1. **Contempt**: REVIEW. A conviction under contempt proceedings can only be reviewed in the supreme court by the filing of a petition in error as in a criminal case.
2. **Stipulations**: INJUNCTION. A stipulation for modification of an existing injunction, and as to compliance therewith, should be construed as an entirety to give effect to the intention of the contracting parties, keeping in mind the situation of the parties, their rights to which such stipulation relates as previously adjudicated, and also the purpose sought to be accomplished by the agreement made.
3. ———: INTERPRETATION. Such stipulation must be read according to the intent of the parties in spite of clerical errors

and omissions made which, if followed, would change that intention.

APPEAL from the district court for Morrill county: EDWARD F. CARTER, JUDGE. *Reversed, with directions.*

Morrow & Morrow, for appellant.

Mothersead & York, contra.

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

EBERLY, J.

The record in this case presents, in all essentials, two final orders for review: One entered herein on the 24th day of September, 1929, adjudicating that the injunction heretofore granted in this action had, under the terms of a stipulation of the parties, been fully complied with, and denying appellant relief; the other entered in this cause on the 29th day of October, 1929, adjudging certain defendants not guilty of violating the terms of this injunction and therefore not guilty of contempt.

The proceedings before us are supplementary to those submitted to the consideration of this court in *Graham v. Pantel Realty Co.*, 114 Neb. 397. For a more complete statement of the facts involved, and the terms of the injunction under consideration, reference is made to that case.

It may be said that, in a trial *de novo*, in the *Graham* case referred to, it was determined by this court: That certain waters had been impounded and formed into lakes by natural conditions on the upper and higher lands of the defendants; that no part of such waters in a state of nature ever flowed upon, over, or caused damage to, the lower and adjoining lands of plaintiff; that, wholly due to the excavations and constructions of ditches by defendants through certain natural protective ridges or elevations of land situated on their lands, and the removal of impediments to their flow, the waters of these lakes were by the defendants unlawfully drained to and cast upon

and flooded plaintiff's land to her damage; that injunction was the proper remedy to abate the nuisance thus created; that plaintiff was entitled to a recovery of damages thus sustained; reversed the action of the trial court denying plaintiff any relief, and remanded the cause, with directions to grant the injunction as prayed, and for further proceedings in harmony with the findings of this tribunal.

The present record discloses that the district court, upon receipt of the mandate from this court, awarded the injunction as directed and retained the case for hearing on the question of the damages involved.

Thereafter the parties to the litigation entered into a stipulation in writing providing for the arbitration of the damages, and that: "It is further stipulated that, for the purpose of avoiding all controversy as to whether or not defendants comply with the injunction heretofore issued in said action, the defendants shall employ Reuben E. Knight as an engineer to formulate plans and specifications for all necessary dams, filling of ditches and such other work as said Knight may determine to be necessary and proper to comply with said injunction, and shall cause, at the time and in the manner said Knight shall determine, and in any event before the first day of October, 1927, such dams, filling of ditches and other work as said Knight shall designate as being necessary to carry out the terms of said injunction to be constructed; provided, however, that said defendants shall fill said ditch up to the natural surface of the ground adjacent thereto immediately below the dam below Rush lake and below the dam below Kane lake for such distance as the defendants may designate, not to exceed, however, one-half mile. Upon the construction of the works as hereinbefore set forth and upon the filing of a certificate in writing by said Knight that said works have been so constructed, the court shall enter judgment finding that the terms of said injunction have been fully complied with; and so long as said defendant, their successors and assigns shall refrain from interfering with, disturbing or removing said works, they shall

not be liable to the plaintiff or his successors or assigns for any damages that may be caused to him by reason of the flow of water from Rush lake and Kane lake or any of the intervening lakes to or upon plaintiff's land." This stipulation of the parties was on the 18th day of May, 1927, approved by the district court and arbitrators duly appointed who, after due proceedings, found for the plaintiff in the sum of $5,370.90. This award was confirmed by the district court and paid by the defendants.

On the 13th day of December, 1927, there was filed in the cause a report of Reuben E. Knight, a civil engineer, which was dated August 31, 1927, and contained the plans and specifications of the improvements referred to in paragraph 5 of the stipulation of the parties, which paragraph is hereinbefore quoted. It sets forth a copy of paragraph 5 and states with reference thereto: "It is evident that article 5 was drawn to cover this part of the mentioned injunction—'to stop the drainage of water as far as the ditch expedited the flow.'" It further sets forth, in substance, that in a state of nature the lands of the plaintiff were protected by three distinct natural barriers; describes the same; sets forth that "filling the ditch below Kane lake would be of no benefit." Blue prints were attached setting forth the nature of the work to be done and further disclosing that the filling of the ditch, as provided for in the fifth paragraph of the stipulation, "for such distance as the defendants may designate, not to exceed, however, one-half mile," was not provided for nor contemplated by the plan. The sworn certificate or affidavit of Reuben E. Knight, dated November 4, 1927, was later filed in this cause showing a full compliance with the work as set forth in his plans, which appear in his report of August 31, 1927. The fills of "not to exceed * * * one-half mile," however, were never made. So far as the record discloses, no notice was ever taken by any of the parties to the action of the plans and specifications, or of the affidavit showing compliance therewith, until May 27, 1929, on which date plaintiff filed objections thereto

and challenged the sufficiency of the work done by Knight and his compliance with the stipulation. It appears this was based, in part at least, upon the fact that the ditches were not filled to the extent of not more than one-half mile, and that on the 23d day of April, 1929, the "dams gave way and permitted the water which had accumulated in said lakes prior to said time to flow through said ditch and upon plaintiff's land," and caused the lands of plaintiff to be again flooded in the same manner as existed at the time of the commencement of the original action; and said defendants have taken no action to restore said dams or to otherwise obstruct the flow of said waters to and upon plaintiff's lands. On the same day, May 27, 1929, the plaintiff also filed an affidavit for contempt, charging that the defendants named had violated the injunction. On the same day the defendants filed a motion based upon the report of Reuben E. Knight for a judgment finding and determining that the injunction issued in this action had been fully complied with under the terms of the stipulation. On the 24th day of September, 1929, the district court, after hearing, determined that the judgment on the stipulation had been fully complied with, found generally for the defendants and against the plaintiff, overruled the plaintiff's objection, and determined "that the injunction heretofore granted in this action, pursuant to the mandate of the supreme court of Nebraska, has been fully complied with." On October 29, 1929, the district court further determined the contempt proceedings in favor of the defendants. The plaintiff now presents an appeal from these orders as provided for by section 20-1912, Comp. St. 1929. Defendants challenge the jurisdiction of this court to review the proceedings of the trial court in the contempt proceedings for the reason that the plaintiff "has failed to file a petition in error as in criminal cases."

Taking up the consideration of the contempt proceedings, it may be said, first, under the Constitution a party may as a right have a case reviewed either by appeal or on error in the court of last resort. *Moore & Cozine v.*

Herron, 17 Neb. 703; *Coburn v. Watson,* 48 Neb. 257. But the right of appeal did not exist at common law, is purely a statutory one, and unless expressly conferred does not exist. *Wilcox v. Saunders,* 4 Neb. 569; *Nebraska R. Co. v. Van Dusen,* 6 Neb. 160; *State v. Ensign,* 11 Neb. 529; *State v. Bethea,* 43 Neb. 451; *Hanika v. State,* 87 Neb. 845.

So far as applied to appeals in contempt cases, the controlling provisions of our statutes appear to be:

Section 20-1912, Comp. St. 1929, which provides: "The proceedings to obtain a reversal of * * * final orders made by the district court, *except judgments and sentences upon convictions for felonies and misdemeanors under the Criminal Code,* shall be by filing in the supreme court a transcript certified by the clerk of the district court, containing the judgment" appealed from.

Section 20-2121, Comp. St. 1929, provides: "Every court of record shall have power to punish by fine and imprisonment, or by either, as for criminal contempt, persons guilty of any of the following acts: * * * Third. Wilful disobedience of * * * any lawful process or order of said court."

Section 20-1072, Comp. St. 1929, provides: "Disobedience of an injunction may be punished as a contempt by the court, or by any judge who might have granted it in vacation." And further authorizes the court or judge, in the discretion of such court or judge, upon conviction, to require defendant "to pay a fine not exceeding two hundred dollars, for the use of the county, to make immediate restitution to the party injured and give further security to obey the injunction; or, in default thereof, he may be committed to close custody, until he shall fully comply with such requirements, or be otherwise legally discharged." It is to be noted in this connection that sections 20-2121, 20-2122, and 20-2123, Comp. St. 1929, which regulate the subject of contempts, in their present form constituted a part of the Revised Statutes of 1866, and appear unchanged in the present compilation. It will also be noted that, as employed in section 20-2121, Comp. St.

1929, the words "as for criminal contempt," in connection with the context, suggest as equivalent the words "as it would be if a criminal contempt," or "supposing that it was a criminal contempt." It is true that such proceedings in certain aspects may be deemed remedial and appropriate to the enforcement of civil obligations. The statutes, however, afford no basis of distinction on this ground, but, in terms which embrace both civil and criminal contempts, direct that judicial investigation and determination thereof be "as for criminal contempt." The certain implication of the sections of our statutes above referred to, construed as *in pari materia,* thus necessitates the conclusion that proceedings for contempt of court are in their nature to be deemed criminal. *Boyd v. State,* 19 Neb. 128; *O'Chander v. State,* 46 Neb. 10; *Zimmerman v. State,* 46 Neb. 13; *Furrer v. Nebraska Building & Investment Co.,* 109 Neb. 1.

Punishments of contempts are thus governed by the rules applicable to prosecutions by indictment. *Beckett v. State,* 49 Neb. 210; *Bee Publishing Co. v. State,* 107 Neb. 74; *Furrer v. Nebraska Building & Investment Co.,* 109 Neb. 1.

Under the facts in the present case, there was necessarily involved the possibility, in the discretion of the trial court, of imposing the penalty that the defendants should pay a fine not exceeding $200. Thus considered, the proceeding must be considered as the equivalent of a prosecution for a misdemeanor. Comp. St. 1929, sec. 29-102. If this be true, the review of the action of the trial court is within the terms of the exception contained in section 20-1912, Comp. St. 1929, and the controlling principle as to the presentation of this class of cases for review in this tribunal is: "A conviction under contempt proceedings can only be reviewed in the supreme court by the filing of a petition in error as in a criminal case." *State v. Dodd,* 99 Neb. 800; *Hanika v. State,* 87 Neb. 845; *Thompson v. Nelson,* 4 Neb. (Unof.) 687. Under the rec-

ord before us, the challenge to the jurisdiction must be sustained.

The second query for our determination is: Did the district court properly determine "that the injunction heretofore granted in this action * * * has been fully complied with?" An analysis of this order, as originally entered by the district court on June 26, 1926, discloses that it consists of three distinct provisions, which will be hereafter indicated as paragraph 1, 2, and 3.

Paragraph 1 perpetually enjoined and restrained the defendants "from continuing to permit or causing the water to flow from Rush lake into or through the ditches described in plaintiff's second amended petition, and from continuing to permit or causing the water to flow from Kane lake into or through the ditches leading therefrom * * * into the valley in which plaintiff's land is located."

Paragraph 2 provides: "Said defendants * * * are hereby commanded and directed to immediately place a substantial dam at the upper end of said ditch immediately below Rush lake in such a way as to permanently obstruct and prevent the flow of any water from Rush lake into or through said ditch, and another substantial dam in said ditch immediately below Kane lake in such a manner as to permanently prevent the water from flowing from said lake into or through said ditch."

Paragraph 3 provides: "Said defendants are hereby perpetually enjoined and restrained from draining the water from any of the lakes mentioned * * * and casting the water therefrom to or upon plaintiff's land," particularly described.

It must be conceded that this injunctional order remains in full force and effect except as to changes therein expressly authorized by the terms of paragraph 5 of the stipulation heretofore referred to, and provided further that such stipulation has been substantially complied with by the defendants. Now the binding, controlling stipulations between the parties, and the true interpretation thereof as evidencing the true intent, must be determined by a careful

comparison of the terms of the stipulation referred to and the provisions of the decree above quoted, always keeping in view the situation of the parties. Indeed, the following statement of the rule applicable to this situation may be deemed approved by the authorities: "Courts, in the construction of contracts, look to the language employed, the subject-matter and the surrounding circumstances. They are never shut out from the same light which the parties enjoyed when the contract was executed, and accordingly they are entitled to place themselves in the same situation as the parties who made the contract, so as to view the circumstances as they viewed them, and so as to judge of the meaning of the words and of the correct application of the language to the things described. It is therefore an established canon of construction that, in order to arrive at the intention of the parties, the contract itself must be read in the light of the circumstances under which it was entered into. General or indefinite terms employed in the contract may be thus explained or restricted as to their meaning and application. And the contract must be so construed as to give it such effect, and none other, as the parties intended at the time it was made." 6 R. C. L. 849, sec. 239.

"The contract must be read according to the intent of the parties in spite of clerical errors and omissions which, if followed, would change that intention." 13 C. J. 538, sec. 503.

"The intention of the parties, which courts seek to discover in giving construction to a contract, is to be gathered, not from particular words and phrases, but from the whole context of the agreement. In fact, it may be said to be a settled rule in the construction of contracts that the interpretation must be upon the entire instrument, and not merely on disjointed or particular parts of it. The whole context is to be considered in ascertaining the intention of the parties, even though the immediate object of inquiry is the meaning of an isolated clause." 6 R. C. L. 837, sec. 227.

So read, it is plain that the intent of all parties to the litigation was, at the time the stipulation was made and entered into, that no water should be thereafter cast upon the lands of plaintiff through or by means of the ditches which had been constructed by the defendants, and which was the source of the litigation here presented. The express agreement set forth in the stipulation, it will be noted, provided for the determination of the details of construction which by the second paragraph of the injunctional order, as above indicated, were required to be so placed and so made by the defendants "as to permanently obstruct and prevent the flow of any water" over the premises of plaintiff through the ditches described. To these agreements the stipulation attaches in terms a proviso relating to a certain detail of construction which was not to be submitted to the discretion of the engineer, but was expressly provided for, and which involved the filling up of certain ditches, but in no manner otherwise qualified the expressed intent of all parties that the result sought and expressed by the injunction was that the protection of plaintiff's property from the waters complained of should be fully accomplished. Then, too, the terms of the stipulation as to the constructions which the defendants were required to, and did agree to, make were limited to the construction required by the terms of the injunction as expressed in the second paragraph above indicated. In the light of the entire record, we can extend these words no further. The terms of the certificate must be likewise limited to a compliance with the second paragraph of the injunction, and this fact in turn operates to limit the possible scope of the judgment finding due performance by the defendants, and affords no support to a judicial finding in excess of the powers expressly stipulated.

True, the stipulation provides that, after full performance of the terms thereof by the defendants, the filing of the engineer's certificate therein provided for, and the approval by the district court, "so long as said defendants, their successors and assigns, shall refrain from interfering with, disturbing or removing said works, they shall

not be liable to the plaintiff or his successors or assigns for any damages that may be caused to him by reason of the flow of water from Rush lake and Kane lake or any of the intervening lakes to or upon plaintiff's land." Considering this to be in terms an effectual waiver of plaintiff's remedy in damages, it is to be remembered that damages are not the sole remedy for the wrong here involved which the law places in the hands of courts of equity. In fact, in many cases the inadequacy of the remedy by damages justifies the exercise of equitable powers of coercion. In the present case, if it be assumed that defendants have fully complied with the stipulation, and by his agreement the plaintiff has legally waived his recourse for damages, it is yet true that paragraphs 1 and 3 of the injunctional order entered by the district court on the 26th day of June, 1926, are and remain in full force and effect, and afford ample power for the protection of plaintiff's land against the mere permissive flooding by the defendants in this action. The controlling maxim, in view of the circumstances here presented, is: *"Expressio unius est exclusio alterius."* Broom's Legal Maxims (9th ed.) 420. The waiver of damages embraces no more than it expresses, and does not include the waiver of other remedies provided by the decree, or implied thereby.

But this court is unanimously of the opinion that the defendants have not complied with the stipulation; that the words thereof, "provided, however, that said defendants shall fill said ditch up to the natural surface of the ground adjacent thereto immediately below the dam below Rush lake and below the dam below Kane lake for such distance as the defendants may designate, not to exceed, however, one-half mile," in the light of the entire record, can justify but one conclusion, which is, that we are confronted with an obvious clerical error and that the true meaning of the last quoted sentence, as indicated by the context and the surrounding circumstances, is: "That said defendants shall fill said ditch * * * for such distance as the plaintiff may designate, not to exceed, however, one-half mile." Such being the case, if we are to regard the

stipulation as a matter of procedure, our statute provides: "The court in every stage of an action, must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect." Comp. St. 1929, sec. 20-853. Or, if to be deemed a simple contract in writing, it must be "read according to the intent of the parties in spite of clerical errors and omissions which, if followed, would change that intention." 13 C. J. 583, sec. 503.

The record discloses that there was a complete failure on the part of the defendants to permit the plaintiff to designate the fills to be made, as the stipulation thus interpreted provided, and that, notwithstanding the report and certificate of the engineer, there has been no substantial performance of the terms of the stipulation in question by the defendants.

The conclusion, therefore, is that the trial court erred in the entry of its judgment of September 24, 1929, and therein in determining "that the injunction heretofore granted in this action * * * has been fully complied with." This judgment is therefore reversed and the cause is remanded, with directions to the trial court to enter a decree herein finding for the plaintiff, and adjudging noncompliance with the stipulation on the part of the defendants, and permitting further proceedings in harmony with this opinion.

REVERSED.

JOHN M. RICE V. STATE OF NEBRASKA.

FILED JANUARY 23, 1931. No. 27390.

1. **Criminal Law:** BILL OF EXCEPTIONS: INDIGENTS. Section 1123, Comp. St. 1922, provides that an indigent defendant may, upon proper affidavit, be furnished a bill of exceptions at the expense of the county. When the affidavit is supported by oral evidence sufficient to meet the requirements of the statute, it is the duty of the trial court to direct the reporter to prepare the bill of exceptions at the expense of the county.

2. **Abortion.** In an action for attempting to procure an abortion, evidence reviewed and found sufficient to sustain a conviction.
3. **Criminal Law:** INTENT: EVIDENCE OF OTHER OFFENSES. "Where a person is charged with the commission of a specific crime, testimony may be received of other similar acts, committed about the same time, for the purpose only of establishing the criminal intent of the accused." *Knights v. State*, 58 Neb. 225. Instruction given by trial court on this rule approved.
4. **Abortion:** PROOF. In a trial for attempting to procure an abortion, the state must prove that the miscarriage attempted was not necessary to preserve the life of the woman nor had it been advised by two physicians to be necessary for that purpose, as provided in section 9548, Comp. St. 1922. But these facts may be shown by circumstantial evidence, which was ample in the case at bar.

ERROR to the district court for Lancaster county: ELWOOD B. CHAPPELL, JUDGE. *Affirmed.*

L. R. Doyle, for plaintiff in error.

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

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

PAINE, J.

This case is brought to this court on a writ of error to the district court for Lancaster county. The plaintiff in error, John M. Rice, will hereafter be called the defendant. He was tried and convicted before a jury upon the charge of attempting to procure an abortion, and was sentenced to a term of one year in the county jail of Lancaster county and to pay a fine of $500, the court directing that he might serve out both the fine and the costs in the county jail in addition to the sentence of one year.

1. This case first came before this court several months ago to require a bill of exceptions to be furnished at the cost of the county.

The defendant had filed an affidavit of poverty in accordance with section 1123, Comp. St. 1922, asking that the district court direct the reporter to furnish a bill of

exceptions at the expense of the county. Oral evidence was taken in the district court in support thereof and an order entered denying the request.

Upon an appeal to this court, briefs were filed and hearing had and the following order entered upon March 25, 1930: "It is by the court ordered that, while ordinarily the matter is in the discretion of the trial court, yet the evidence submitted as shown by the record is sufficient to require an order to furnish a bill of exceptions to the plaintiff in error at the expense of the county, and said motion is therefore sustained and the district court is ordered to direct the reporter to prepare bill of exceptions, same to be paid for by Lancaster county."

2. There are four propositions of law relied upon for a reversal: First, that the verdict is not sustained by sufficient evidence; second, that the court erred in allowing divers witnesses to testify to alleged similar offenses; third, that the court erred in failing to instruct the jury that evidence of similar offenses could only be considered for the specific purpose for which such evidence was admitted; and, fourth, the court erred in allowing the prosecution to materially change the information by amending it just a few moments before the trial began.

The facts in the case, as set out in the bill of exceptions of nearly 200 pages, show that the defendant in July, 1929, was conducting an office on the upper floor of the old Burlington building at Thirteenth and O streets, Lincoln, and that the sign upon his front window read, "Dr. Rice, Hair Specialist," and that the defendant in his testimony states that he was 74 years of age and was licensed as a barber and giving all kinds of hair and scalp treatments. The testimony discloses that Richard C. Wood, an attorney and investigator in the employ of the department of public welfare of the state of Nebraska, was assigned to an investigation of the defendant's business, and called to his assistance Harold W. Hulfish, a deputy sheriff, and also city detectives Towle and Davis. Observations were first made from a window in a bank building across the street, and later a position was secured in the attic directly above

the defendant's operating room, the plaster was removed, and a small flap made of the wallpaper about the size of a quarter, which flap when depressed would give them a clear view of defendant at work. He had a barber chair almost immediately below this point of observation. Later a dictograph was used, and this went to an adjoining room, and from the adjoining room a telephone was employed to telephone the detectives at the street entrance the description of the women who had visited his office and were to be followed to ascertain their names and addresses.

That from July 8, 1929, over a period of eleven days, ending on July 19 with the arrest of the defendant, a surveillance during each afternoon and evening was made of the defendant's office and the business that he conducted therein. Testimony was given concerning a large number of women who came there. Some came with a husband, others came with a sister or a female friend, and that in only one or two cases were scalp treatments or electric treatments given, but that in the greater number of cases the woman placed herself in the barber chair, which was tipped back, a small white cloth was placed over her body, and the defendant, after covering a metal instrument about twelve inches long with vaseline, inserted the same into the vagina of the woman, turning and twisting it, and that he was engaged in this particular act at the moment the officers forced in the door of his inner office and he was arrested. The defendant stepped back and the woman then in the chair removed the instrument from her body and it dropped to the floor and was introduced in evidence at the trial. In the amended information upon which the defendant was tried, he was charged with using the said instrument upon one Mrs. Lloyd Savery, a pregnant woman, with the intent thereby to procure the miscarriage of such woman, the same not being necessary to preserve her life and the act not having been advised by two physicians for the purpose of saving her life.

The testimony discloses that Mrs. Lloyd Savery was married March 28, 1929, and was 19 years of age; that they were in poor circumstances financially; and that upon discovering that she was pregnant she did not talk to any doctors about her condition, but went to see the defendant at the suggestion of a friend, and the defendant offered to produce an abortion upon her for the payment of $50, and that her husband paid him $25 in cash, and that, although the defendant had used the instrument upon her on at least three separate occasions, he did not produce an abortion upon her, and that in December, 1929, at the time of trial she testified that she was in good health and would probably be delivered of a child shortly.

This court finds on the first proposition of law relied upon for reversal that there is sufficient evidence, including the direct and circumstantial, upon which to sustain this conviction.

3. The second error relied upon by the defendant is that the court erred in allowing divers witnesses to testify to alleged similar offenses over the objections of the defendant, and cites the case of *Baxter v. State,* 91 Ohio St. 167, which holds: "Evidence of a vague and uncertain character offered for the purpose of proving that the defendant had been guilty of similar offenses should never be admitted under any pretense whatever." And defendant also cites the case of *State v. Willson,* 113 Or. 450, 39 A. L. R. 84, and *State v. Smith,* 103 Wash. 267, which held that it was permissible to show that the act charged was one of a series of similar acts for the purpose of establishing guilty intent, but that the state could not go beyond this and show the perpetration of other similar acts where there is no proof required to establish intent, motive or knowledge other than proof of the act charged. In *Baxter v. State, supra,* there was a conviction of embezzlement. The court held that, while evidence of other offenses of a similar character is competent to prove intent, the burden is upon the state to prove that the accused is guilty

of such other offenses by the same degree of proof required in all criminal cases.

The rule in Nebraska as laid down in the case of *Knights v. State,* 58 Neb. 225, reads: "Where a person is charged with the commission of a specific crime, testimony may be received of other similar acts, committed about the same time, for the purpose only of establishing the criminal intent of the accused." *Swogger v. State,* 115 Neb. 621; *Clark v. State,* 102 Neb. 728.

In 1 C. J. 328, it is held in a large number of cases cited that evidence that the accused has held himself out as willing and able to perform abortions is admissible to show intent where evidence has been introduced tending to establish the commission of the offense.

In this case direct evidence was introduced, over the objection of the defendant, of what had been seen through the peephole above the chair on which the defendant worked, and the trial judge in instruction No. 5 correctly instructed the jury, as follows: "The intent to thereby procure the miscarriage of a pregnant woman by the use of any instrument is one of the essential elements of the crime charged. The intent with which an act is done is a mental process, however, and, as such, is generally hidden within the mind where it is conceived, and is rarely susceptible of proof by direct evidence, but must be inferred by the words and acts of the party entertaining them and the facts and circumstances surrounding and attendant upon the act charged to be committed. All evidence of similar acts and conduct at or about the same time that this act is alleged to have been committed is to be considered by you only for the purpose of showing the intent of the accused in the particular act charged in the information, and for no other purpose."

4. The last assignment of error relied upon by the defendant is that the original complaint and the original information failed to negative the two exceptions set out in section 9548, Comp. St. 1922, now section 28-405, Comp. St. 1929, and that the defect was allowed to be corrected

by an amendment made at the moment the trial began, over the objection of defendant.

The original complaint has not been brought to this court in the record and it does not appear that a plea in abatement was filed to reach this alleged defect.

An amendment was permitted by interlineation and the two negatives inserted in the information to the effect that the miscarriage attempted was not necessary to preserve her life nor had it been advised by two physicians to be necessary for that purpose.

In instruction No. 4 the court said that these exceptions must be proved before a verdict of guilty could be returned, yet, although these two exceptions must be excluded beyond a reasonable doubt, the requirements may be fully met by circumstantial evidence as well as by direct evidence.

The testimony of Mrs. Savery is that she did not talk to any doctors about her pregnancy and that her sole purpose in employing Rice was to be rid of her child. The jury saw this woman testify in December. She was in good health and in an advanced stage of pregnancy. Such facts clearly rebut the claim that the defendant's act was based on advice of two physicians or was to save her life. The evidence was sufficient to convict. See *Dixon v. State,* 46 Neb. 298; *State v. Montifoire,* 95 Vt. 508.

"The absence of necessity to save a woman's life may be shown by circumstantial evidence." 1 C. J. 330; *Howard v. People,* 185 Ill. 552.

The bill of exceptions does not disclose that defendant failed to be accorded a fair trial, and the verdict reached by the jury does not appear to be a verdict founded upon local feeling, passion, or prejudice. There was abundant evidence to prove the guilt of the defendant beyond a reasonable doubt. There were no errors of law which warrant a reversal, and the judgment of the district court is hereby

AFFIRMED.

ELMER L. HEVELONE, APPELLANT, V. CITY OF BEATRICE ET AL., APPELLEES.

FILED JANUARY 31, 1931. No. 27770.

1. **Municipal Corporations:** STATUTE: CONSTRUCTION: READINGS OF ORDINANCES. The requirement of section 16-404, Comp. St. 1929, that a certain class of ordinances "shall be fully and distinctly read on three different days unless three-fourths of the council shall dispense with the rules," is limited in its application to "ordinances of a general or permanent nature." It has no application to ordinances not within the class named, nor is it applicable to municipal action taken in the form of resolutions or simple motions.
2. **Waters:** SPECIAL ELECTION: CALL. Special elections called pursuant to the provisions of sections 16-652 and 16-659, Comp. St. 1929, in cities of the first class having more than 5,000 and less than 25,000 inhabitants, may properly be by resolution duly adopted. The enactment of an ordinance therefor is not required.
3. ———: ———: NOTICE. Sections 16-652 and 16-659, Comp. St. 1929, *held* applicable to the subject-matter involved in this action, and to be construed as *in pari materia*. So construed, the notice of the special election and the publication thereof, set forth in the record herein, approved as authorized thereby.
4. **Statutes:** CONSTRUCTION. "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." *Kelley v. Gage County*, 67 Neb. 6.
5. **Waters:** WATERWORKS: SPECIAL ELECTION: VOTE. The record in the present case discloses substantial compliance with the provisions of section 16-659, Comp. St. 1929, requiring that "no such contract shall be made unless thereunto authorized by a majority vote of the legal voters of such city at a special election called for that purpose." It affirmatively appears that a majority of all the legal voters who voted at the special election authorized and called for the express purpose of determining the question on public notice duly given voted in favor of the proposition.
6. ———: ———: PROCEDURE APPROVED. Procedure and action taken by the municipal authorities of Beatrice in the subject-matter of the litigation examined and approved as within the terms of the controlling statutes and the powers conferred thereby.

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

Vasey & Mattoon, for appellant.

J. A. O'Keefe, Jack & Vette and *Rinaker & Delehant, contra.*

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

EBERLY, J.

This is an appeal from a judgment of the district court for Gage county sustaining a general demurrer to appellant's petition, and thereafter dismissing the same.

The proceedings presented for review challenge the validity of the contract entered into between the city of Beatrice and the Layne-Western Company, hereinafter called the construction company. By the terms of this agreement the construction company obligated itself to supplement an indefinite and an insufficient supply of good water obtainable through the municipal waterworks by the construction of certain wells, pumps, pipe lines, etc., without the city limits of Beatrice, and by conveying therefrom and delivering to and into the city waterworks system for the use of the city and its patrons a daily definite amount of good water conforming to tests prescribed in the contract, and for a compensation stated. This compensation included an agreement by the city, as part thereof, to pay certain taxes on the property of the construction company constituting a part of this supplementary system of waterworks by it to be erected, created and established, and also reserved the right to the city to purchase the improvements thus made from the construction company, at its option, at times certain, in accordance with a definite schedule of prices set out in the contract.

The proposition involved in the foregoing transaction had been, prior to the execution of the contract involved in the suit, submitted by the municipal authorities to the action of the electors of the city. These electors at a

special election had, by a majority vote of those participating therein, approved the same, and in terms directed the execution of this contract. The plaintiff questions the validity of the proceedings involved in part because he alleges that the special election referred to was called by the terms of an ordinance which was not read on three different days, and there was no suspension of this rule as provided by section 16-404, Comp. St. 1929, and no notice of the proposed special election was given as prescribed by sections 1 and 2 of chapter 16 of the municipal code of Beatrice; that the contract itself was not read and passed on upon three separate days by the legislative department of the city government.

The following facts appear in the petition: On February 26, 1930, at a meeting of the city council, the mayor and all members being present, the proposed contract between the construction company and the city of Beatrice was presented and read, and the same, referred to as "the agreement or resolution," was then adopted by a unanimous vote. Thereafter the estimate of the cost of the proposed improvement by the city engineer and the due approval of the plans submitted with his report by that officer were filed with the council. By a unanimous vote the plans and specifications submitted were accepted and placed on file. Thereupon and thereafter an instrument, in form an ordinance, embodying the proposed contract was read and introduced. After such introduction a resolution was proposed and unanimously adopted that this ordinance be submitted at a special election "to a direct vote of the voters of the city at a special election to be held on the 24th day of April, 1930." This resolution further recited that the action taken was pursuant to section 16-652, Comp. St. 1929, which section, so far as applicable to the objections now under consideration, provides:

"The mayor and city council shall have power to make contracts with and authorize any person, company or association to erect * * * waterworks in said city and give

such persons, company or association the privilege of furnishing water * * * for * * * its inhabitants for any length of time not exceeding twenty-five years: Provided, no such contract shall be made or entered into by the mayor and city council until the question of granting the contract or privilege shall have been submitted to the electors of the city at a special election called for that purpose * * * notice of which shall be given by publication in some newspaper published in the city at least thirty days before the date of such election and a majority of the electors voting upon the proposition shall have voted in favor of making the contract or granting such privilege;" (and expressly includes the power) "to purchase or provide for, establish, construct, extend, enlarge, maintain and operate and regulate for the city any such waterworks."

But it also appears that section 16-659, Comp. St. 1929, is applicable, and so far as it relates to the subject-matter under consideration may be quoted as follows:

"Or having voted bonds and constructed a system of waterworks and having failed to obtain an adequate supply of good water, then the mayor and council may contract with and procure individuals or corporations to construct and maintain a system of waterworks * * * in such city for any time not exceeding twenty years from the date of the contract, with a reservation to the city of the right to purchase such waterworks, * * * at any time after the lapse of ten years from the date of the contract upon payment to such individuals or corporations of any amount to be determined from the contract, not exceeding the cost of the construction of such waterworks; * * * in other respects such contract may be on such terms as may be agreed upon by a two-thirds vote of the council, entered upon the minutes: Provided, no such contract shall be made unless thereunto authorized by a majority vote of the legal voters of such city at a special election called for that purpose."

The petition expressly alleges that the city of Beatrice has heretofore voted bonds, and constructed a system of

waterworks with the proceeds thereof, and also failed to obtain an adequate supply of good water, a condition which still exists.

An examination of section 16-404, Comp. St. 1929, discloses that its requirement that certain ordinances "shall be fully and distinctly read on three different days unless three-fourths of the council shall dispense with the rules" is limited to "ordinances of a general or permanent nature." It has no application to ordinances which are not within the class named, nor is it applicable to legislative action taken in the form of resolutions or of simple motions. The provisions of the statutes on the subject of waterworks, heretofore quoted, are in fact a grant of power unaccompanied by any express limitation on the manner in which it shall be exercised. It contains no specification as to the form in which the municipal action shall be taken. Indeed the provisions in question imply the right of the mayor and council to employ ordinances, resolutions, or simple motions, as in their discretion they deem best. In the light of the previous decisions of this court, the principle seems established that a special election in a city of the first class, having more than 5,000 and less than 25,000 inhabitants, may be properly called by a resolution, and that the enactment of an ordinance for that purpose is not necessary. *State v. Babcock,* 20 Neb. 522; *McGavock v. City of Omaha,* 40 Neb. 64; *Hurd v. City of Fairbury,* 87 Neb. 745; *Van Valkenberg v. Rutherford,* 92 Neb. 803; *State v. Marsh,* 106 Neb. 547; *Weilage v. City of Crete,* 110 Neb. 544.

It is also true that this court has expressed the view that an ordinance, by its terms limited to calling a special election such as here attempted, is not a matter of a "general or permanent nature" within the meaning of the statute referred to. *State v. Babcock,* 20 Neb. 522; *Hurd v. City of Fairbury,* 87 Neb. 745.

After examination of the terms embodying the municipal action before us for review, we are of the opinion that in substance it was in fact the adoption of a resolution by

the mayor and council calling a special election, and not the passage of an ordinance for that purpose, which the record before us sets forth. True, the words "Be it Ordained" were employed in the proceeding adopted as a resolution. It is to be remembered, however, that this court is committed to the view that the words last quoted include the formula, "Be it Resolved," and is effective as the adopting expression in the passage of a resolution. *In re Senate File* 31, 25 Neb. 864.

It would seem that sections 16-652 and 16-659, Comp. St. 1929, are applicable to the subject-matter here presented. Section 16-659, it appears, provides for a situation in which it is desired to supplement, amplify, and make definite what has heretofore been done and accomplished by the legislature under the provisions of section 16-652. If we are correct in the conclusion, then both provisions, essentially applicable to the same subject-matter, are to be construed together as *in pari materia.* It is quite apparent, if so construed, the notice of the special election in the present instance was proper; and the steps actually taken thereunder by the municipal authorities conform to the controlling statutory provisions.

We are also quite convinced that the location of the proposed wells contemplated by the improvement without the city limits is, under the facts in this case, no substantial ground of objection to the validity of the proceeding. Comp. St. 1929, secs. 16-601, 16-652, 16-659.

In this connection it is to be remembered that 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. *Kelley v. Gage County,* 67 Neb. 6; *State v. Drexel,* 75 Neb. 614, 618; *Hurd v. City of Fairbury,* 87 Neb. 745; *Parker v. Nothomb,* 65 Neb. 315; *State v. Ure,* 91 Neb. 31; *Kearney County v. Hapeman,* 102 Neb. 550, 552; *Taylor v. Taylor,* 10 Minn. 107.

In the light of the rule of construction last referred to, it cannot be deemed objectionable that no previous appropriation had been made by the mayor and council with

respect to the payments to be made under the contract, as these payments accrued by its terms. In the nature of the case, such previous appropriation by an annual appropriation ordinance, in view of the extent of the time and the facts here involved, is a substantial impossibility.

We also find that the canvass of the votes cast at the special election held, as set forth in the petition, discloses full compliance with the requirements of section 16-659, Comp. St. 1929, viz.: "Provided, no such contract shall be made unless thereunto authorized by a majority vote of the legal voters of such city at a special election called for that purpose." In *Carroll County v. Smith,* 111 U. S. 556, it was held: "The number and qualification of voters at such an election is determinable by its result, as canvassed, ascertained and declared by the officers appointed to that duty, or as subsequently corrected by a contest or scrutiny in a direct proceeding, authorized and instituted for that purpose; it cannot be contested in any collateral proceeding, either by inquiry as to the truth of the return, or by proof of votes not cast, to be counted as cast against the proposition, unless the law clearly so requires."

The clause quoted, forming the proviso to section 16-659, considered by itself and unrelated to a similar clause constituting a proviso to section 16-652, could hardly be considered as intended to establish a rule at variance to the principle announced in *Carroll County v. Smith, supra.* But these provisos applicable by their terms to similar subject-matter must be construed as *in pari materia* and harmonized. So treated, the conclusion most favorable to defendants' contention would, or might, be that the assent of the majority of the "legal voters of such city at a special election called for that purpose" means the vote of the majority of the qualified voters present and voting at such election in its favor, as determined by the official canvass and returns thereof. Even this would in truth ignore and wholly disregard the words, "a majority of the electors voting upon the proposition," forming a part of section 16-652.

We conclude that the majority vote of the legal voters of such city, as applied to the instant case, designated the voters who voted, and not those who, although qualified to vote, did not vote at the election. Such is the fundamental basis of the decision of this court in *Bryan v. City of Lincoln*, 50 Neb. 620. See, also, *Carroll County v. Smith*, 111 U. S. 556; *People v. Wiant*, 48 Ill. 263; *County of Cass v. Johnston*, 95 U. S. 360; *Everett v. Smith*, 22 Minn. 53; *St. Joseph Township v. Rogers*, 16 Wall. (U. S.) 644; *Mills v. Hallgren*, 146 Ia. 215; *Vance v. Austell*, 45 Ark. 400; *Sanford v. Prentice*, 28 Wis. 358; *East Bay Municipal Utility District v. Hadsell*, 196 Cal. 725; *Treat v. DeJean*, 22 S. Dak. 505.

We also find that the reservation as to the city's right to purchase on the basis of the schedules contained in the contract, and as covering the additions to the plant to be subsequently made, is in all essentials in accordance with the terms of the statutes involved; and it further appears that the inclusion in the contract of an agreement on the part of the city to pay certain taxes upon the improvements provided for by the contract did not in any manner affect the validity of the contract before us. Comp. St. 1929, sec. 16-659.

From the above it follows that, in sustaining the defendants' demurrer to the plaintiff's petition, and in subsequently dismissing the action, no error was committed by the trial court, and its judgment is

AFFIRMED.

JOHN DORAN ET AL., APPELLEES, V. FARMERS STATE BANK OF YORK: E. J. DEMPSTER, APPELLANT.

FILED FEBRUARY 6, 1931. No. 27470.

1. Guaranty: CONSIDERATION. The interest of a stockholder and officer of a bank in keeping the bank open as a going concern and retaining his official position therein constitutes a valid consideration for a contract, whereby he guarantees the bank against loss on specified bills receivable of the bank which are

of doubtful value and which have been found by the state banking department to be objectionable assets of the bank.

2. **Mortgages:** DEED AS SECURITY. A deed, absolute on its face, but which, in fact, was given as security for certain obligations, and by which grantors were to receive any sum over and above such obligations for which the land conveyed should be sold, is, in nature and effect, a mortgage.

3. ———: ———. Evidence examined and *held* to require a finding that the deed in controversy was delivered as a mortgage and to be presently effective and operative as such.

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

C. M. Skiles, W. W. Wyckoff, I. D. Beynon and *Albert S. Johnston,* for appellant.

Thomas & Vail, George M. Spurlock, W. L. Kirkpatrick and *Gilbert & Gilmore, contra.*

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

PER CURIAM.

This is an action to cancel a deed executed by plaintiffs and conveying to the Farmers State Bank of York 480 acres of land, to quiet title to said lands in plaintiffs, and for other relief.

In the amended and supplemental petition it is alleged that plaintiffs are husband and wife; that in 1922, while plaintiff John Doran was a stockholder, director and president of the Farmers State Bank of York, he executed a written guaranty, guaranteeing to the bank payment of certain specified notes, then constituting part of the assets of the bank, and that said instrument was without consideration; that thereafter, and in 1925, when the bank was in financial difficulties, plaintiffs executed a deed to the land in question, as security for the said guaranty, and that this deed was executed and delivered upon the condition that it should not be operative until one Myers, also a stockholder in the bank, should secure or pay to the bank certain notes and obligations of members of Mr.

Myers' family; that the condition was never complied with and that the deed was therefore inoperative.

The receiver of the defendant bank answered, admitting the execution of the guaranty, the execution and delivery of the deed, together with another instrument outlining the purpose and the conditions under which the deed was made and delivered, and that the deed was absolute and delivered for the purpose of taking up and canceling certain assets of the bank on which members of plaintiff's family were liable, and which Mr. Doran had previously guaranteed. Another defense was that of *res judicata*, which we think it unnecessary to consider.

The trial court found adversely to the plaintiffs on the question of conditional delivery, but found that the deed was intended between the parties to operate as a mortgage; that it was given to secure a liability guaranteed by the plaintiffs, but that the guaranty was without consideration, and that, therefore, the deed operating as a mortgage secured nothing and should be canceled. The defendant receiver has appealed, and the plaintiffs have cross-appealed.

The first question for consideration is whether or not the court erred in holding that there was no consideration for the contract of guaranty. The contract is as follows:

"I, John Doran, for and in consideration of one dollar in hand paid the receipt of which is hereby acknowledged and in consideration of my being president of the Farmers State Bank, of York, Nebraska, and in consideration of the duties so implied, I hereby guarantee the said Farmers State Bank, of York, Nebraska, against any loss whatsoever that may ultimately accrue to said Farmers State Bank, of York, Nebraska, by reason of said bank carrying certain notes among its assets and numerated below.

"It is understood and I hereby agree that this guarantee shall extend to and cover any renewal or extension of time upon said numerated notes, it being my intention and desire to protect said bank against loss on said notes after all chattels or other assets have been exhausted that

they may be made to apply on same, not to exceed a term of six years.

"It is a part of this guarantee and my desire that it shall extend to and be obligatory on my heirs, executors, administrators and assigns.

"In witness whereof I have hereunto set my hand and seal this 4th day of April A. D. 1922.

"(Signed) John Doran."

The above instrument is duly acknowledged, and attached thereto is a list of promissory notes referred to in the guaranty. There are 13 of the notes, aggregating in amount approximately $35,000. However, the guaranty extends only to 50 per cent. of the amount of some of the notes.

From the record it appears that Mr. Doran was the officer who took these notes into the bank, and that the state banking department had found that these notes were of doubtful value and had ordered them out of the bank. The following appears in the testimony of Mr. Doran: "Q. You took these notes into the bank when you were manager of the bank? A. Yes, sir. * * * Q. The banking department had ordered those out, had they not? A. They had become objectionable; yes, sir. Q. That's the reason you signed the guaranty, was it, partly? A. Yes, sir; they were objectionable and they wanted me to sign a guaranty." This was in 1922, and the bank was kept open for a period of three or four years thereafter, with Mr. Doran in charge as the principal officer of the bank. It also appears that at the time of the execution of the guaranty Mr. Doran owned 180 shares of the bank's stock, and that after the guaranty was executed he purchased 71 shares, paying approximately $130 a share therefor.

The bank had a capital of $50,000, so that at the time of the execution of the deed Mr. Doran owned more than 50 per cent. of the capital stock. It is evident that if the amount of paper involved in the guaranty, aggregating approximately $35,000, was worthless or of little value, and the department of trade and commerce was insisting

that such paper be removed from the assets of the bank, or secured, the bank would soon be closed and placed in the hands of a receiver, unless the paper was removed from the assets and good securities substituted therefor, or otherwise secured. By executing the guaranty and securing the worthless or doubtful paper, Mr. Doran averted the calamity of a failure of the bank, together with the resulting loss to stockholders and perhaps to the depositors and creditors of the bank, and was enabled to keep the bank open as a going concern, with the hope and expectation that it would be solvent and become a profit-earning institution. The fact that he subsequently purchased 71 shares of stock at a substantial price evidences his belief in the then solvency of the institution, and that it would be profitable to keep the bank open as a going concern. By securing the paper, it enabled him to retain his position as president of the bank and to receive the salary therefor, and avoid his constitutional double liability as a stockholder if the bank had failed and its assets were insufficient to satisfy all creditors. We think these facts constituted a sufficient consideration for the execution of the guaranty.

Similar questions have arisen in other courts, and particularly in the state of Iowa, and that court has held that in contracts of guaranty of this nature, given by officers, directors and stockholders, guaranteeing paper of doubtful value for the purpose of keeping the bank open as a going concern, such facts constituted a valuable consideration. *In re Estate of Prunty,* 201 Ia. 670; *Hills Savings Bank v. Hirt,* 204 Ia. 940; *Andrew v. Farmers & Merchants State Bank,* 205 Ia. 712; *Boyd v. Miller,* 230 N. W. (Ia.) 851.

Three and one-half years later, or in the autumn of 1925, when the bank was in financial difficulties, Mr. Doran wrote to the secretary of the department of trade and commerce, asking the department to send some one to take charge of the bank and see if it could not be put in better condition. Pursuant to this request, the depart-

ment sent out Mr. McWhorter to take charge of the bank. After going over the condition of the bank, he reported to Mr. Doran that a large volume of paper was worthless or of doubtful value, and that the bank could be saved only by taking this paper out of the bank or having it properly secured. Thereupon it was arranged that Mr. Doran should convey to the bank, subject to prior incumbrances, 480 acres of land in York county. On the 23d of December, 1925, a deed was prepared and delivered to Mr. McWhorter for the bank. Accompanying the deed was the following instrument, prepared by the attorney for Mr. Doran and signed by Mr. and Mrs. Doran, the plaintiffs:

"York, Neb. December 23, 1925.

"To The Farmers State Bank of York, Neb.

"We hereby deliver to you a deed to the (here follows description of land) executed by us and delivered this day to the Farmers State Bank of York, Neb., under this agreement and with this understanding that said deed is an absolute conveyance to said bank of said premises. You are authorized to handle said property as your own and to sell and dispose of the same at the best price and upon the best terms which you can obtain therefor, and to apply the proceeds thereof in paying off and liquidating the indebtedness upon which John Doran is liable to said bank as guarantor. The indebtedness of J. T. M. Doran, generally known as Mel Doran, for which John Doran is liable as guarantor to be first paid out of the proceeds derived from the sale of said premises. Any proceeds thereafter remaining is to be applied on the other indebtedness for which John Doran is liable to said bank, and if any surplus then remains, the same is to be paid to John Doran and Mamie E. Doran.

"We acknowledge the valid consideration for said deed, and as a part of the consideration therefor, it is understood and agreed that said bank shall not take any judgment against John Doran for any of said indebtedness within ninety days from this date, and shall not here-

after commence any action against him during said ninety days to recover any of said indebtedness, and with the further understanding that said bank shall never assert any claim against our home in York, Neb. for any indebtedness now owing said bank by John Doran.

"(Signed) John Doran,
"Mamie E. Doran."

Mr. McWhorter immediately thereafter listed this real estate, so conveyed, on the books of the bank as a part of its assets, and removed from bills receivable notes that had been guaranteed by Mr. Doran, aggregating approximately $30,000, placed them in an envelope and left them in the bank. Shortly thereafter Mr. McWhorter, for the bank and pursuant to the purported authority in the foregoing instrument, advertised the land for public sale. Before the sale was consummated, however, plaintiffs brought an action to enjoin the sale and the consummation thereof, and, as grounds for the action, alleged that the bank was not to sell the land except at a price which was satisfactory to or approved by plaintiffs; that they had not been consulted in the matter; that no price was fixed for the sale of the land, and that the land was about to be sold at much less than its actual and real value. That action was settled and dismissed, and no sale was ever effected by the bank.

At the time Mr. McWhorter examined the bank he found that a considerable amount of paper in the bank was of doubtful value and on which members of the Myers family were liable, and that Myers was also a stockholder and director of the bank. It is the contention of plaintiffs that the deed, when executed and delivered, was upon the condition that Myers should take out or secure the paper in the bank on which members of the Myers family were liable, that the deed was not to be operative until this was done and the Myers paper was taken up or secured.

The evidence upon this question, as to conditional delivery, is in conflict. The trial court found against the plaintiffs in this respect. It would serve no useful pur-

pose to detail the evidence. Suffice it to say that after a careful examination thereof we are convinced that the holding of the trial court is supported by a preponderance of the evidence. The written instrument accompanying the deed was prepared by plaintiffs' attorney and purports to set forth all the conditions and terms on which the deed was delivered. Had the delivery of the deed been conditioned, as now claimed by Mr. Doran, it is amazing that so important a matter was not included in the instrument accompanying the deed. It is also significant that such fact was not pleaded in the petition for an injunction or in the original petition in this action. From the record we find, as did the trial court, that the deed was not delivered upon the condition now asserted.

We are unable to agree with the contention of defendants that the deed was to operate as an absolute conveyance. From the instrument accompanying the deed, it clearly appears that when the land should be sold the proceeds were to be used in paying off and liquidating the indebtedness upon which Mr. Doran was liable as a guarantor, and that if any proceeds should thereafter remain the same were to be paid to the plaintiffs. Clearly, the deed was intended to operate as security for the fulfilment of the guaranty and not as an absolute conveyance.

The conclusions reached on these questions render it unnecessary to consider any other of defendants' assignments of error.

The only assignment of error of plaintiffs relates to the fact that they were not awarded possession of the land by the decree of the trial court. Since the plaintiffs were not entitled to possession, as we have heretofore found, of course there was no error committed in that respect.

The judgment of the district court is reversed, with directions to the trial court to dismiss plaintiffs' action and to grant to the receiver of defendant bank, if he so elects, leave to amend his pleading so as to ask foreclosure of the deed as a mortgage.

REVERSED.

FARMERS STATE BANK OF PLYMOUTH, APPELLANT, V. BANK OF PLYMOUTH ET AL., APPELLEES.

FILED FEBRUARY 6, 1931. No. 27552.

1. **Contract:** PAROL EVIDENCE. Parol evidence is admissible to prove that a contract was not completed and executed until a date subsequent to that which it bears.
2. ———: ———. Under a contract for the sale of the assets of a bank, which was not executed and delivered until two days after its date, parol evidence is admissible for the purpose of proving what the assets were on the date of delivery, and further to prove that assets belonging to the bank at the time of the signing were, by agreement, to be withdrawn before the contract became effective.
3. **Record** examined and *held* to present a question of fact for the determination of the jury, and that their finding upon the controverted fact was conclusive.

APPEAL from the district court for Lancaster county: LINCOLN FROST, JUDGE. *Affirmed.*

Burkett, Wilson, Brown & Wilson, W. J. Moss and *Melvin Moss,* for appellant.

Sanden, Anderson, Laughlin & Gradwohl and *John C. Hartigan, contra.*

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

PER CURIAM.

This is an action for breach of a contract by the terms of which plaintiff purchased the assets and good will of defendant bank.

In substance, plaintiff alleged that defendants did not turn over all of the assets of the defendant bank, but wrongfully withheld and retained assets equal in amount to the surplus and undivided profits carried on the books of the defendant bank at the time the contract was signed.

Defendants denied withholding any assets, and averred

that at the time of the delivery of the contract there were no surplus and undivided profits in defendant bank. The trial resulted in a verdict and judgment thereon for defendants. Plaintiff has appealed.

The contract of sale was signed February 18, 1928, by the directors of the respective banks, and was left in possession of one Davis, a state bank examiner. The contract, among other things, contained the following provisions:

"The vendor agrees to furnish the purchaser a good abstract of title, to execute and deliver to purchaser a good and sufficient warranty deed to said property on or before ninety days (90) and to deliver possession February 20, 1928. * * * Worthless paper, as agreed upon, is to be removed from the assets of the Bank of Plymouth and cash put in therefor."

Examination of the note pouch of defendant bank did not occur until the 20th of February, when an agreement was reached as to the amount of worthless paper. Late in the afternoon of that day the contract was delivered; plaintiff's directors signed and delivered notes representing the purchase price, and received from defendants what the latter terms an "inventory" and the former merely a "receipt." This written instrument was signed by the respective cashiers of the two banks. This written statement is, in part, as follows:

"List of the furniture and fixtures of the Bank of Plymouth sold to the Farmers State Bank of Plymouth, Nebraska. (Here follow items of furniture, fixtures, etc.)

"Statement of the liabilities and resources as of February 20, 1928, when turned over to The Farmers State Bank of Plymouth, Neb.

"Liabilities. * * * Surplus 00. Profits 00. Discount 00. Exchange 00. (Here are listed deposits of various accounts in the bank, with total liabilities $264,817.87.)

"Resources. (Then follows list of the resources, totaling $264,817.87.)

"We hereby acknowledge the correctness of this state-

ment with the books of the Bank of Plymouth, as of February 18, 1928."

Signed by the respective cashiers.

There is evidence that at the time the contract was being drawn there was a conversation had with respect to the surplus and undivided profits of the vendor bank, and in which it was stated that surplus and undivided profits (assets representing the amount) were not to be transferred in the contract of sale, and evidence also that assets to the amount of these items were withdrawn from the vendor bank before the contract was delivered and before possession was surrendered. The contract, while dated February 18, did not become effective, and neither of the parties was bound, until the amount of worthless paper was agreed upon and there was a delivery of the contract. This did not occur until late in the afternoon of February 20. At that time assets of the vendor bank had been withdrawn to an amount equaling surplus and undivided profits. If the contract is to speak and be effective as of the 18th of February, then, in terms, it described all of the assets of the vendor bank. By its terms, however, it was not to be effective until the 20th of February. If the contract is to speak as of the date of February 20 when it was delivered, then there were no surplus and undivided profits.

Where a contract, by its terms, shows that it is not to be operative until a day subsequent to its date and is not delivered until a subsequent date, parol evidence is admissible to show that the contract was not completed and executed until a date subsequent to that which it bears.

In *United States v. Le Baron,* 19 How. (U. S.) 73, it was held: "A deed speaks from the time of its delivery, not from its date." In the body of the opinion, quoting from another case, it was said (p. 75): "A lease, bearing date on the 26th of May, to hold for three years 'from henceforth,' was delivered on the 20th of June. It was resolved, that 'from henceforth' should be accounted from the day of delivery of the indentures, and not from the

day of their date; for the words of an indenture are not of any effect until delivery—*traditio loqui facit chartam.*" And in the opinion it was further said (p. 76): "And the modern case of *Steele v. March,* 4 B. and C. 272, is to the same point. A lease purported on its face to have been made on the 25th of March, 1783, habendum from the 25th of March *now* last past. It was proved that the delivery was made after the day of the date, and the Court of King's Bench held that the word *now* referred to the time of delivery, and not to the date of the indenture." The holding in the *Le Baron* case was approved and followed in the more recent case of *District of Columbia v. Camden Iron Works,* 181 U. S. 453, 45 L. Ed. 948, wherein it was held, in effect, that it is competent to show by parol that a contract was finally executed and delivered at a date subsequent to that shown on its face.

Under this rule, if the contract was not to be operative until February 20, parol evidence was admissible to show what assets the vendor bank had at that time, and to show that at the time of the negotiations it was agreed that assets, representing the amount of the surplus and undivided profits, were not to be included and were to be withdrawn from consideration.

Plaintiff in its brief states: "These pleadings raised the following questions:

"1. Whether the contract of sale included under the term assets the surplus and undivided profits in the bank at the time contract, exhibit A, was signed.

"2. Whether this surplus and undivided profits had been turned over to the purchaser or taken out of the bank after the signing of the contract and before the assets were turned over."

Really, the only question in controversy is the first question. An examination of the entire record leads us to the conclusion that this question was one of fact for the jury, and their finding thereon is conclusive.

There are numerous alleged errors in the instructions given and refused. Plaintiff requested an instruction for

a directed verdict, which was refused, and asserts this was error. We do not agree. Under the evidence, there was a question of fact for the jury to determine.

With respect to the instructions given and other instructions requested, plaintiff's rights, we think, were thoroughly and fully protected by the instructions which the court gave. These instructions were much more favorable to plaintiff than were warranted under the record.

We find no error prejudicial to the plaintiff. Judgment AFFIRMED.

PAULINE C. STUERTZ, ADMINISTRATRIX, APPELLEE, V. L. L. CORYELL BUILDING CORPORATION, APPELLANT.

FILED FEBRUARY 6, 1931. No. 27554.

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

Roy B. Ford, Smith, Schall & Sheehan and *David A. Murphy,* for appellant.

Chambers & Holland, contra.

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

PER CURIAM.

Plaintiff, as administratrix of the estate of her deceased husband, brought this action against the defendant L. L. Coryell Building Corporation to recover damages for negligently causing the death of her husband. Defendant denied negligence. Trial resulted in a verdict and judgment thereon for plaintiff in the amount of $25,000. Defendant appeals.

A number of assignments of error relate to the instructions given to the jury. We find it unnecessary to consider any of these alleged errors, for the reason that, from an examination of the record, we are convinced that no other verdict than one for plaintiff could have been sustained. Errors, if any, in the instructions were, therefore, not prejudicial to the defendant.

The only assignment of error that seems to have merit is that the verdict is excessive. From a consideration of the evidence, the court is convinced that it does not warrant so large a verdict. However, the verdict is not so excessive as to indicate that the jury acted from passion or prejudice, and does not necessarily call for a reversal of the judgment.

If plaintiff shall, within 20 days from this date, remit from the judgment all in excess of $20,000, the judgment will be affirmed. Otherwise, it will be reversed and the cause remanded for a new trial.

AFFIRMED ON CONDITION.

JOHN H. RUWE ET AL., APPELLEES, V. SCHOOL DISTRICT NO. 85 OF DODGE COUNTY, APPELLANT.

FILED FEBRUARY 6, 1931. No. 27507.

1. **Constitutional Law**: SCHOOL DISTRICTS: DETACHING TERRITORY: PARTIES. A resident, elector and taxpayer may question the constitutionality of a statute the enforcement of which would detach territory from his school district and thus increase his taxes for school purposes.
2. ———: DUE PROCESS OF LAW: NOTICE. Due process of law requires notice and an opportunity to be heard, where financial burdens are necessarily imposed on property owners by an exercise of judicial power pursuant to specific terms of a statute.
3. ———: SCHOOL DISTRICTS: CHANGE OF BOUNDARIES. While the establishing of boundaries of school districts for school purposes is a legislative function, the legislature may confer on public boards or courts judicial power to determine the facts and equities under which legislation authorizes changes in such boundaries.
4. ———: ———: ———: NOTICE. Legislation, conferring on the county superintendent, county clerk and county board judicial power to change boundary lines between school districts without giving notice to those who would necessarily suffer a financial loss by the exercise of such power, and without giving them an opportunity to be heard, is unconstitutional and void as violating the due-process clause of the state and federal Constitutions. Comp. St. 1922, sec. 6267; Comp. St. 1929, sec. 79-130.

APPEAL from the district court for Dodge county: FREDERICK L. SPEAR, JUDGE. *Affirmed.*

John F. Rohn and *C. M. Heine,* for appellant.

Abbott, Dunlap & Corbett, contra.

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

ROSE, J.

This is a controversy over a change in the boundary between school district 43 and school district 85, Dodge county. March 6, 1929, the county superintendent, county clerk and county board of Dodge county made an order separating a quarter section of land from district 43 and attaching it to district 85 on petition of the latter which included the village of Winslow. John H. Ruwe and George Wenke, residents, electors and owners of property in district 43, had protested against the change and they subsequently prosecuted in the district court for Dodge county a proceeding in error in which they were plaintiffs and school district 85 was defendant. In making the order changing the boundary between the districts the county tribunal acted under legislation providing:

"When any school district has only three sections of land or less than three sections of land, the county superintendent, county clerk and county board shall have authority and it shall be their duty, upon petition of the district board or board of education of such school district, to make such changes in the boundaries of such district and of any or all districts contiguous thereto as in their judgment will be just and equitable." Comp. St. 1922, sec. 6267; Comp. St. 1929, sec. 79-130.

The proceedings and order of the county tribunal were challenged as erroneous and void on the ground, among others, that the enactment quoted is unconstitutional as violative of the state and federal Constitutions providing that no person shall be deprived of property without due process of law. Nebraska Const. art. I, sec. 3; U. S.

Const. Amend. XIV, sec. 1. In the proceeding in error, plaintiffs took the position that the statute, without requiring notice to any one, purported to confer on a tribunal composed of the county superintendent, county clerk and county board judicial power to separate territory from one school district and attach it to another, thus violating the due-process clause of the state and federal Constitutions. On the other hand, defendant contended that the power under which the body composed of county officers acted was legislative. and that therefore notice was not essential, though given by newspaper publication in the present instance.

Upon a trial of the issues raised by the pleadings the district court decreed that the legislation in question and the order of the county tribunal were void; that the boundary was not changed and that the quarter section of land involved was not separated from district 43 and attached to district 85. Defendant appealed.

The competency of plaintiffs to question the constitutionality of the legislation assailed by them is challenged by defendant on the ground that the changing of the boundary between the districts left their lands in district 43—the former situs. The position does not seem to be well taken. Each school district was regularly organized with definite boundaries and conducted a public school in its own schoolhouse with money raised by taxation. In district 43 the basis of the levy for school purposes in 1929 was three mills on the dollar and six mills on the dollar in district 85. The order detaching a quarter section of land from district 43 and annexing it to district 85, if allowed to stand, would increase the school taxes on the lands of plaintiffs who are residents, electors and taxpayers in district 43 which was thus reduced in size. To some extent, therefore, the order of the county tribunal increased the financial burden of plaintiffs. If property interests were thus unlawfully invaded by public officers acting under void legislation, plaintiffs, who made a timely protest against the wrong, had a right to invoke the pro-

tection of the court. A recent statement of the principle reads as follows:

"A taxpayer may not question the constitutionality of a statute which does not affect him; but may attack the validity of a statute exempting persons or property from taxation, or of a statute the enforcement of which would impose on him an additional financial burden, however slight." 12 C. J. 764, sec. 181. See, also, *Ellingham v. Dye,* 178 Ind. 336, 413.

Is the section quoted unconstitutional as authorizing the county tribunal to exercise judicial power without notice to persons pecuniarily affected? Due process of law requires notice and an opportunity to be heard, where financial burdens are necessarily imposed on property owners by an exercise of judicial power pursuant to specific terms of a statute. Whether the county tribunal was required to act judicially in determining the facts and equities essential to an order detaching a quarter section of land from district 43 and annexing it to district 85 depends upon the language of the legislature. While the establishing of boundaries of public school districts for school purposes is a legislative function, the legislature may confer on public boards or courts judicial power to determine the facts and equities under which legislation authorizes changes in such boundaries. *City of Wahoo v. Dickinson,* 23 Neb. 426; *Winkler v. City of Hastings,* 85 Neb. 212; *Searle v. Yensen,* 118 Neb. 835. A recent opinion contains the following language:

"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 injuri-

ously affected, may have his rights judicially determined." *Elliott v. Wille,* 112 Neb. 78, 89.

With these rules of law in mind, did the legislature attempt to delegate to the county tribunal judicial power as a condition of changing school district boundaries? "When any school district has only three sections of land or less," say the legislators, boundaries may be changed by the officers comprising the county tribunal. This is a condition requiring the determination of a fact essential to the exercise of the power granted or to the performance of the duty imposed. A petition is another prerequisite to the exercise of the power granted—a pleading commonly used to invoke judicial power. Only such boundary changes can be made by the county officers "as in their judgment will be just and equitable." These terms and conditions imply duties and powers of a judicial nature. The exercise of general legislative power does not necessarily require a petition or the finding of a fact or the making of an order that, in the judgment of lawmakers, "will be just and equitable." The tribunal composed of the county superintendent, county clerk and county board was required to exercise judicial functions as conditions of exercising the powers granted and of performing the duties imposed. No other interpretation of the language used by the legislature is permissible. Since there was no statutory provision for notice to those whose financial burdens would necessarily be increased by the exercise of judicial power, or for a hearing, the section violates the due-process clause of the state and federal Constitutions and is, therefore, unconstitutional and void. The trial court so held and the judgment below is

AFFIRMED.

AUGUST F. SCHAFERSMAN ET AL., APPELLEES, V. SCHOOL DISTRICT NO. 85 OF DODGE COUNTY ET AL., APPELLANTS.

FILED FEBRUARY 6, 1931. No. 27508.

Injunction: SCHOOL DISTRICTS: TAXATION. Injunction is a proper remedy to prevent a school district and its officers from assuming jurisdiction over, and taxing land in, another school district.

APPEAL from the district court for Dodge county: FREDERICK L. SPEAR, JUDGE. *Affirmed.*

John F. Rohn and *C. M. Heine,* for appellants.

Abbott, Dunlap & Corbett, contra.

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

ROSE, J.

This is a suit in equity for an injunction. August F. Schafersman, Harry Thorndyke, and school district 43, Dodge county, are plaintiffs. School district 85, Dodge county, and the members of the school board of district 85 are defendants. Assuming to act under statutory authority, the county superintendent, county clerk and county board of Dodge county made an order detaching a quarter section of land owned by Schafersman and Thorndyke in district 43 and annexing it to district 85. Comp. St. 1922, sec. 6267; Comp. St. 1929, sec. 79-130. Plaintiffs applied for an injunction to prevent defendants from exercising jurisdiction over the land mentioned and from subjecting it to taxation for school purposes, on the ground that the legislation under which the county officers assumed to act and the order made by them were unconstitutional and void. Upon pleadings and evidence putting in issue the validity of the statute cited, the district court held it unconstitutional and granted the injunction for which plaintiffs prayed. Defendants appealed.

Plaintiffs pursued a proper remedy. There is no error in the proceedings and decree below. This suit is a com-

panion of *Ruwe v. School District, ante,* p. 668, in which the legislation and order in question herein were reviewed and adjudged void.

AFFIRMED.

WILLIAM A. MCNEEL, APPELLEE, V. STATE OF NEBRASKA ET AL., APPELLANTS.

FILED FEBRUARY 6, 1931. No. 27558.

1. **States:** CLAIMS UNDER CONTRACTS: APPEAL. A claim against the state, when founded upon or growing out of a contract expressed or implied, may be presented to the auditor of public accounts and, from a disallowance thereof in whole or in part, claimant may appeal to the district court.
2. ———: ACTION EX DELICTO. An action against the state for a tort, as distinguished from a claim founded upon or growing out of a contract expressed or implied, cannot be maintained without permission of the legislature.
3. ———: ACTION: FORUM. Where the statutes provide an exclusive remedy against the state and a particular forum for a judicial trial, one branch of the legislature alone cannot extend jurisdiction to another forum.
4. ———: ———: ———. The constitutional provisions that "The state may sue and be sued, and the legislature shall provide by law in what manner and in what courts suits shall be brought," do not confer on a single branch of the legislature power to extend jurisdiction beyond that limited by statute.
5. **Action.** "The mere breach of an ordinary contract does not constitute a tort, and if there is no liability except that arising out of a breach of a purely contractual duty, the action must be in contract, and an action in tort cannot be maintained." 1 C. J. 1016, sec. 139.
6. **States:** ACTION: WAIVER. The state's immunity from suit cannot be waived by the voluntary appearance of the attorney general.

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

C. A. Sorensen, Attorney General, L. Ross Newkirk and *W. R. Raecke,* for appellants.

Hoagland, Carr & Hoagland, contra.

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

ROSE, J.

This is an action at law to recover damages for breach of contract. August 11, 1925, the state of Nebraska and the county of Merrick employed plaintiff to grade approximately four miles of public highway in Merrick county. A contract in writing, including specifications, was executed by the parties. Plaintiff rented a complete grading outfit and entered upon the performance of his contractual duties. In his petition it is alleged that defendants violated their contract, failed to prepare for the work to be performed by him, ordered him to quit October 15, 1925, and prevented further performance on his part. His entire claim consists of $6,898.86 for breach of contract and of $1,034.83 for loss of profits, or a total of $7,933.69. He received $3,782.57 and claims the remainder or $4,151.12. For the latter sum plaintiff commenced this action against the state in the district court for Lincoln county under authority of a resolution adopted by the house of representatives March 17, 1927, permitting him to do so. The petition was assailed by demurrer on the grounds that it did not state facts sufficient to constitute a cause of action, and that it did not make Merrick county a defendant, though a party to the grading contract. Later the petition was amended and Merrick county was joined as a defendant. Defendants filed objections to the amending of the petition, stating, among other grounds, that the district court was without jurisdiction to determine the cause. The trial court overruled the demurrer and the objections to jurisdiction. The answer of defendants to the amended petition contained pleas that the state adjusted the claim of plaintiff for damages by contracting with him for additional grading, and that he completed the original and supplementary contracts and received compensation in full for both and accepted $17,146.37 in

complete and final settlement including his claim for damages.

Upon a trial to the district court without a jury, judgment was rendered against defendants for $3,471.75 and they appealed.

On appeal it is argued by defendants that the district court for Lincoln county was without jurisdiction to entertain the action or to determine the controversy and that consequently the proceedings and judgment below are void. In this connection it is contended that the action is based on, or arises out of, a contract, as distinguished from a tort, and cannot be maintained against the state in an independent suit, the only judicial remedy being an appeal to the district court for Lancaster county from a decision of the auditor of public accounts, rejecting the claim in whole or in part. On the contrary, plaintiff states his position as follows:

"When the legislature permits a suit to be brought against the state upon any claim, whether tort or contract, the court has jurisdiction to determine the controversy irrespective of the remedy which the claimant may have by appeal from the auditor."

Plaintiff relies on the second clause of the statute containing the following language:

"The several district courts of the judicial districts of the state as now provided for and established by the Constitution of the state, and of such judicial districts as may hereafter be provided by law, shall have jurisdiction to hear and determine the following matters: First. All claims against the state filed therein which have previously been presented to the auditor of public accounts, and have been in whole or in part rejected or disallowed. Second. All claims or petitions for relief that may be presented to the legislature, and which may be by any law, or by any rule or resolution of the legislature, or either house thereof, referred to either of said courts for adjudication." Comp. St. 1929, sec. 27-319.

The latter or "second" clause quoted must be considered with what precedes it and with the following constitutional and statutory provisions:

"The state may sue and be sued, and the legislature shall provide by law in what manner and in what courts suits shall be brought." Const. art. V, sec. 22.

"The legislature shall provide by law that all claims upon the treasury shall be examined and adjusted by the auditor and approved by the secretary of state, before any warrant for the amount allowed shall be drawn. Provided, that a party aggrieved by the decision of the auditor and secretary of state may appeal to the district court." Const. art. VIII, sec. 9.

"The state may be sued in the district court of the county wherein the capital is situate, in any matter founded upon or growing out of a contract, expressed or implied, originally authorized or subsequently ratified by the legislature, or founded upon any law of the state." Comp. St. 1929, sec. 27-324.

"The auditor of public accounts shall keep a record of all claims presented to him for examination and adjustment and shall therein note the amount of such claims as shall be allowed or disallowed, and in case of the disallowance of all such claims, or any part thereof, the party aggrieved by the decision of the auditor and secretary of state may appeal therefrom to the district court of the county where the capital is located within twenty days after receiving official notice." Comp St. 1929, sec. 77-2607.

In view of the constitutional and statutory provisions relating to claims against the state and the judicial interpretations thereof, the legislation conferring upon the district courts jurisdiction to hear and determine "all claims against the state filed therein which have previously been presented to the auditor of public accounts, and have been in whole or in part rejected or disallowed," includes "any matter founded upon or growing out of a contract, expressed or implied, originally authorized or subsequently ratified by the legislature, or founded upon any law of the state,"

while "all claims or petitions for relief that may be presented to the legislature, and which may be by any law, or by any rule or resolution of the legislature, or either house thereof, referred to either of said courts for adjudication," apply to claims based on wrongs or torts. In other words, claims in the first of the statutory classes are based on, or arise out of, contracts with the state, and claims in the second of the statutory classes are not included in the first but are based on wrongs or torts committed by departments, officers or agencies of the state. A claim in the first class must be presented to the auditor with the right of appeal from his decision and the second must be presented to a district court with legislative authority to sue the state. Comp. St. 1929, sec. 27-319; *State v. Stout*, 7 Neb. 89; *Peterson v. State*, 113 Neb. 546; *Pickus v. State*, 115 Neb. 869.

Where the statutes provide an exclusive remedy against the state and a particular forum for judicial trial, one branch of the legislature alone cannot extend jurisdiction to another forum. The constitutional provision that "The state may sue and be sued, and the legislature shall provide by law in what manner and in what courts suits shall be brought," does not confer on a single branch of the legislature power to extend jurisdiction beyond that limited by statute. Since the Constitution and statutes provide that "matter founded upon or growing out of a contract, expressed or implied," require such a claim against the state to be presented to the auditor of public accounts with the right of claimant to appeal from an adverse decision to the district court where the capital is located, a single branch of the legislature cannot confer on another district court jurisdiction to entertain and determine an action "founded upon or growing out of a contract, expressed or implied."

Is plaintiff's action based on contract or tort? The grading contract into which the parties entered was authorized by law. The improvement of the highway was legitimate business of the government. The legislature made appro-

priations available to plaintiff for the payment of his compensation upon performance of his contractual duties. Laws 1925, ch. 21, sec. 15. By means of claims against the state and warrants drawn by the auditor of public accounts on the state treasurer, plaintiff received part of his stipulated earnings. The remainder of his claim is based solely on failure of the state to comply with its contract to provide clay for surfacing and on failure to permit him to perform his duties without delay and on failure to permit him to complete the job. Negligence or other active wrongs are not charged or proved. Mere breach of contract is the basis of his claim for damages. A statement of the law supported by precedent follows:

"The mere breach of an ordinary contract does not constitute a tort, and if there is no liability except that arising out of a breach of a purely contractual duty, the action must be in contract, and an action in tort cannot be maintained." 1 C. J. 1016, sec. 139, notes 52 and 53, and cases cited therein, including *Russell & Co. v. Polk County Abstract Co.*, 87 Ia. 233.

The gist of an action for tort is a wrong or breach of duty imposed by law as distinguished from a mere breach of contract. 1 C. J. 1019, sec. 141, note 33. An independent wrong or an unlawful act committed by a contracting party or his agent may of course give rise to an action for tort, but this is not a case of that kind. In *Benda v. State*, 109 Neb. 132, and in *City of Chadron v. State*, 115 Neb. 650, there were independently of contract, wrongful acts by employees of the state.

The state's immunity from suit in the district court for Lincoln county was not waived by the appearance of the attorney general therein. *McShane v. Murray*, 106 Neb. 512; *Eidenmiller v. State, ante*, p. 430.

The conclusion is that the action is based on contract and that the district court for Lincoln county did not have jurisdiction to entertain or determine the cause. The judgment below is therefore reversed and the action dismissed.

REVERSED AND DISMISSED.

IN RE CLAYTON.

FRANK CLAYTON, APPELLANT, V. BOARD OF EXAMINERS OF DEFECTIVES, APPELLEE.

FILED FEBRUARY 11, 1931. No. 27562.

1. **Criminal Law:** INSANE PERSONS: PAROLE: STERILIZATION. The provisions of chapter 163, Laws 1929, relating to the sterilization of a feeble-minded person as a condition prerequisite to his parole from a state institution, constitute a valid legislative enactment.
2. **Insane Persons:** STERILIZATION. The sterilization of feeble-minded persons, within the meaning of chapter 163, Laws 1929, may be accomplished by the operation of vasectomy in the case of a male person.
3. ———: PAROLE: STERILIZATION. It is the duty of the examining board to diligently inquire into and to carefully review the status of each case of proposed sterilization to determine whether such individual shall be sterilized as a condition prerequisite to his release from a state institution for the feeble-minded.
4. ———: ———: ———: POLICE POWER. It is within the police power of the state, and is not in derogation of the rights of any person, under the Fourteenth Amendment of the federal Constitution, to enact a law providing for the sterilization of feeble-minded persons as a condition prerequisite to their release from a state institution.

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

McKillip & Barth, for appellant.

C. A. Sorensen, Attorney General, and *Homer L. Kyle, contra.*

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

DEAN, J.

Frank Clayton, an incompetent, is about 22 years of age, and since November 16, 1920, he has been an inmate of the Nebraska institution for the feeble-minded at Beatrice. This proceeding has been prosecuted in his behalf from a judgment of the district court for Gage county,

wherein an order of the board of examiners of defectives was affirmed, directing that Clayton be sterilized, pursuant to the provisions of chapter 163, Laws 1929, now sections 83-1501 to 83-1510, Comp. St. 1929, as a condition prerequisite to his parole from the above named institution. Section 1, ch. 163, above cited, follows:

"Hereafter no feeble-minded or insane inmate or habitual criminal, physically capable of bearing or begetting offspring, shall be paroled or discharged from the institution for the feeble-minded or the hospitals for the insane, nor paroled from the penitentiary, reformatory, industrial home, industrial schools or other such state institutions, except as hereinafter provided, or by order of a court of competent jurisdiction."

Counsel for Clayton argue that the act is in derogation of the rights granted by the Fourteenth Amendment of the federal Constitution, and they also contend that the act is in violation of section 9, art. I of the Bill of Rights of the Nebraska Constitution, wherein it is provided that no "cruel and unusual punishment" shall be inflicted on one convicted of a crime.

The trial court made this pointed observation in respect of the act in question and its applicability to the facts disclosed by the record, namely:

"The only part thereof that could or should be held constitutional would be the part relating to the sterilization of feeble-minded persons, such as the subject in this case, and the court interprets the operation of sterlization, as used in this act, to mean the use of that form of sterlization known as vasectomy in the case of a male person and the form of sterilization known as salpingectomy in the case of a female person."

From a report of the board of examiners, it appears that Clayton was born in April, 1909; that he has two brothers and two sisters, and that one sister and a brother are likewise inmates of the same institution for feeble-minded at Beatrice. The report also discloses that, while Clayton appears to be physically normal, his mentality is such that he is not capable of progressing beyond the third grade

in school, and that his "intelligence quotient," at the time of the hearing before the board, was only 40 per cent., as compared to the average 90 per cent. or 110 per cent. of a normal person. It also appears that, while Clayton has been employed at various occupations while confined at the institution, his mentality is that of a child of six or seven years and that he is rated as a high grade imbecile.

The evidence of the examining physicians is that Clayton's feeble-minded condition is congenital, and not acquired, and that his offspring, if any there should be, would inherit about the same degree of mentality that is discovered in him. And from their evidence it appears that Clayton has himself reached his greatest capacity of mentality, and that, since his is an established case of hereditary feeble-mindedness, his condition would be transmitted in the germ plasm of his body to his offspring. In the opinion of the examining physicians, who compose the personnel of the board, the sterilization of Clayton is unquestionably advisable.

The operation of vasectomy in a male consists of rendering the individual incapable of begetting offspring. But such an operation does not affect the health of the person upon whom the operation is performed nor does it destroy sexual desire. One physician testified that he had performed more than 50 such operations on both men and women and that no change in the health of the individual was noticeable therefrom. And this witness also points out that the operation herein discussed comes within the class of minor operations and that it can be performed in 10 or 15 minutes by an efficient surgeon. He also testified that the operation does not at all incapacitate the patient and that, should the individual so operated upon at any future time desire it, an operation can be performed resexing him and making him potent as before. But he added that the castration of an individual is a major operation that renders the subject without desire for sexual intercourse. And he testified that the castration of an individual might have a serious detrimental effect upon the patient.

From the record before us, we conclude that the operation under discussion, as applied to a feeble-minded person, does not come within the meaning of the constitutional inhibition against cruel and unusual punishment.

Inasmuch as a feeble-minded person may have become so afflicted by reason, perhaps, of some unfortunate accident, it then, under the act in question, becomes the duty of the examining board to diligently inquire into and carefully review the status of each case to determine whether the individual so examined has an acquired or a congenital or hereditary form of feeble-mindedness and whether such individual shall be sterilized as a condition prerequisite to his release from a state institution for the feeble-minded.

Buck v. Bell, 143 Va. 310, is a case wherein the court held that the sterilization act is not repugnant to the provisions of the state and federal Constitutions. The court there said:

"The act is not a penal statute. The purpose of the legislature was not to punish but to protect the class of socially inadequate citizens named therein from themselves, and to promote the welfare of society by mitigating race degeneracy and raising the average standard of intelligence of the people of the state."

The *Buck* case was affirmed by the supreme court of the United States and the rule was there announced that the failure to extend the provision of the act to persons outside the institutions named did not render the act obnoxious. *Buck v. Bell,* 274 U. S. 200. In Massachusetts, the court held that it was within the police power of the state, and not in derogation of the rights of any person, under the Fourteenth Amendment of the federal Constitution, to enact a compulsory vaccination law for the prevention of smallpox. *Jacobson v. Massachusetts,* 197 U. S. 11. And, in Washington, the court there held, in the case of one convicted of rape, that vasectomy was not cruel punishment and that the operation could be painlessly performed in a few minutes. *State v. Feilen,* 70 Wash. 65. See, also, *Smith v. Wayne Probate Judge,* 231 Mich. 409; *In re Salloum,* 236 Mich. 478; *State v. Schaffer,* 126 Kan. 607.

In respect of the police power as pertaining to the affairs of the public generally, Mr. Justice Post said:

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

The legislative act before us is in the interest of the public welfare in that its prime object is to prevent the procreation of mentally and physically abnormal human beings. We think it is within the police power of the state to provide for the sterilization of feeble-minded persons as a condition prerequisite to release from a state institution.

It is contended that the subject-matter of the act is not clearly expressed in the title. But, upon an examination of both the title and the act, we do not think the exception should be sustained. The judgment is right and it is therefore

AFFIRMED.

DAY, J., concurs in the result.

MARY SIMONSEN, APPELLEE, V. THEODORE M. THORIN ET AL., APPELLANTS.

FILED FEBRUARY 11, 1931. No. 27505.

1. **Highways:** OBSTRUCTING: CARE REQUIRED. When one engaged in the proper use of a highway causes an obstruction to be placed upon it in such a manner as to be dangerous to traffic, he must use ordinary care to prevent injury to others where he knows that such obstruction is calculated to do an injury to travelers upon said highway.
2. ———: ———: NEGLIGENCE. The negligence in such a case is, after having placed an obstruction in the highway, to leave it in such a manner as will be dangerous to others using the highway.
3. ———: ———: DUTY OF OBSTRUCTER. Whoever places an obstruction in a public highway, even by an involuntary act and without negligence, is under obligation to remove such a nuisance from the highway or is required to use ordinary care

to warn the traffic on said highway of the dangers incident to said obstruction.

4. **New Trial:** NEWLY DISCOVERED EVIDENCE. A new trial will not be granted on account of newly discovered evidence unless it is of such a nature that, if believed by the jury, it would probably change the result of the trial.

5. ———: ———. In such a case, a new trial will not be granted where the newly discovered evidence, if produced and believed by the jury, would not change the result of the trial, but would have no greater effect than to discredit the testimony of a witness as to a matter in no manner related to defendant's liability.

6. **Evidence** examined relative to physical injuries occasioned by the accident and to her present physical and mental condition, and found to sustain the verdict.

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

Kennedy, Holland, DeLacy & McLaughlin, for appellants.

George B. Boland and *J. C. Travis, contra.*

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

DAY, J.

Mary Simonsen brings this action to recover damages for personal injuries received while riding as a passenger in an automobile driven by her husband which collided with a trolley pole obstructing the street. The trolley pole had been broken and knocked into the street by a delivery truck, owned and used in the grocery business of Theodore M. Thorin and driven by his son Theodore. Hereinafter, for convenience, Mrs. Simonsen will be designated as plaintiff and the Thorins as defendants. The record presents three assignments of error, which will be discussed in the order of presentation.

The first question presented by this case is the duty and liability of one who involuntarily and without negligence obstructs a street. This case was tried upon the

theory that the collision of the defendants' car which broke the pole and caused it to fall into the street was not due to any negligence on the part of the defendants. It is also true that the pole was not broken off and placed in the street by the voluntary act of the defendants. Simplified, the exact question here presented is whether or not it was the duty of the driver to remove the barrier or to remain at the scene of the accident and warn travelers upon the street of the danger, to prevent them from running into the pole. And if it was his legal duty to do so, whether he in fact failed to discharge that obligation. The obstruction which was in the street was not the property of the defendants but that of the street railway company. The defendants contend that, since the pole was not their property and was knocked into the street without negligence and involuntarily, they were under no obligation to remove such a nuisance from the public highway or to warn approaching travelers of the danger. This position is untenable. It appears that the defendants, in the operation of their automobile on the public street, accidentally hit a trolley pole without negligence on their part. It is assumed that they did not voluntarily hit the pole and knock it into the street. However, the operation of their automobile was their voluntary act and in the course of such operation they did cause the obstruction to be placed in the street. They cannot be said to be in the position of a bystander who is under no legal obligation to remove or guard said pole. In such a case, the mere failure to remove obstructions placed in the highway by another does not render one liable for injuries caused thereby. *Lucas v. St. Louis & S. R. Co.*, 174 Mo. 270. But when one engaged in the lawful use of the highway causes an obstruction to be placed upon it in such a manner as to be dangerous to traffic, he must use ordinary care to prevent injury to others where he knows that said obstruction is calculated to do injury to travelers upon said highway. The negligence in such a case consists of having placed an obstruction upon the street,

and leaving it in such a manner as will be dangerous to others using the street. It is unlawful, reads our statute, to "cause to be left upon any public road or street * * * any * * * broken substance whatever, liable to injure any person * * * or vehicle." Comp. St. 1929, sec. 39-1025. Under the well-established rule in this state, a violation of this statute is evidence of negligence. The defendants in this case were bound to know that travelers were passing along said street at the time and that they were liable to be injured as a result of the obstruction. One cannot obstruct the street in such a manner and say: "I obstructed the street, but I thought some one would warn of the danger." They had a positive, continuing duty to the public traveling the street to warn of this danger. The situation in such a case is not unlike that of a private contractor who opens up an excavation in the street, which is a lawful act and done without negligence, but he is required to use ordinary care in preventing injury to others. Whoever places an obstruction in a public highway, even by an involuntary act and without negligence, is under an obligation to remove such a nuisance from the highway or is required to use ordinary care to warn the traffic on said highway of the dangers incident to said obstruction.

The next question presented in this case is whether the trial court erred in overruling a motion for a new trial on the ground of newly discovered evidence. A certain witness testified in this case relative to things which happened at the scene of the accident. The newly considered evidence consists of testimony by two boys who were also present at the time and contradict certain statements made by this witness at the trial. The statements which are contradicted relate to the activity of said witness between the time the obstruction was placed in the street and the time of the collision of the plaintiff's car with said obstruction. The evidence is undisputed that, at the time of the collision, this obstruction was in the street and no one was warning approaching travelers of

the danger of said obstruction. Even the newly discovered evidence corroborates this statement. The driver of the car which had caused the obstruction in the street was not present giving any warning, and neither was any one else. We fail to see the importance of evidence as to what took place in the meantime in the trial of this case. The witness in the case testified that for a time she was "flagging" cars in the street and the affidavit of one newly discovered witness states that he "saw no woman flagging cars in the street." The affidavit of the other proposed witness states that, after the first accident in which the pole was broken, he assisted the driver of the car in pushing the car down the street and around the corner, and that he came back and "flagged" traffic for a time, but that at the time of the second accident he had discontinued such activity and had gone over on the sidewalk. He states in his affidavit that, after he returned from removing the car, he did not see the witness in the case "flagging" cars, as she testified, and is "positive that Mrs. Sprague did not flag any cars after he came back." He further states in his affidavit that, at the time the plaintiff's car hit the obstruction, there was no one out in the street. In the state of the record, which shows without dispute that the driver of the car which broke the trolley pole and knocked it upon the street busied himself with removing his car and left the scene of his accident as soon as possible, accompanied by the two newly discovered witnesses, and that at the time of the plaintiff's accident he was neither on the scene warning travelers of the danger of collision with the obstruction, nor was anyone else, it appears that the newly discovered evidence does not go to the crux of the case. A new trial will not be granted unless the newly discovered evidence is of such a nature that it would probably change the result of the trial. *McDonald v. Brown,* 90 Neb. 676; *Keiser v. Decker,* 29 Neb. 92. The most that can be said in this case for the newly discovered evidence produced by the defendants is that it might discredit the testimony of a witness for the plaintiff as to a

statement which does not affect the liability of the defendants. A new trial will not be granted on the ground of newly discovered evidence when such evidence, if produced, can have no greater effect than to discredit a party as a witness. *Kenyon v. State,* 111 Neb. 175.

The last error urged is that the verdict is excessive. Doctor Reed, the attending physician, testified that plaintiff was struck on the posterior part of the head, causing a bump with small cuts upon her face, hands and scalp; that she had pains in her back and developed a nervous condition, with the result that she was sleepless and hysterical. Doctor Dishong, who treats nerve and mental disorders exclusively, testified similarly as to her nervous condition. He found it necessary to hospitalize her for three weeks; that she was still under his care almost a year after the accident and that her chances for a complete recovery are problematical. She was unable to testify at the trial of the case. There is no evidence in the record challenging this evidence of her physical condition. If she is malingering, as delicately insinuated by defendants, it cannot be discerned from the record. She was a well, normal woman before the accident. Members of the family also testified in corroboration of her physical condition. She is unable to attend to her household duties and spends several days a week in bed. Without further delineation of testimony, which would serve no useful purpose, suffice it to say that the evidence sustains the amount of the verdict, $5,000.

Since we find no reversible error in the record, the judgment of the trial court is

AFFIRMED.

JAMES ELBERT WILES, APPELLEE, V. DEPARTMENT OF PUBLIC WORKS, APPELLANT.

FILED FEBRUARY 11, 1931. No. 27548.

1. **Eminent Domain:** VALUATION. The compensation for land taken by right of eminent domain is measured by its market

value at the time taken, and no evidence is admissible of its peculiar value for special reasons to its owner.

2. ———: DAMAGES. The owner is not entitled to damages to the remainder of a large tract of land not taken under eminent domain, when damages to such land are of the same character as those suffered by all owners of land in that vicinity from the construction of a federal highway.

3. ———: ———. The evidence carefully examined, and it is found that the verdict is excessive. The judgment thereon will be reversed in the event the plaintiff fails to file a remittitur.

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

C. A. Sorensen, Attorney General, and *L. Ross Newkirk,* for appellant.

A. L. Tidd, contra.

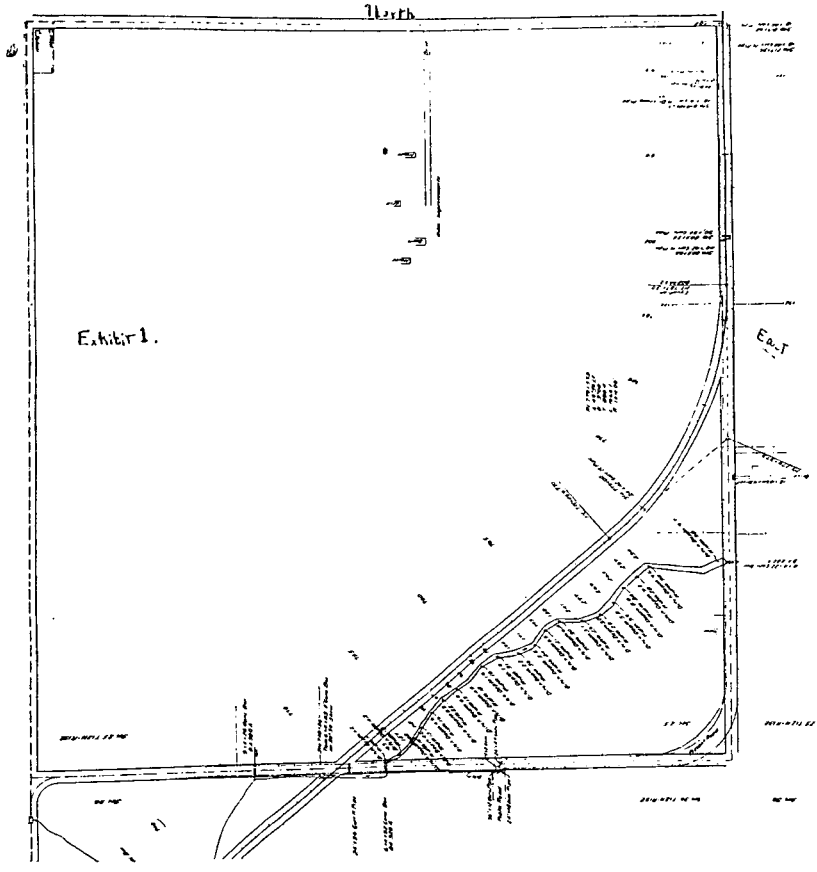
Heard before GOSS, C. J., ROSE, DEAN, GOOD, EBERLY, DAY and PAINE, JJ.

PAINE, J.

This is an appeal brought by the department of public works of the state of Nebraska, the defendant and appellant in this case, from a judgment of the district court for Cass county entered in favor of the plaintiff and appellee, James Elbert Wiles. Prior to paving a portion of federal highway No. 75, which is also called King of Trails highway, it was required by the government rules for road construction that, as a condition to the United States paying a portion of the cost of paving the road, two slightly rounded turns at the corners of the farm, the first of which turns is just two miles directly south of Plattsmouth, must be eliminated. Proceedings were had by the state of Nebraska, acting through its department of public works, to condemn a right of way through this farm, and Frank P. Sheldon, Orin A. Davis and C. R. Troop were appointed appraisers by the county judge and awarded $8,000 damages to the appellee. From this award appellant appealed to the district court for Cass county;

the appellee filed a petition asking $20,000 damages; and the jury returned a verdict in favor of the appellee for $9,000.

The only issue presented in this case is a question of fact as to the amount of damages suffered by the appellee by reason of the appropriation of this strip of ground across the southeast corner of his farm for a highway. The facts brought out at the trial show that the Wiles farm is approximately a square tract of land, nearly three-fourths of a mile on each side, from which the highway cuts off a tract of about 43 acres. This highway, where it crosses the farm, parallels in a general way for about three-fourths of its length a drainage ditch, which has for nearly 17 years run across the farm between the present location of the highway and the corner. The tract of land outside of the drainage ditch in the corner consists of 29.5 acres, having located thereon a tenant house, garage, sheds, and a good well. The tract of land lying between highway No. 75 and the drainage ditch, consisting of 12.1 acres, is the only acreage that could have been farmed jointly with the rest of the farm if the highway had not been constructed through the farm. The ditch is in places 9½ feet deep and from 13 to 36 feet in width, the area of the land in the ditch being 1.4 acres, and the area of the federal highway is a trifle over 5 acres, making a total of only 48 acres of land directly affected by the new road. The main improvements upon this farm are located about one-half mile north of the highway, and the drive from the buildings connects to the public road north of the farm, directly away from federal highway No. 75 across the farm. These facts are clearly set out in a large map drawn by the highway department and which was the only exhibit introduced in evidence, and a small reproduction of which accompanies this decision.



The appellee testified that this was the main highway connecting Omaha and Kansas City, and that a car passed on this highway on an average of every four minutes, and that he had purchased the 120 acres of land, which includes the 48 acres cut off by the highway, only two years before the time of trial; that the remainder of the farm he had owned for 17 years. The appellee supported his case by the evidence of seven men, as follows: T. H. Pollock, banker and stock raiser, owned seven farms within five miles, and testified that the Wiles farm is one of

the best in the state of Nebraska; that the value of the 385-acre tract was $250 an acre prior to the road going across it, and was worth $200 an acre after the road went across it. B. W. Livingston, who lived across the road east of the Wiles farm all of his life, testified that the value of the entire farm was decreased $40 to $50 an acre. He testified this was because of the perpetual damage during the lifetime of Mr. Wiles and his children's lifetime, and that he considered a paved highway much more damage to a farm than a railroad going across it. W. D. Wheeler, a former county official, who owned a 476-acre farm within four miles of the Wiles farm, testified that the highway going across this farm would make a difference in its value of $35 to $40 an acre. Frank P. Sheldon, who had been one of the appraisers, testified that he owned 1,000 acres of similar land, and that the value of the Wiles farm would be $225 to $250 an acre before the highway crossed it, and "I would say $40 or $50 an acre damage," and three other men living in the vicinity testified to practically the same facts—that the entire Wiles farm was worth from $30 to $50 an acre less after the highway crossed it.

The first of the expert witnesses called by the highway department was H. N. Thomas, federal loan examiner for the Lincoln Joint Stock Land Bank, who has during the past few years appraised such farm lands for loans of more than $2,000,000. The next witness, Vincent W. Straube, who owns over 2,000 acres of land in Cass and Otoe counties, has been appraising lands for the Nebraska Guaranty Fund Commission for 11 years, and had also appraised in bankruptcy proceedings and railroad tax cases. These well-qualified experts placed the value of the five acres of land taken by federal highway No. 75 at $1,011.68, a loss on the 12.1-acre strip between the road and the ditch at $1,200; the cost of the fences on both sides of the highway, $500; for permanent maintenance of the fence, $500; and each testified that the loss on the 340-acre tract, being the main body of the farm, and of

the 29.5-acre tract outside of the ditch was nothing; making the total damages $3,211.68. James M. Teegarden, of Weeping Water, acquainted with farm values in Cass county for 27 years, agreed in the main with the other appraisers after making three inspections, but allowed a diminution in value of $30 an acre for the land outside of the ditch, making the total damages in his opinion amount to $3,796.68. He was positive the loss of market value on the 340 acres north of highway No. 75 was nothing. Mr. H. N. Thomas testified that because of the ditch crossing the farm it had always been handled as two separate units.

How is it possible to reconcile such conflicting testimony? The testimony of the seven witnesses for the appellee followed the rule established in many cases in Nebraska. In *Beckman v. Lincoln & N. W. R. Co.*, 85 Neb. 228, Chief Justice Reese said: "From the adoption of our present Constitution in 1875 to the present time the uniform holding of this court has been that, in the exercise of the right of eminent domain by the condemnation of real estate for purposes of right of way, the landowner was entitled to the value of the land actually taken and the diminution in value of the land not taken as his damages." See *Omaha S. R. Co. v. Todd*, 39 Neb. 818; *Chicago, R. I. & P. R. Co. v. Buel*, 56 Neb. 205; *Fremont, E. & M. V. R. Co. v. Bates*, 40 Neb. 381; *Atchison & N. R. Co. v. Boerner*, 45 Neb. 453. Some of the early Nebraska cases are *Wagner v. Gage County*, 3 Neb. 237; *Chicago, K. & N. R. Co. v. Wiebe*, 25 Neb. 545; *Lowe v. City of Omaha*, 33 Neb. 587; *City of Omaha v. Howell Lumber Co.*, 30 Neb. 633, as cited in 2 Lewis, Eminent Domain, 1179.

And, in addition, if the owner has suffered any special damages, these must be considered. *Lowell v. Buffalo County*, 119 Neb. 776.

This court is mindful of the fact, called to its attention by appellee, that verdicts, though large, if within the estimate of some of the witnesses, should not be reversed

without just cause. *Kayser v. Chicago, B. & Q. R. Co.*, 88 Neb. 343; *Atchison & N. R. Co. v. Washburn*, 5 Neb. 117. Also, that no judgment should be reversed by reason of errors which do not affect the substantial rights of the adverse party. Comp. St. 1922, sec. 8657, Comp. St. 1929, sec. 20-853, and the many cases cited thereunder.

However, in the brief of the attorney general on behalf of the department of public works we find this language: "The department of public works for the state of Nebraska is charged with the privilege and responsibility of carrying out the great program of building a fine system of highways to meet the enormous demands of efficient and up-to-date transportation in this state. The department's duty, desire and intention is to build these roads at a cost that is fair and reasonable both from the standpoint of the people of this state and of the individual property owners particularly affected by these highways. The department would, therefore, be wholly remiss in fulfilling its duties and responsibilities if it did not oppose, with every lawful means at its command, every attempt on the part of any individual or group of individuals to cripple the carrying out of this public program by the imposition of unbearable financial burdens. The verdict of the jury in this case is more than an excessive and unconscionable decision as between individuals. It strikes at the vitals of a public convenience and necessity. Highway construction in this state would be almost paralyzed, in fact, utterly impossible from a financial standpoint, if the standards of compensation here sought to be imposed were allowed to prevail."

Is this court bound in every case by the rule laid down by Chief Justice Reese and cited above?

If a paved highway should cut off 40 acres across the corner of an entire section, is each of the 640 acres to be considered as diminished in value? If so, and this Wiles farm had included a section of land, this court would be faced in such a case with a verdict of $30,000 or more because of diminished value of the entire section. There

must be a limit to the size of the tract included. With this in view, we will examine the Nebraska cases.

1. 2. In *Beckman v. Lincoln & N. W. R. Co., supra,* Chief Justice Reese said that a Lancaster county farm of 148 acres was cut by a railroad, leaving 12 acres outside the right of way.

The decision in *Chicago, R. I. & P. R. Co. v. Buel, supra,* does not give the size of the tract of land, but an examination of the petition in the office of the clerk of this court shows it to have been for right of way across two 50-acre tracts in Lancaster county.

In the *Bates* case, *supra,* Judge Harrison states that the railroad goes through the southeast quarter of section 20, township 16, range 12, in Douglas county.

In the *Boerner* case, *supra,* Commissioner Irvine does not give the size of the tract. But in the first appearance of this case before this court, *Atchison & N. R. Co. v. Boerner,* 34 Neb. 240, it is shown to be four lots in the town of Rulo, and here Judge Norval reviews cases involving 120 acres of land (*Wilmes v. Minneapolis & N. W. R. Co.,* 29 Minn. 242); another 30 acres (*Sheldon v. Minneapolis & St. L. R. Co.,* 29 Minn. 318); and of two city lots (*Cummins v. Des Moines & St. L. R. Co.,* 63 Ia., 397).

In *Northeastern N. R. Co. v. Frazier,* 25 Neb. 42, Judge Maxwell shows that 120 acres was crossed by the railroad line, and states: "In other words, just compensation for real estate taken or damaged entitles the owner of several descriptions used as one farm * * * to compensation for injury to the whole, although the right of way extends across but one or two of the subdivisions."

In *Scace v. Wayne County,* 72 Neb. 162, Judge Letton states that the tract was 313 acres, adjoining the city of Wayne, and was an irregular tract, from which one-half mile of road established cut off some 80 acres and deprived the owner of the use of well, windmill and tank. The trial court erroneously limited the jury to determin-

ing only the value of the land taken for the road and the cost of fencing, and the case was reversed.

In no one of the Nebraska cases reviewed is the size of the tract as large as in the case at bar, i. e., 385 acres.

In the interesting case of *United States v. Honolulu Plantation Co.*, 122 Fed. 581, where the government condemned 561.2 acres out of a plantation of 8,000 acres upon which to establish the naval station at Pearl Harbor, the court held that evidence respecting the value and extent of improvements upon the remaining portion of the tract was inadmissible, and cites from the opinion of Judge Bronson in *In re Furman Street*, 17 Wend. (N. Y.) 649, 669, as follows:

"However much the necessity for disarranging the plans of any individual may be regretted, the great principle upon which public improvements are to be effected must be substantially the same in all cases. All classes and conditions of men hold their property subject to the paramount claims of the state; and when it is taken for public purposes, and the question of compensation is presented, the only proper inquiry is, what is its value? The question is not, what estimate does the owner place upon it, but what is its real worth, in the judgment of honest, competent, and disinterested men? * * * What price will it bring in the market? That is the proper inquiry in a proceeding of this kind. As between individuals, the owner may demand any price, however exorbitant, for his property; but when it is taken for public purposes he can only demand its real value."

The compensation for land taken by right of eminent domain is measured by its market value at the time taken, and no evidence is admissible of its peculiar value for special reasons to its owner. The owner is not entitled to damages to the remainder of a large tract of land not taken when the damages to such land are of the same character as those suffered by all owners of land in that vicinity.

3. The third contention of the attorney general is that where the "verdict is so grossly disproportionate to any reasonable limit of compensation warranted by the facts that it shocks the sense of justice and raises at once a strong presumption that it is based on prejudice or passion, rather than on sober judgment, the appellate court should not hesitate to set it aside or direct a remittitur, even though the trial court has refused to do so." 2 R. C. L. 199, sec. 170. See *Kurpgeweit v. Kirby*, 88 Neb. 72; *In re Estate of O'Connor*, 105 Neb. 88; *Trute v. Holden*, 118 Neb. 449; *Garfield v. Hodges & Baldwin*, 90 Neb. 122; *Tyler v. Hoover*, 92 Neb. 221; *Burge v. Adams Co.*, 98 Neb. 4.

Does the verdict in this case warrant the charge made?

An examination of the map introduced in this case discloses that this large farm of 385 acres is three-quarters of a mile on each side, and has been divided into two tracts by the irregular drainage ditch, which permanently cuts the farm in two parts. It is evident that the engineers intentionally ran the federal highway No. 75 parallel therewith to decrease the damages as far as possible. In the southeast corner we find the house, garage and well for the tenant or hired man, while the appellee's extensive farm buildings are in the north central part of the farm with a driveway running north to the public road, not to the paved federal highway. The chickens and live stock kept at these buildings are far distant from dangers from passing automobiles. Should the 43-acre tract cut off by the road be farmed to corn or small grain, the teams or tractor will have to cross the highway but a comparatively few times during the year. Credible evidence appears in the bill of exceptions that 340 acres of this farm is not damaged in any way by the highway. A fair analysis of this evidence does not support the appellee's contention that this fine paved highway is of no value whatever to the owner of this land, and is of greater damage to him than a railroad line would be with its danger from fire and other things.

In *Sternberger v. Sanitary District,* 100 Neb. 449, Judge Barnes in a similar case rejected the testimony to the effect that an entire tract of 310 acres was all damaged by a ditch being constructed across a tract of land, and said: "This testimony, as a whole, was entitled to little consideration. The record shows that the plaintiff's witnesses gave their evidence with such perfect agreement that it should be carefully scrutinized by the court, and was not entitled to adoption as the true measure of damages." The court in that case reduced a judgment for $1,585.15 to $500.

It should be noted that this action was initiated as a condemnation proceeding to appropriate land for the use of the state of Nebraska for a federal highway. No question of jurisdiction has been raised at any stage of the proceedings. We wish it understood that we are not deciding here whether or not the department of public works of the state of Nebraska, without specific authority from the legislature, may ordinarily sue or be sued by or in its own name as such department.

Without further discussion, we find that the evidence fails to sustain the damages of $9,000 returned by the jury, and this court finds that under the facts in this case the judgment should be reversed, and this will be done unless the plaintiff shall within 30 days remit the sum of $3,000, leaving a judgment for $6,000. The costs will be taxed to the appellee.

AFFIRMED ON CONDITION.

VINCENT YARDUM, EXECUTOR, APPELLEE, V. THOMAS H. EVANS, APPELLANT.

FILED FEBRUARY 20, 1931. No. 27489.

1. **Gifts.** Possession by an alleged donee of personal property of the alleged donor, after the death of the latter, raises no presumption of ownership in the alleged donee.
2. **Witnesses:** COMPETENCY. Section 20-1202, Comp. St. 1929, prohibits one claiming to be a donee of personal property given him by one who is now deceased from testifying to "any trans-

action or conversation" between the alleged donee and the deceased, unless the adverse party, representative of the deceased, shall have introduced a witness who shall have testified in regard to such transaction or conversation.

3. ———: ———. If the alleged donee plead that the deceased delivered the securities to him, then such donee is not permitted to testify to the date when such securities were delivered to him.

4. **Evidence**: GIFTS: DECLARATIONS. Evidence of the declaration of a claimant, while in the possession of securities and shortly before the decedent's death, that he claimed the securities as a gift and that they belonged to him, is admissible as in the nature of *res gestæ* to show the intent attending possession, but not to prove the origin of his title.

5. **Gifts.** To make a gift *causa mortis* there must be clearly and intelligently manifested by the donor an intention to make a present gift to the donee.

6. ———. If a gift be a good gift *causa mortis*, the donee takes title as of the moment of the gift, subject to defeasance while the donor lives.

7. **Appeal.** On appeal in equity cases, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying.

APPEAL from the district court for Madison county: CHARLES H. STEWART, JUDGE. *Affirmed.*

Webb Rice and *Forrest Lear*, for appellant.

Mapes, McDuffee & Mapes, contra.

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

GOSS, C. J.

This is a suit in equity brought by an executor claiming ownership and the right to the possession of personal property alleged to belong to the estate. The defendant appealed from a decree in favor of the executor.

The petition of the executor, filed September 3, 1928, alleges that Armenag B. Tashjean died testate on May 27, 1928, and plaintiff is the executor; that for more than two years prior to his death the testator was ill and infirm and during said period the defendant acted as his

agent and confidential adviser in the handling of securities and in selling real estate; that thereby the defendant secured possession of certain specifically described personal property, consisting of time certificates of deposit, government bonds and certificates and a real estate note and mortgage, all of a total face value of $29,500; that the testator suffered a severe stroke of paralysis on May 25, 1928, and from that time on was dying, and defendant claims that on May 26, 1928, the testator gave said property to defendant in contemplation of death. But plaintiff alleges that neither at the time defendant claims the property was given him nor at any other time was there any gift or any delivery of said property, that no indorsements were made by Tashjean on any of the securities, and that Tashjean was incompetent, by reason of his physical and mental condition, to give the property to defendant. Plaintiff alleges that he duly brought action in replevin to secure possession of the property, and the defendant refused to deliver it to the sheriff or to disclose where it was, though admitting its possession; and resisted a citation to go into court and submit to an examination as to its whereabouts; that the property is liquid and liable to be transferred out of the jurisdiction. Wherefore plaintiff prays for a decree that plaintiff, as executor, is the owner and entitled to the possession, that a receiver be appointed to take charge of the property until the ownership has been determined by the court, and that the defendant be enjoined from transferring, removing and secreting the property.

The parties stipulated in writing that the application for a receiver should be sustained. A receiver was appointed and evidently took over the property and holds it and the proceeds of some that was sold, subject to the ultimate disposition of the court.

By the amended answer of the defendant it is admitted that the defendant has possession of the securities described in the petition, but defendant avers that he is the owner thereof by gift from Armenag B. Tashjean during

his lifetime. It is admitted that the securities given defendant by Armenag B. Tashjean, who was popularly called Dr. Tashjean, do not bear his indorsement, and that defendant has no written assignment of them, but it is alleged that Dr. Tashjean intended to indorse them and offered to indorse them at the times of their respective deliveries, which times are set out, and would have done so had defendant then consented to accept said securities as a completed gift, and that they were not indorsed solely because of defendant's request to the donor not to indorse them at the time they were delivered, at which time defendant accepted them subject to the condition that Dr. Tashjean might need them for his own use before his death; that later, about the middle of May, 1928, Dr. Tashjean requested defendant to bring the treasury certificates for his indorsement, so that defendant could cash them and use the funds, and defendant then showed Dr. Tashjean that they would not begin to mature until August and suggested that they be not indorsed until then, and so they were not indorsed; that on May 26, 1928, after the stroke of paralysis on the preceding day, Dr. Tashjean called defendant to his bedside, told him he wanted him to keep for himself the securities theretofore given him, and also the money on his person when he was stricken, and avers that he was then physically unable to indorse the securities; and "that the gift of said securities to defendant was fully completed without indorsement, and that said gift was a gift *causa mortis*."

The reply consists of a general denial and of specific allegations that, on the several dates named in 1928, Dr. Tashjean was not possessed of sufficient mental capacity to transact the business alleged in the amended answer.

The decree of the district court finds that the evidence is insufficient to sustain defendant's claim of a gift of the property, that the alleged donor was mentally incompetent to make a gift *causa mortis* on May 26, 1928, and that plaintiff is entitled to the possession of the property. Judgment was entered, directing the receiver to turn over

to plaintiff the property remaining and the proceeds of any part sold.

In this case, as is usual in those of its type, there is not so much difficulty about the law as about the evidence. In an unusual sense each case is ruled by its own facts. Once the truth is discerned, it is not so hard to find the applicable rules of the law.

At the time of his death Armenag B. Tashjean was probably somewhat more than 70 years of age. An Armenian by birth, he had come to Norfolk about 40 years earlier and there had practiced his profession as a doctor until about two years before his death, when he suffered a stroke of paralysis. The evidence shows that for some years his power of locomotion was impaired so that he took very short steps, without lifting his feet, in order to preserve his balance when walking; that he did not have very good control of his bowels, and that his urinary tract was likewise affected. About the time he retired from business, he had sold his home, in which he also maintained his office, and, while in Norfolk, made his home chiefly at a hotel. For a few weeks in that period he had lived at the home of defendant, who testified he is an auditor, insurance and real estate man, who had sold the doctor's home for him and who had acted for the doctor in some of his transactions concerning his securities. By frugality the doctor had accumulated considerable personal property, and retired with approximately $100,000.

Vincent Yardum, the executor, lives in Scarsdale, a suburb of New York City. He is a lawyer with offices in the city. Mrs. Yardum, also born in Armenia, is a cousin of Dr. Tashjean. Her father was his mother's youngest brother. When Mrs. Yardum testified, she was 36 years old. She states that her own mother died when she was two weeks old and she was then adopted by the doctor's mother. She came to this country when she was 13. At first she lived a few years in California and then two years in Michigan, after which she lived in Nebraska. The doctor paid her bills from the time she first arrived

in this country. He sent her to Lincoln to college. After a few years she went to New York and was married to Vincent Yardum in 1917. They have three children, boys, ranging from ten years down to three. Several years before his death the doctor visited the Yardums in their home. At another time they visited him in Buffalo, where he had gone for rest and treatment in a private hospital. In November, 1927, they came to Norfolk and took him back to their New York home, where he remained until the last of February, 1928, when he returned to Norfolk and remained until the end. While at the Yardums he gave $40,000 to the family—$13,000 each to Mr. and Mrs. Yardum and $14,000 to the parents in trust for their three boys. Mrs. Yardum also testified that he gave her $500 just before leaving for Nebraska. On November 3, 1927, he made his last will and testament, which has been duly probated in Madison county, Nebraska, and is the authority on which the plaintiff acts as executor. This will was executed in Norfolk and was sent by Dr. Tashjean to Yardum. It devised and bequeathed all his remaining property to the Yardums and their three sons, share and share alike.

By reason of the state of the pleadings which we have shown, and by reason of the relationship between the parties, the defendant had the burden of showing the gift of the securities to him by Dr. Tashjean during the latter's lifetime. Had the defendant offered no evidence, judgment would have had to be for the plaintiff on the pleadings. Defendant had admitted in his amended answer that he was in possession of all the securities described in the petition, that they were unindorsed, that they were given him by Dr. Tashjean, and had alleged that the gift was fully completed without indorsement and was a gift *causa mortis*. The law casts the burden of proof upon the donee. Possession of the property by the alleged donor, after the death of the latter, raised no presumption of ownership in the alleged donee. 12 R. C. L. 971, sec. 44. So, on the defense, on direct examination,

separate suitable questions were propounded to the defendant, seeking to elicit from him as a witness the times when he came into possession of the several securities. To each such question objection was interposed, on behalf of the plaintiff, that the evidence was incompetent and that the defendant was an incompetent witness under the statute, the plaintiff being the representative of Dr. Tashjean, who is deceased. The objection was sustained to each question he asked and to stated offers of proof by the witness on the exact date when the particular security in question came into his possession. It is assigned that the court erred in excluding this line of testimony offered by the defendant and that section 8836, Comp. St. 1922, section 20-1202, Comp. St. 1929, does not inhibit testimony of the defendant as to proof of the dates when the securities came into his possession. This section inhibits defendant from testifying to "any transaction or conversation" between him and deceased, unless plaintiff shall have offered testimony of the deceased or of a witness in regard to "such transaction or conversation." No such evidence has been offered by the plaintiff, so the evidence was not admissible on the ground, permitted by the statute, that it had been opened up by plaintiff. Hence, if the proof of the dates when the securities came into his possession relates to a "transaction" with the deceased, it was inadmissible. It does not always follow that the date when one gets possession, or has possession, of property belonging to or coming from one who has since died relates to a transaction between such party and the deceased, but in view of the defendant's amended answer there can be no ground for debate there. The fourth paragraph of defendant's amended answer alleges that Dr. Tashjean "delivered" the securities to defendant at the Travelers hotel in Norfolk and then specifies the dates when particular securities were so given him by the deceased. If the deceased delivered the securities no one else did, and so an offer to prove their date of delivery

was an offer to prove a part of a transaction with the deceased.

Likewise, defendant asserts error on the part of the trial court in excluding certain testimony of Mr. Lear, one of his attorneys. The defendant and Neighbor, who was used as a witness for plaintiff, went to the office of Mr. Lear on Monday, May 28, 1928. Defendant had expressed an intention to consult the attorney about what he should do about the $39,000 of Dr. Tashjean's money, so Neighbor had testified, and that he went along with defendant. Defendant introduced Neighbor to Lear as one who "also has a claim to file against the estate for services." Mr. Lear advised them about the probate procedure, and then the testimony of Neighbor shows this question and answer: "Q. Anything said at that time about a gift? A. Nothing whatever." Mr. George Tannehill, also a witness for plaintiff, testified that he met defendant on the street a day or so after the death and asked him what the doctor "did with his money—who he give it to? And he said he didn't know." In this state of the evidence Mr. Lear, while on the stand on rebuttal for the defendant, was asked, but on objection was not allowed to tell, about a conversation alone with defendant at the office of the witness on Saturday afternoon, May 26, 1928, in which defendant had told the attorney that the doctor had given defendant securities approximating $30,000. It is claimed that this was proper rebuttal testimony and should not have been excluded. This tendered evidence of Mr. Lear was not express rebuttal in terms of the testimony of either Neighbor or Tannehill, because it did not relate to any specific conversation with the defendant to which they had testified. But in another sense it was proper rebuttal, for what it was worth, to repel the inference, to be derived from testimony on behalf of plaintiff, that the defendant had possession of the property without any claim thereto. The principle is stated as follows: "And in the case of an alleged gift *causa mortis*, a declaration of the donee, made while the donor is still

alive or on the day of the donor's death, as to the fact of the gift, is admissible both as a part of the *res gestæ* and to rebut the inference from other testimony that at a later day the donee made no mention of the gift." 12 R. C. L. 971, sec. 43. In the recent case of *Stevens v. People's Savings Bank,* 185 Ia. 619, a similar question was reviewed, and the judgment reversed because it was a law action tried, it is true, without the intervention of a jury, but with findings of the trial court based in part upon the absence of the excluded evidence. There the supreme court of Iowa held: "Evidence of declarations of claimant while in the possession of passbooks and before decedent's death that they belonged to her were admissible as in the nature of *res gestæ* to show the animus and intent attending possession, but not to prove the origin of her title." (171 N. W. 130.) In the present case the court first allowed an answer to be given but then struck it from the record, upon which, offers by the defendant were objected to and excluded on the grounds that the testimony was incompetent and improper rebuttal. We think the court should have allowed the attorney to testify that the defendant had informed him on that occasion that he claimed the property as a gift. This, however, is an equity case and is considered and reviewed *de novo.* We are not only authorized to consider evidence improperly excluded, where this clearly appears (4 C. J. 729, sec. 2653), and to give it that consideration to which it is entitled, but defendant, in his brief, suggests that such procedure be followed. We therefore shall consider this phase of the case as if the defendant's witness had testified that, on the occasion stated, the defendant told him that he claimed the property as a gift.

The main issue between the parties is whether the evidence is sufficient to sustain defendant's claim to a gift of the securities. It would unduly prolong this necessarily extended opinion to recite the testimony at great length. We can only abstract it and deduce our conclusions from it. While there is testimony here and there as to the

fact that the defendant got at different times and had at different times in his possession the different securities involved, yet the pivotal testimony must center about the last days of Dr. Tashjean, because it is then that the defendant alleges that the gift *causa mortis* was completed, when on May 26, 1928, the doctor, as defendant pleads, called defendant to his bedside and told defendant to keep the securities.

The plaintiff testified that all the personal property described in the petition was in his possession May 26, 1928, at 10 o'clock, but he was not allowed to testify as to the transaction or conversation or as to when or where the property came into his possession. George W. Woodward, proprietor of the Travelers hotel at Norfolk, from 1926 to 1928, where Dr. Tashjean lived at two different times in that period, testified for defendant that not long after the deceased came back from New York in March, 1928, the doctor made a trip to Sioux City, and on his return he handed some papers to defendant in the lobby of the hotel, told defendant they were defendant's and asked for a pen to "sign them over," but defendant said: "No; let that go for the time—just let that go." Witness supposes they were treasury certificates. (Witness was not a party to any conference but was about his duties.) He says the deceased and defendant counted the certificates out and he saw several that had $1,000 on them; that there were several of them and there was a mortgage of $6,000, but witness did not recall seeing any note. The doctor was stricken in front of the hotel on Friday, May 25, 1928, and witness helped him into the hotel, and later he was placed in bed and a trained nurse arrived about noon and cared for him until he died. About Saturday noon the patient indicated he wanted "Sam," and so the witness sent for "Tom," the defendant, to whom deceased had referred as "Sam," who came and remained about 30 minutes. There were no papers or money there. Deceased said, "Tom, I give everything to you to keep. Everything is yours," and "he motioned to his clothes and his money

—he had in his clothes * * * but I had advised Tom to take the money out" the morning the doctor was taken sick. The securities in question were not there.

Mrs. Woodward, wife of the proprietor of the hotel, on behalf of defendant, testified on direct examination substantially as her husband did in respect of the securities and mortgage handed over by the doctor to the defendant on the doctor's return from Sioux City early in March, 1928. When the doctor asked for a pen to indorse the papers, she says: "Mr. Evans said not to be so hasty; just to wait awhile." She testified also to a transaction about April 4, 1928, between the doctor and the defendant when the former gave the latter some papers, one probably a certificate of deposit and another probably a liberty bond, and said, "These are yours Tom," and he said, "No; I'll put them away for you." He said, "No, Tom; they're yours." "That's all I heard." On cross-examination she finally testified as to the papers turned over in March, 1928; that Mr. Evans said, "I won't take them now, Doc;" and as to the papers turned over about April 4, 1928, Mr. Evans said, "Well, doctor, I'll keep these for you. Q. I'll take care of them for you? A. Yes; or words to that effect."

Dorothy Woodward, the daughter of the proprietor, testified that she was present on the March, 1928, occasion; that she saw some papers, but did not know what they were, handed by the doctor to Mr. Evans, and "he told him he would keep them for him."

Dr. Nelson, whose specialty is treatment of the eye, ear, nose and throat, was first called about 10:30 the morning of May 25, 1928, when the doctor was stricken. A nurse was called while he was there. Witness afterwards called Dr. Barry, the general physician, to attend the case, but he himself dropped in three times a day. He saw him about 8:30 Saturday morning, when the patient stated that he was not going to get well. He saw him again about noon on Saturday and again about 3 o'clock on Saturday afternoon, and in his opinion the patient was con-

scious at both times. He had known him about eleven years. He had had a hemorrhage of the brain a few years before his death, and his final illness was caused by a like hemorrhage a little before noon May 25, 1928, causing incoherence of speech, dizziness, vomiting, and involuntary bowel movement. He also had bladder irritation and had to be catheterized. He doubtless had another hemorrhage, which later caused his death. Just before noon—probably between 11 and 12 o'clock—May 28, the patient would answer by shaking his head and nodding his head when a suggestion was made to him, but the witness does not recall anything that the patient said.

F. J. Tierney, janitor at the hotel, testified that he saw the doctor a few minutes after his stroke on the morning of May 25 and saw him several times a day thereafter until his death; that at no time did the doctor converse with any one, except when direct questions were asked him, and he would answer in the affirmative by using one grunt and in the negative by using two grunts.

C. C. Neighbor, a barber, who had known the doctor about seven years and had done barber work for him, had given him baths and had massaged him and assisted in giving him enemas, for several months prior to May, 1928, first saw the doctor about 2 o'clock the day he was stricken. The witness was there half or three-fourths of an hour at that time, and the doctor did not recognize him nor talk to him or any one else then, nor at any other time when he was present, though he was there often and stayed all night with the patient from 8 o'clock Saturday night until 10 o'clock Sunday forenoon. On the Monday after the doctor's death, says Neighbor, the defendant came to Neighbor's house and said, "I have close to $39,000 of Dr. Tashjean's money. I don't know what to do with it. I don't want those people to come back and just grab this money and get back to New York with it. I am going to see an attorney;" that they went to Mr. Lear's office and Evans introduced the witness, saying, "Mr. Neighbor also has a claim to file against the estate

for services;" that the attorney advised as to the procedure to probate a will and as to the filing of claims, and that nothing whatever was said about a gift; that at Neighbor's home on the same day the defendant said, "Where I made a damned fool of myself was where I didn't have doctor indorse the liberty bonds;" that on that occasion, as he left the witness, the defendant said, "I'm going to try to make a settlement with Mrs. Yardum for $20,000 and I'll split fifty-fifty with you;" that later, in June, in defendant's office, defendant asked Neighbor if he "would consider a proposition just to stay out of this altogether," and "I said, no; if it ever come to trial I would tell what happened; and he guaranteed me he wouldn't go to trial—he didn't want no publicity." It appeared from the cross-examination of this witness that he had filed a claim for $5,000 for personal services to the deceased in 1921, 1922, 1926, 1927, and 1928, and had never had a hearing on the claim, but that Mr. and Mrs. Yardum had told him shortly after the funeral that "they felt indebted to me $5,000 for the services I had rendered Dr. Tashjean."

The defendant testified in rebuttal that he never stated to Neighbor, in substance or in effect, that he had $39,000 of Dr. Tashjean's securities or money, that he was going to hold them and make the relatives give him $20,000 in settlement, and that he would give Neighbor half of it.

Dr. Barry, a physician and surgeon who had practiced in Norfolk and knew Dr. Tashjean since 1919, was called to attend the patient on May 25, 1928, and saw him first about noon; the patient was "muttering considerably, not an audible, understandable speech," and the doctor did not understand his responses to any questions; saw him about noon the next day and again in the evening; he had by noon developed a decided paralysis of his right arm and leg, and it was the doctor's impression that he was not conscious; his condition was the same in the evening and when the doctor saw him again Sunday noon when he died; that from the time of his first call to the

time of death the witness said the patient did not say anything the witness could understand, and the witness is of the opinion the patient was not of sound mind at noon of May 26, 1928, that he was not capable of knowing or realizing the nature and extent of his property or the disposition he might want to make of it.

Cleo Boltz, a trained nurse, cared for the patient from the time she was called, between 12 and 1 o'clock Friday, May 25, until his death, which she fixes at about 1:20 p. m. May 27. When she first arrived, she testifies, he was dressed and in a lying position in his bed in the Travelers hotel. She undressed him and cared for him continuously; he did not at any time talk so she could understand him, but Mr. Woodward thought, upon asking the patient if he wanted "Sam," that he wanted the defendant, and so the defendant was sent for. This was about noon on Saturday. About ten minutes after Mr. Evans came in, the nurse and Mr. Woodward left the room and took lunch together, and Mr. Evans stayed in the room with the patient while she went to lunch.

Dr. G. Alexander Young, of Omaha, an expert in nervous and mental diseases, in answer to a hypothetical question put to him on the stand, was of the opinion that Dr. Tashjean was of unsound mind from the time of his being taken suddenly ill to the time of his death, and that he was incapable of carrying on intelligently any business transactions.

Dr. J. M. Mayhew, of Lincoln, specialist in diagnosis, in internal medicine, and of mental diseases, likewise was of the opinion that Dr. Tashjean was of unsound mind from the time he had the cerebral hemorrhage on Friday; but on cross-examination, in answer to a hypothetical question, indicating that on Friday and Saturday the patient recognized and conversed with people, and that he had a second hemorrhage on Saturday evening or Sunday morning, which caused his death, stated that those facts would change his opinion as to the doctor's mental condition on Saturday noon. But assuming, after the first

stroke on Friday, the doctor did not talk but muttered, he expressed the opinion there was a hemorrhage in the first instance, and that he was not of sound mind on Saturday, the 26th of May.

It should be said, also, that there was testimony on behalf of defendant by the Woodwards and by Mrs. Hall to the effect that, after Dr. Tashjean's return from New York about the first of March, 1928, he had on different occasions expressed himself as not intending to give to the Yardums any more property than he had already given them, that he intended to leave the rest to his friends, meaning friends at Norfolk, where he had lived so long; and that he had expressed appreciation of the kindness of the defendant and wife toward him.

It is perfectly clear from the evidence that, on Saturday, the 26th day of May, 1928, when the defendant alleges in his pleading that the gift *causa mortis* was "fully completed," the defendant had possession of the securities involved and that such possession continued until after the death of Dr. Tashjean. The pivotal issue of fact is whether Dr. Tashjean by word or act then turned over to him the right to possess them as his own, so that after the death of the doctor the defendant had not only their possession but had the title as well. More accurately speaking, if the gift was a good gift *causa mortis,* the defendant took title as of the moment of the gift, subject to defeasance while the donor lived. 28 C. J. 697, sec. 118.

"To make a gift *causa mortis,* there must be clearly and intelligently manifested an intention to make a present gift to another." 12 R. C. L. 957, sec. 33; 28 C. J. 687, sec. 99; and cases cited. A gift *causa mortis* partakes of the nature of a legacy. "In its essential properties, it is testamentary." 28 C. J. 684, sec. 92. To make a gift *causa mortis* effective after the death of the alleged donor, it must appear that the donor was competent to make the gift, that he intended to make it, and that he clearly and intelligently manifested that intention.

Weighed by these rules, we do not find much difficulty in deciding the facts. It seems to us no unprejudiced and disinterested person can peruse the evidence shown in the bill of exceptions without coming to the conclusion that it fails to show clearly an intent on the part of Dr. Tashjean to express a gift of the personal property to the defendant at the time stated. In our opinion the evidence shows that from the time he was stricken on May 25 until he died on May 27, 1928, the deceased was not competent to make the gift, however much he might have desired it had he then been in the possession of sufficient mental faculties, and however worthy the defendant may have been of such a gift. If it could be said or thought that the evidence shows a decided or irreconcilable conflict and that in this court we should arrive at an independent conclusion without reference to the findings of the district court, we may consider the fact that the trial court observed the witnesses and their manner of testifying. *Johnson v. Erickson,* 110 Neb. 511; *Greusel v. Payne,* 107 Neb. 84; *Shafer v. Beatrice State Bank,* 99 Neb. 317; *Magill v. Magill,* 114 Neb. 636; *McDonald v. McDonald,* 115 Neb. 708.

For the reasons stated, we are of the opinion that the findings of the trial court were correct and that the decree was right. The judgment of the district court is therefore

AFFIRMED.

EDWIN E. ELLIOTT, APPELLANT, V. CALAMUS IRRIGATION DISTRICT, APPELLEE: ALEX W. DRAVER ET AL., INTERVENERS, APPELLEES.

FILED FEBRUARY 20, 1931. No. 27416.

1. **Waters:** IRRIGATION DISTRICTS: STATUTORY PROVISIONS. The statutes governing the organization and the management of irrigation districts are mandatory and are to be strictly construed.
2. ———: ———: POWERS OF OFFICERS. An irrigation district is a public corporation and the powers of its officers and di-

rectors are limited by the terms of the statute under which the district was created.

3. ———: ———: WARRANTS: VALIDITY. When the officers of an irrigation district issue warrants prior to a levy therefor at a time when no fund exists against which a levy may be made, such warrants are void.

4. ———: ———: ———: ———. In the absence of a levy by the officers of an irrigation district, such officers are without statutory authority to issue warrants for any amount.

5. ———: ———: OFFICERS. The officers of an irrigation district are charged with notice of the statutory powers conferred upon them by the legislature and they are likewise charged with notice of the limitations of such officers by the provisions of the statutes relating thereto.

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

Frank H. Woodland, for appellant.

Guy Laverty, E. M. White and *Davis & Vogeltanz, contra.*

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

DEAN, J.

This action was begun in the district court for Loup county by Edwin E. Elliott, plaintiff, wherein the Calamus Irrigation District, hereinafter called the district, is named as defendant. The action was brought to recover $3,000 from the district, together with interest thereon at the rate of 7 per cent. per annum. The warrants were sold by the district to the C. E. Johnson Bond Company of Omaha, from whom they were purchased by plaintiff. Certain resident property owners intervened in behalf of the district and contested Elliott's right of recovery on any of the warrants by reason of the fact that such warrants were issued before an assessment or levy had been made by the officers of the district therefor. Upon submission, the trial court found for the interveners and against the plaintiff and denied his right to recover any

part of the alleged indebtedness from the district. The plaintiff has appealed.

The question of the legality of the proceedings leading up to the organization of the district was before us in a former action in quo warranto, wherein the judgment of the district court was affirmed by us without a written opinion. It was there held, *inter alia,* that the district was not legally organized, and its officers were thereupon ousted and the district, as an entity, was dissolved.

The interveners contend that the acts of the directors and officers of the district are their individual acts and not the authorized acts of the district. And they further contend that the directors were without authority to issue the warrants in suit, for the reason, as noted above, that the warrants were issued before an assessment or levy had been made therefor, and that the warrants, under the facts, are void and wholly worthless.

The following sections of the statute appear to be in point: Section 46-121, Comp. St. 1929, follows:

"No irrigation district shall in any year issue warrants in excess of ninety per cent. of the levy for said year: *Provided,* in case of due and outstanding obligations against the district contracted prior to the year in which any levy is made, the district board shall have power to make an additional levy, not to exceed two mills on the dollar, assessed valuation, to create a special fund for the payment of past-due obligations."

And section 46-126, Comp. St. 1929, provides:

"Whenever there is no cash on hand in the district treasury for the payment of general fund warrants when presented, the board of directors may in their discretion issue from time to time general fund warrants in denominations not greater than one thousand dollars to the aggregate amount required, but in no case in an amount greater than ninety per cent. of the general fund levy for the current year, such warrants to be drawn on the general fund levy for the current year and payable to the irrigation district and sell or discount the same to the

best advantage possible, but not at a discount to exceed five per cent., and deposit the proceeds of such sale in some local bank in the name of the district."

The former secretary of the district testified that warrants in the sum of $10,000 were issued at the same time those in question here were issued and that they were sold to the Johnson Bond Company for $9,000, and the money derived from the sale was deposited in an Omaha bank. This witness testified that, during the period in question here, he acted as secretary, but that he afterward resigned. From his evidence it appears that there was no money in the district treasury when the warrants were issued, nor at any time prior thereto, and that the proceeds of the sale of the warrants were at no time turned over to the treasurer. And he also testified that no levy was made at any time prior to the issuance of the above $10,000 warrants. The county clerk testified that there was no record of a levy having been made by the officers of the district for the time in question.

Plaintiff contends that the warrants were issued prior to the making of a levy therefor for the purpose of paying the expenses of the organization of the district. But provision is made for this purpose in section 46-127, Comp. St. 1929, in the following language:

"The board may either fix rates of tolls and charges, and collect the same from all persons using said canal for irrigation or other purposes, or may provide for the payment of said expenditures by a levy of assessments therefor, or by both said tolls and assessments."

The above cited statutes clearly provide that, before any warrants may be issued by the board, a levy must have been made therefor. But in the present case warrants in the sum of $10,000 were issued before any levy was made.

The statutes governing the organization and management of an irrigation district are mandatory and this, of course, is clearly to protect the owners of lands that are subject to irrigation in the district. It follows that the

mandate in such case must be strictly construed. An irrigation district is a public corporation and the powers of its officers and directors are strictly limited by the statute under which the district is organized and created. *Lincoln & Dawson County Irrigation District v. McNeal,* 60 Neb. 613; *Board of Directors of Alfalfa Irrigation District v. Collins,* 46 Neb. 411. During all of the time material to this inquiry, the plaintiff and the officers of the district, as well, were charged with notice of the statutory powers and limitations of such officers by the provisions of the statutes relating thereto. *Paxton Irrigation District v. Conway,* 94 Neb. 205. And, in the absence of a levy therefor, the directors of an irrigation district board are without statutory authority to issue warrants in any amount. That the warrants were not lawfully issued on the general fund for the year in question is evident. And this from the fact that it does not appear from the record that a fund existed upon which such a levy might have been made. It is such a condition that the statute guards against.

We have held that warrants issued by a county in excess of a levy therefor are void. *Grand Island & W. C. R. Co. v. Dawes County,* 62 Neb. 44; *Bacon v. Dawes County,* 66 Neb. 191; *National Life Ins. Co. v. Dawes County,* 67 Neb. 40. And, in the absence of a levy in the present case, the same rule prevails herein. *Draver v. Greenshields & Everest Co.,* 29 Fed. (2d) 552, is cited, but we do not think that the decision therein is decisive of the present case.

The judgment is right and it is

AFFIRMED.

JAMES CAMERON, APPELLANT, V. CALAMUS IRRIGATION DISTRICT, APPELLEE: ALEX W. DRAVER ET AL., INTERVENERS, APPELLEES.

FILED FEBRUARY 20, 1931. No. 27417.

For syllabus, see *Elliott v. Calamus Irrigation District, ante,* p. 714, decided herewith.

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

Frank H. Woodland, for appellant.

Guy Laverty, E. M. White and *Davis & Vogeltanz, contra.*

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

DEAN, J.

The question here presented for determination is decided in *Elliott v. Calamus Irrigation District, ante,* p. 714. By stipulation of the parties the three actions, namely, *Elliott v. Calamus Irrigation District, Cameron v. Calamus Irrigation District,* and *Stroud v. Calamus Irrigation District,* were combined and tried as one case. Our decision in the *Elliott* case therefore controls in the present case. It follows that the judgment herein must be and it hereby is

AFFIRMED.

THOMAS F. STROUD, APPELLANT, V. CALAMUS IRRIGATION DISTRICT, APPELLEE: ALEX W. DRAVER ET AL., INTERVENERS, APPELLEES.

FILED FEBRUARY 20, 1931. No. 27418.

For syllabus, see *Elliott v. Calamus Irrigation District, ante,* p. 714, decided herewith.

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

Frank H. Woodland, for appellant.

Guy Laverty, E. M. White and *Davis & Vogeltanz, contra.*

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

DEAN, J.

The question presented here for determination is decided in *Elliott v. Calamus Irrigation District, ante,* p. 714. By stipulation of the parties the three actions, namely, *Elliott v. Calamus Irrigation District, Cameron v. Calamus Irrigation District,* and *Stroud v. Calamus Irrigation District,* were combined and tried as one case. Our decision in the Elliott case therefore controls in the present case. It follows that the judgment herein must be and it hereby is

AFFIRMED.

JAMES M. O'REILLY, APPELLEE, V. HAZEL M. O'REILLY, APPELLANT.

FILED FEBRUARY 20, 1931. No. 27518.

1. **Marriage:** ANNULMENT: DURESS. Record examined, and *held,* evidence insufficient to support a finding that the marriage contract was induced by duress.
2. **Statutory Provision.** No decree for annulment of a marriage can be lawfully entered unless the allegations of the petition for annulment are supported by satisfactory evidence other than the admissions of the parties.

APPEAL from the district court for Douglas county: HERBERT RHOADES, JUDGE. *Reversed and dismissed.*

Lee & Bremers, for appellant.

North & O'Reilly, contra.

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

GOOD, J.

Plaintiff brought this action for the annulment of his marriage, alleging that it was procured by duress and

fraud. Defendant answered, denying duress and fraud, and by cross-petition prayed for a divorce on the ground of nonsupport and cruelty. The trial court found for plaintiff, and entered a decree annulling the marriage and denying any relief to defendant upon her cross-petition. Defendant has appealed.

Plaintiff and defendant were each residents of Douglas county. The marriage ceremony was performed at Glenwood, Iowa, on the 19th day of December, 1929, in the presence of defendant's parents and the officiating minister, after which the parties to this action and defendant's parents returned together to Omaha. Plaintiff left the home of defendant's parents the same evening and did not return, and on the 3d of January following brought this action.

The evidence shows that for a period of about four years plaintiff and defendant had "kept company" with each other, and for a period of three years prior to the marriage they had, from time to time, sustained illicit sexual relations. At the time of the marriage plaintiff was pregnant. On the evening before the marriage ceremony defendant and her mother called upon the plaintiff and asked him to come to their home for a conference. He assented and went in his own car to the home of defendant's parents, where there was a conversation lasting from 20 to 30 minutes, at which time it was agreed that the plaintiff and defendant should be married, but the time was not definitely fixed. Defendant's father was employed in some capacity where it was necessary for him to have a substitute, should he be away, and they arranged to go to Glenwood as soon as the father could procure a substitute in his place. On the following morning plaintiff was called by telephone and informed that a substitute had been obtained, and was asked if he could go on that day to Glenwood, he responding in the affirmative. He went in his car to the home of defendant's parents, placed his car in their garage, and plaintiff and defendant, with defendant's parents, went together to Glenwood,

where the ceremony was performed. Plaintiff testified that on the evening previous, while at the home of defendant's parents, he was threatened by defendant's mother, that unless he married defendant she would cause him to be sent to the penitentiary. This is denied by defendant, and her father and mother testified that no threats of any kind or character were made. Plaintiff testified that, when confronted with the proposition of entering into the marriage, he remarked that he did not know whether the unborn child was his, and he admitted that the mother said to him that if he was not the father she did not want him to marry her daughter. He responded, in effect, that he was responsible for her condition.

Two points are relied upon for the annulment of the marriage: First, duress; second, fraud.

Pursuant to the provisions of section 20-1925, Comp. St. 1929, this court is required to try equity cases *de novo*, and to reach independent findings of fact and conclusions without reference to the findings made by the trial court.

The burden was upon plaintiff to establish duress by a preponderance of the evidence. The only one testifying to any duress or threats was the plaintiff. The defendant and her father and mother, all present at the time, each testified that no threats of any character were made. It is significant that, after plaintiff left the home of defendant and her parents on the evening before the marriage, he had an opportunity to consult with friends or with an attorney, had he so desired, and that, when he was called by telephone the next morning, without any objection he responded that he was ready and willing to go to Glenwood for the purpose of having the marriage ceremony performed. He further admitted that, after he arrived at defendant's home on the morning of the ceremony, during the drive to Glenwood, while there, and on their return, no angry conversation or threats or anything of an unpleasant nature occurred. Under this state of

the record, we feel constrained to hold that the charge of duress is not sustained.

The fraud relied upon by plaintiff for an annulment of the marriage is that defendant was pregnant by another than himself; that this fact was concealed from him, and that he was led to believe that he was the cause of defendant's pregnancy. The record shows without dispute that for three years previous to the marriage plaintiff and defendant had sustained illicit sexual relations at frequent intervals, and that she was pregnant at the time of the marriage ceremony. The defendant testified that she had never sustained sexual relations with any other person than her husband. The only evidence in the record tending to controvert her testimony is the testimony of one, Mrs. Kelly, who testified that in a conversation with the defendant the latter said to her that she did not really think plaintiff was the father of her unborn child. There is no competent evidence that defendant ever had sexual intercourse with any other person than plaintiff.

Section 42-335, Comp. St. 1929, provides: "No decree of divorce and of the nullity of a marriage shall be made solely on the declarations, confessions, or admissions of the parties, but the court shall, in all cases, require other satisfactory evidence of the facts alleged in the petition for that purpose." Defendant denied that she ever had such conversation with the witness Kelly, but, even had this conversation occurred and had she made such admission, under the provisions of the statute above quoted, such evidence was insufficient to entitle plaintiff to the annulment of the marriage contract.

It follows that the judgment of the district court is not sustained by the evidence. Defendant is awarded the sum of $150 as an attorney's fee, to be taxed as costs.

The judgment is reversed and the action dismissed.

REVERSED AND DISMISSED.

NORTHERN NEBRASKA POWER COMPANY, APPELLANT, V. HOLT COUNTY, APPELLEE.

FILED FEBRUARY 20, 1931. No. 27543.

1. **Taxation:** FRANCHISE TAX: ELECTRIC CORPORATIONS. A corporation which owns and operates a hydroelectric power plant, selling electric energy at its generator, is subject to a franchise tax under the provisions of section 77-801, Comp. St. 1929. It is conclusively comprehended in said statute as a corporation "engaged in * * * electric lights, * * * and all other like companies."
2. ———: FRANCHISE: APPROPRIATION OF WATER. The right to appropriate the public waters of the streams of the state for the beneficial purpose of generating electric energy is a franchise.
3. ———: ———: EMINENT DOMAIN. The right of eminent domain which is conferred upon this class of corporations is a special privilege conferred by the state and is a valuable franchise right.
4. ———: ———. The right given to public utility companies by statute to erect poles and wires along the highways of the state is a valuable franchise right.
5. ———: ———: EXERCISE OF RIGHTS. The present exercise of existing franchise rights is not essential to subject said franchise to taxation.
6. ———: ASSESSMENT: NOTICE. Where a taxpayer has made no return for assessment purposes and an original assessment is made by an assessing board, which meets at the time and place fixed by statute, personal notice to the taxpayer is not necessary.

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

J. A. Donohoe, for appellant.

C. A. Sorensen, Attorney General, L. Ross Newkirk and *Julius D. Cronin, contra.*

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

DAY, J.

The Northern Nebraska Power Company brought this action to recover the amount of a tax paid under protest

to Holt county by reason of a franchise tax levied against it. The tax in question was levied by virtue of a certificate transmitted to the county assessor by the state tax commissioner. This certified that the franchise value of the Northern Nebraska Power Company for 1929 for Holt county was $20,000. The state tax commissioner purported to act under section 77-801, Comp. St. 1929. Holt county filed a demurrer to the petition of the plaintiff, which was sustained by the trial court. The plaintiff elected to stand on its petition and the cause was dismissed by the court.

The power company contends that the assessment attempted to be made was unlawful and void for the reason that it was not subject to a franchise tax under the provisions of the law, since it was engaged only in the business of manufacturing and selling electric energy at its generator. Section 77-801, Comp. St. 1929, under the provisions of which this tax was levied, in so far as pertinent to a decision of this case, is as follows:

"Each and every person, association, copartnership, joint stock company or corporation, organized under the laws of this state or any other state or government engaged in street railways, waterworks, *electric lights,* gas works, natural gas, mining, express, telegraph, telephone business in the state of Nebraska, *and all other like companies and like associations* (italics ours), or owning or operating a pipe line in the state of Nebraska, whether such line is used for * * * lighting, heating, power or other purpose, or for the transmission of articles by pneumatic or other power, shall, in addition to listing the tangible property owned in each governmental subdivision by such person, association, copartnership, joint stock company or corporation, and being taxed thereon in like manner as other tangible property is taxed in the governmental subdivision, shall furnish to the local assessor and to the tax commissioner a sworn statement of the amount of the capital stock, setting forth particularly:"

The first and most serious question to be determined in this case is whether or not the plaintiff is one of the class of corporations subject to the franchise tax provided by the foregoing statute. The petition alleges and the demurrer admits that the plaintiff owns and operates a hydroelectric power plant on the Niobrara river at a place between Holt and Boyd counties; that the sole business of the plaintiff is that of manufacturing and selling electric energy at its generator.

The plaintiff corporation is one of the corporations enumerated in section 77-801, Comp. St. 1929. It is a corporation engaged in "electric lights," and is conclusively comprehended in said statute by the language in the modifying clause, "and all other like companies." It requires no stretch of the imagination to reach this conclusion. The power company contends that the electric energy may be, and is, used for other purposes besides light, and that it might be used entirely for power. The plaintiff is engaged in the generation of electric energy and it may be used for light or power, and the electric energy used for power is like that used for light. The generating plant is comprehended and included in the term electric light works. 20 C. J. 302. If all the plaintiff's electric energy were used for power, which it is not, it would still be a corporation like one engaged in electric lights.

From the statute alone, it is obvious that the intention of the legislature was to tax the franchise "to do" or the right to engage in electric light or a like business. It was not the intention to tax the franchise "to be" or the right of corporate existence. This is sufficient answer to the plaintiff's contention that it had already made a return of all its taxable property, when it is admitted that no return was made under this statute. This distinction is clearly and ably drawn by Letton, J., in an opinion construing this statute at a time before it had been amended to include certain franchises now included, but as applicable now as then. *Western Union Telegraph Co. v. City of Omaha,* 73 Neb. 527. This statute provides for a tax

imposed upon the franchise which public utility and public service corporations have been granted. The plaintiff has the right to purchase, own and operate electric plants capable of generating and transmitting electric current for sale. Its power to acquire a right of way for its works and to erect poles and wires along the state lands and public highways of the state, as provided by section 86-303, Comp. St. 1929, is a franchise. But it is argued that the energy is sold at the generator without being transmitted. We submit that the right is still a valuable one, and if it serves no other useful purpose it enables them to more advantageously sell their electric energy than if compelled to sell it to one who could or would come to their plant for it. In *Western Union Telegraph Co. v. City of Omaha, supra,* it was held that the term "franchise" is a generic term and includes all rights and privileges granted to or exercised by an individual or corporation engaged in public service. To the same effect is the holding in *Nebraska Telephone Co. v. City of Lincoln,* 82 Neb. 59. It seems that the exercise of franchise rights is not essential to render the franchise subject to taxation.

Furthermore, this is a hydroelectric plant, using the public waters of the state in the generation of electric energy. If at present it is not engaged in the transmission of the current over its own lines, it is selling it for distribution. It is a vital and a necessary part of an electric light and other like business. Section 5, art. XV of the Constitution, provides: "The use of the water of every natural stream within the state of Nebraska is hereby dedicated to the people of the state for beneficial purposes, subject to the provisions of the following section." Section 7 of the same article provides: "The use of the waters of the state for power purposes shall be deemed a public use and shall never be alienated, but may be leased or otherwise developed as by law prescribed." Section 46-502, Comp. St. 1929, provides: "The water of every natural stream not heretofore appropriated within the state of Nebraska is hereby declared to be the property

of the public, and is dedicated to the use of the people of the state, subject to appropriation as herein provided."

In *Kirk v. State Board of Irrigation,* 90 Neb. 627, it is said: "In this state, the water of running streams is *publici juris;* its beneficial use belongs to the public and is controlled by the state in its sovereign capacity." The right to appropriate the public water of the streams of the state for the beneficial purpose of generating electric energy is a franchise.

Section 46-602, Comp. St. 1929, confers the right of eminent domain to procure sites for works for power purposes upon all persons desirous of constructing such works. This is a franchise and special privilege conferred by the state upon individuals, which is valuable. *Chicago & W. I. R. Co. v. Dunbar,* 95 Ill. 571; *Fayetteville Street Ry. v. Railroad,* 142 N. Car. 423; *Goddard v. Chicago & N. W. R. Co.,* 202 Ill. 362.

Lastly, the plaintiff contends that the assessment of the tax was void for the further reason that it was assessed and levied without notice. Under the provisions of the statute, the state board of equalization and assessment has been constituted the original assessing authority by section 77-802, Comp. St. 1929. It is their duty to determine the franchise value. The time and place of the meeting of the board is fixed by section 77-1004, Comp. St. 1929, as "the first Monday of July of each year, * * * at the state capitol." Where the statute designates the time and place for the meeting of the assessing board, personal notice to the taxpayer is not necessary. *Chicago, B. & Q. R. Co. v. Richardson County,* 72 Neb. 482; *Hacker v. Howe,* 72 Neb. 385. This tax was levied upon property which had not been returned by the plaintiff. The power company contends that the petition alleges and the demurrer admits that it had made a return of all of its property for taxation. However, their claim herein is presented upon the theory that they are not subject to a franchise tax. The petition clearly and definitely sets out this theory. The assessment of this franchise tax was

made without a return having been made by the company. It was not an increase or a raise of an assessment heretofore made, since it was the original assessment. The case cited by the plaintiff, *Northwestern Bell Telephone Co. v. State Board of Equalization and Assessment*, 119 Neb. 138, is not applicable to this case, for the reason that it discusses an increase in the tax by the board without notice.

The case presents no legal reason supporting the allegation that the tax assessed is void and should be recovered by the plaintiff. The judgment of the district court is

AFFIRMED.

CITY OF SCHUYLER, APPELLEE, V. SYLVIA VERBA, APPELLANT.

FILED FEBRUARY 27, 1931. No. 27585.

1. **Pleading.** A demurrer to a petition is not, by the provisions of our Code of practice, a proper part of an answer filed in a case and should be disregarded.
2. ———: DEMURRER. Where the objection that the petition does not state a cause of action is made by demurrer *ore tenus* after commencement of the trial, the allegations of the pleading will be liberally construed, and, if possible, sustained.
3. **Appeal:** INSTRUCTIONS. Although certain instructions of the trial court may be technically erroneous, yet the same will not work a reversal of the case, where the verdict is clearly right and the only one which could have been reached upon the particular issues involved.

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

George W. Wertz, for appellant.

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

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

PER CURIAM.

This is an action in the nature of ejectment brought by the city of Schuyler to recover portions of its platted city

streets adjacent to the real estate of the defendant, which, it is alleged by the city, the defendant is inclosing with fences.

The defendant in her answer, comprising four separate paragraphs, alleged: (1) Admits the corporate existence of the city, and the making of request by it, as alleged in its petition; (2) denies generally the allegations of the petition, except as in such "answer expressly admitted, explained or modified;" (3) alleges "that the petition filed herein does not state facts sufficient to constitute a cause of action;" (4) that the defendant is the owner of all the property in controversy, and in approved form alleges title in herself thereto by adverse possession. To this answer, it appears, a reply was filed.

Trial was had to a jury; verdict for plaintiff; judgment on such verdict entered; and defendant appeals.

The defendant contends that the petition of plaintiff was wholly insufficient, and that the trial court erred in giving certain instructions, among which was one placing the burden of proof of the issue of adverse possession on defendant.

The record discloses that the sufficiency of the petition was not properly challenged by the defendant until after the jury had been impaneled and the introduction of evidence commenced. At this point the defendant interposed a demurrer *ore tenus.*

We do not overlook the fact that the defendant, as her first pleading in the case, had filed a demurrer in proper form, but unfortunately, so far as the transcript discloses, it had never been called to the attention of the district court, nor a ruling had thereon. So too, as already indicated, the defendant had incorporated a general demurrer as paragraph 3 of her answer. But this we are required to wholly disregard. *Damicus v. Kelly, ante,* p. 588; *Kyner v. Whittemore,* 90 Neb. 188; *Pine-Ule Medicine Co. v. Yoder & Eply,* 91 Neb. 78; *Fidelity & Deposit Co. v. Parkinson,* 68 Neb. 319.

As to the effect of the demurrer *ore tenus,* we are committed to the rule that, when interposed after the com-

mencement of the trial, the pleading demurred to will be liberally construed, and, if possible, sustained. *Macrill v. City of Hartington*, 93 Neb. 670.

In the light of the principle last announced, in view of the nature of the property in controversy, the rights of plaintiff therein, and the public duties in reference thereto enjoined by statute, we find no difficulty in approving the action of the trial court in overruling defendant's objection to the evidence.

On the subject of defendant's further contention as to claimed errors of the trial court in its instructions to the jury, it may be said that this court is unanimously of the opinion that the evidence in the record is wholly insufficient to establish continuous adverse possession of the land in dispute by the defendant's predecessors in title between July 1, 1889, and July 1, 1899. But, apart from this, it also appears conceded that Mary Verba on the 17th day of March, 1924, while the undisputed owner in fee of block 6, Clarkson and Dorsey's Addition to Schuyler, Nebraska, caused a plat of the same to be made as provided by sections 17-414 and 17-415, Comp. St. 1929, and caused the same to be filed and recorded as provided by law, and the same has never been vacated. An inspection of this plat discloses that the several lots into which this land was platted comprised, inclusive of the alleys indicated, a compact body of land 640 feet long and 264 feet wide. These dimensions coincide with the boundaries of block 6 as originally platted in 1881. It is to be noted that the plat of 1881 (block 1 to 8, inclusive, Clarkson and Dorsey's Addition to Schuyler, filed July 26, A. D. 1881) was admitted in evidence on the express admission of the defendant, made at the trial, "that this is a true and correct record of the plat of a portion of the city of Schuyler."

Surrounding the land thus shown on the plat of 1924, as continuous boundaries on the four sides thereof, appears the word "street." Thus, the plat of 1924, in connection with the abstract also in evidence, sustain the conclusion that all land owned or claimed by Mary Verba, situate contiguous to original block 6 and within the limits of the

public streets, if any such there was, was by that act effectually rededicated to the public. Indeed, the statute expressly provides: "The acknowledgement and recording of such plat is equivalent to a deed in fee simple of such portion of the premises platted as is on such plat set apart for streets." Comp. St. 1929, sec. 17-416. See, also, *Jaynes v. Omaha Street R. Co.*, 53 Neb. 631; *Gregory v. City of Lincoln*, 13 Neb. 352; *Ehmen v. Village of Gothenburg*, 50 Neb. 715.

Sylvia Verba, the defendant, claiming title pursuant to a conveyance by Mary Verba executed subsequent to the recording of the plat of 1924, is thereby limited to block 6 as the same appears on that plat.

It follows, in view of these admitted facts, that at the close of the evidence the plaintiff was entitled to a directed verdict in its favor. Therefore, no error of the court, if error there was in instructions given, could in any manner become material to the issues involved in the case. *Fellers v. Howe*, 106 Neb. 495. The verdict of the jury and judgment of the court are therefore approved and

AFFIRMED.

HARRY PAIGE AND LOYD CHRISMAN V. STATE OF NEBRASKA.

FILED FEBRUARY 27, 1931, No. 27759.

ERROR to the district court for Garden county: EDWARD F. CARTER, JUDGE. *Affirmed.*

Sullivan & Wilson, for plaintiffs in error.

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

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

PER CURIAM.

The defendants were charged with unlawfully manufacturing whisky and having in their possession a still and mash being used in the process of manufacturing intoxicating liquor. They waived trial by jury and the court

found both defendants guilty. They brought proceedings in error here and in their brief and argument narrow the errors down to two questions:

The first complaint is that the district court failed to recognize their attack on the proceedings, based on the ground that the examining magistrate bound them over to the district court and bail in an amount fixed was approved, conditioned on their appearance on the first day of the first term of the district court, instead of requiring them to appear in the district court forthwith. Section 29-506, Comp. St. 1929, requires that in such cases it shall be "conditioned that the accused appear forthwith before the district court, if then in session, and if not in session, then on the first day of the next jury term thereof." Another provision of the same section recites: "No recognizance requiring the accused to appear at the next term of court shall be rendered invalid by the fact that the court is in session." The county judge who bound the defendants over may have had knowledge that the district court in that particular county was not then in session and for that reason did not require the bound-over defendants to appear in the district court forthwith. Moreover, the defendants duly appeared in the district court and pleaded not guilty to the information there filed. The court had jurisdiction over their persons and they were duly tried. It is difficult to see how any departure from the statute in the specific form of their recognizance caused any error prejudicial to the defendants. If they had given no recognizance at all and had remained at large between the time they were bound over and until the time of their plea and trial in the district court, the judgment would be unaffected thereby. *Bookhout v. State,* 66 Wis. 415.

The second point presented by defendants is that the information is fatally defective because it does not recite that the defendants did not have possession of a permit authorizing manufacture of intoxicating liquor. It would seem to be a complete answer to this that the section of the statute describing the necessary qualities of an indictment, information, or complaint, based on the liquor laws

and being a part of the chapter on that subject, expressly provides that it shall not be necessary to negative any of the exceptions contained in the act. Comp. St. 1929, sec. 53-141; *Fitch v. State,* 102 Neb. 361; *Peterson v. State,* 110 Neb. 26.

We have examined the record and find no prejudicial error therein. The judgment of the district court is therefore

AFFIRMED.

ELLERY DAVIS, APPELLEE, V. HIGHWAY MOTOR UNDERWRITERS, APPELLANT.

FILED FEBRUARY 27, 1931. No. 27551.

1. **Contracts.** "When the terms of an agreement have been intended in a different sense by the parties to it, that sense is to prevail against either party in which he had reason to suppose the other understood it." Comp. St. 1929, sec. 20-1217.
2. **Insurance:** POLICY: REFORMATION. "When a soliciting agent of an insurance company and the insured mutually agree upon the terms and conditions of the insurance contract, and the policy, later issued by the company, omits one of the essential elements of the contract, which is not discovered by the insured until after a loss occurs, he may then have the policy reformed so as to express the real agreement of the parties, and his failure to promptly examine the policy when received and discover the departure therein from the real agreement will not defeat his right to have reformation of the policy." *Robinson v. Union Automobile Ins. Co.,* 112 Neb. 32.
3. ———: PUBLIC POLICY. Public policy does not forbid the enforcement of a contract of insurance indemnifying the insured against liabilities for injuries accidently suffered by any one through the negligent operation or use of an automobile where, in the action thereon, it appears—(1) that at the time of the accident the automobile was being driven by the insured's son, who was under age of sixteen, contrary to the statute fixing the minimum age at sixteen; (2) that the son was described in the contract of insurance (as reformed) as under sixteen; and (3) that the accident was caused by the actionable negligence of said son, while thus violating the law.

APPEAL from the district court for Lancaster county: ELWOOD B. CHAPPELL, JUDGE. *Affirmed.*

Allen & Requartte and *O. C. Wood*, for appellant.

H. W. Baird and *Hall, Cline & Williams, contra.*

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

GOSS, C. J.

This is an action to reform a public liability automobile insurance policy and to recover upon the policy as reformed. The case was assigned to an equity court and tried to a judge without the intervention of a jury. From a decree reforming the policy and entering judgment against the defendant this appeal was taken.

The defendant, Highway Motor Underwriters of Kansas City, Missouri, is a reciprocal insurance exchange, authorized under chapter 44, art. 15 (sections 44-1501 to 44-1513) Comp. St. 1929, to write such an insurance contract as is involved here. A. R. Talbot Underwriters, Inc., of Lincoln, is its attorney in fact in this jurisdiction and state. Richard L. Kimball of Lincoln, is defendant's general manager, for the whole company, and is also secretary for its attorney in fact. The defendant has two agencies in Lincoln, the Stuart Investment Company and Lincoln Insurance Service, who take applications for insurance. All policies are issued from defendant's office in Lincoln. Lincoln Insurance Service is composed of Don A. Chapin and Leo Scherer.

Plaintiff purchased a new automobile about the middle of August, 1928, and on August 16 was solicited by Mr. Scherer to insure it. Plaintiff told Scherer he wanted a policy with limits of $25,000 and $50,000, with coverage for his son, who would be 16 in a few months. Plaintiff testified that Scherer said "he would take care of it, and that there would be no extra premium as it was only a few months." Scherer testified: "He asked if we could put an indorsement on this policy covering this boy, and I told him that I had never written that kind of a policy before, but I would see if we could not get that coverage." Scherer went directly to Mr. Kimball and told him the kind

of coverage Mr. Davis wanted. The general manager testified that he told Scherer he did not know whether or not the company could legally issue such a policy, but he would consider it and let him know later; but that he never did tell him definitely whether he could issue a policy with such a rider. Kimball says: "I knew what he (Davis) wanted. I didn't know what he expected to get."

The policy was written without the rider and was delivered by Scherer, who was under the impression that it contained the coverage requested by the insured. It was delivered at the office of Mr. Davis in his absence, and when he returned he put it in a pigeonhole without reading it. He paid the premium on the first of September and did not discover that the policy lacked the rider until after the loss in October. The defendant denied liability and kept the premium. The evidence indicates that the defendant could have written such a policy as plaintiff thought he had, but did not do so because of difficulty of reinsuring the risk, and that it was willing, after the loss occurred, to attach such a rider to the policy, but not to make it retroactive so as to cover the loss. An offer to this effect made by Stuart Investment Company was rejected by Mr. Davis. No written application for the insurance policy was ever made by Mr. Davis. The contract in that respect as between him and the agent rests in parol. His offer was to buy a policy with certain stated features, and according to his understanding the agent agreed to furnish it. The agent testified that plaintiff asked for that particular kind of a policy and he informed the general manager and was under the impression the policy delivered was of the kind ordered. About as nearly as parties may mutually agree upon such a matter, the insured and the agent for the insurer understood the policy was to cover plaintiff's son. The policy omitted this essential element of the contract as understood by both of them and not discovered by either of them until the loss occurred. In such circumstances the plaintiff is entitled to have the policy reformed so as to express the real agreement of the parties, and his failure to examine the policy

when received will not defeat his right to have reformation of the policy. *Robinson v. Union Automobile Ins. Co.*, 112 Neb. 32; *Central Granaries Co. v. Nebraska L. M. Ins. Ass'n*, 106 Neb. 80. In the first of these cases we said: "When a soliciting agent of an insurance company and the insured mutually agree upon the terms and conditions of the insurance contract, and the policy, later issued by the company, omits one of the essential elements of the contract, which is not discovered by the insured until after a loss occurs, he may then have the policy reformed so as to express the real agreement of the parties, and his failure to promptly examine the policy when received and discover the departure therein from the real agreement will not defeat his right to have reformation of the policy." *Robinson v. Union Automobile Ins. Co., supra.*

Then, too, Scherer had all the reason in the world to think that Davis would believe the policy had been written as he requested it. Davis had not even known, as Scherer knew, that there was ever any question that the policy would contain the terms requested. So if it be argued that Mr. Kimball, as general manager of defendant, understood the contract in a different sense than plaintiff understood it, although he knew what plaintiff had asked for and plaintiff did not know that what he had asked for had not been provided for in the contract, then a section of the Code aids in the construction of the agreement: "When the terms of an agreement have been intended in a different sense by the parties to it, that sense is to prevail against either party in which he had reason to suppose the other understood it." Comp. St. 1929, sec. 20-1217.

It is argued by defendant that the trial court erred in reforming the policy and in enforcing it because the contract to insure against "damages for negligence of a driver under 16 years of age" is contrary to public policy.

The same question arose in *Messersmith v. American Fidelity Co.*, 232 N. Y. 161. The New York law fixed the age limit at 18 years. In a well-reasoned opinion by Judge Cardozo, the court of appeals held that public policy does not forbid the enforcement of such a contract of insurance.

In *McMahon v. Pearlman,* 242 Mass. 367, it was held that, although the operation of a registered motor vehicle without a license and unaccompanied by a licensed operator is a crime under the state law, yet such an operator is not prevented by public policy from recovering under an insurance contract indemnifying against accident.

The opinion in *Messersmith v. American Fidelity Co., supra,* cites numerous instances in which liability was incurred through personal fault that is defined by statute as a misdemeanor or a crime and yet was permitted to be the subject of recovery against an insurer, and pertinently says: "Insurance instead of prejudicing the victim of an accident is seen to supply in many cases the only fund from which the victim can be paid. *Boston & Albany R. Co. v. Mercantile Trust Co.,* 82 Md. 535, at pp. 577, 578; *Phœnix Ins. Co. v. Erie & W. Transportation Co.,* 117 U. S. 312, at p. 324. Courts are slow to substitute their own varying views of policy for those which have found embodiment in settled institutions, in everyday beliefs and practices, which have taken root and flourished. *Janson v. Driefontein Mines, Ltd.,* 1902 A. C. 484, at p. 496. The field of discretion is still narrower when there has been statutory sanction, tacit, if not express, of callings and forms of conduct which it would have been easy to condemn. * * * We conclude that public policy does not forbid the enforcement of the contract. *Brock v. Travelers Ins. Co.,* 88 Conn. 308, 313; *Ford v. Stevens Motor Car Co.,* 203 Mo. App. 669; *Tinline v. Whitecross Ins. Co.,* 90 L. J. K. B. 1118."

We are therefore of the opinion that the trial court did not err in reforming the contract so as to insure the plaintiff against loss by reason of the operation of his car by his son who was under 16 years of age at the time; that such contract was not void as against public policy; and that plaintiff may recover on said contract as reformed.

The amount of the recovery is not complained of. For the reasons stated in this opinion, we affirm the judgment of the district court.

AFFIRMED.

RUTH KEEBLER, APPELLEE, V. RICHARD D. HARRIS: AMERICAN CREDIT CORPORATION, APPELLANT.

FILED FEBRUARY 27, 1931. No. 27581.

Automobiles: COLLISION: LIABILITY. Where an employee in charge of his employer's automobile temporarily abandons his duties and uses it for his own pleasure, the employer may be liable for the subsequent negligence of the employee while the latter is driving the automobile in performing the duties of his employment after resuming them.

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

Herbert E. Story and *J. Ralph Dykes,* for appellant.

Crossman, Munger & Barton, contra.

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

ROSE, J.

This is an action to recover $5,000 in damages for negligence resulting in the collision of a Ford roadster with a Dodge sedan and in personal injuries to plaintiff. The accident occurred about 11 o'clock at night November 7, 1929, at Forty-sixth and Farnam streets, Omaha. Plaintiff was then a passenger in the sedan and defendant Harris was driving the roadster which was owned by his employer, the American Credit Corporation, also a defendant. Plaintiff pleaded facts showing that the proximate cause of the collision and of the resulting injuries to her was the negligence of defendants. The American Credit Corporation admitted the collision occurred at the time and place stated and denied other allegations of the petition. Harris alleged as a defense that the negligence of the driver of the Dodge sedan caused the collision. Upon a trial of the issues the jury rendered a verdict in favor of plaintiff and against both defendants for $1,000. The American Credit Corporation, hereinafter called defendant, alone appealed.

There is no reversible error in the record unless the evidence is insufficient to sustain a finding that Harris was engaged in the duties of his employment when the automobiles collided. Defendant took the position that Harris, at the time of the accident, was using the Ford car in furtherance of his own business or pleasure and that he deviated materially from the route he was required to take in the course of his employment.

The specific error assigned was the failure of the trial court to direct a nonsuit on motion of defendant. The testimony of Harris alone determined the issue. Defendant in the regular course of its business held claims against purchasers of automobiles for deferred payments, including the right of repossession in cases of default. Harris was an employee of defendant with authority to collect delinquent payments and to repossess cars. He worked at night or during the day as duty called, and had been thus engaged about three months. The Ford car had been previously located in Omaha and Harris had been told to repossess it and take it to his employer's storage garage at 610 South Fifteenth street, to which he had a key, but he was not directed to take any particular route in performing his duties. His movements during the evening of November 7, 1929, were as follows: From his home at Fifty-second and Izard streets, he went in his father's car, taking Frederick Aye, a friend, with him, to 915 South Forty-eighth street, where he took possession of the Ford car. He promptly went back home in his father's car while Aye drove the other one. He then took the Ford car and with Aye went to 2019 California street to make a collection; went on to 2412 Decatur street to make another collection; drove to Forty-ninth and Dodge streets where the two men sat in the Ford car and talked for an hour or more; left there about 11 o'clock at night and started to the fraternity house at 118 South Thirty-eighth street, intending to stop, let Aye out, and drive on to the storage garage, but on the way the accident occurred at Forty-sixth and Farnam streets. In addition to the facts outlined, Harris answered "No, sir" to the question: "Did

you transact any business for the American Credit Corporation, or go upon any errand of theirs, between the time you left Twenty-fourth and Decatur streets and the time of this accident?" Relying upon this evidence and upon the fact that Harris had deviated 25 blocks from the direct route between 2412 Decatur street, where he had gone to make a collection, and 610 South Fifteenth street, where he had been directed to store the Ford car, defendant argues that the testimony shows conclusively that Harris was pursuing his own pleasure and not engaged in any duty of his employment at the time of the accident.

There is a fallacy in this argument of defendant. It does not give consideration to testimony of Harris to the effect that he was directed by his employer to repossess this identical car and take it to the storage garage; that he was on the way there at the time of the collision, intending to stop at the fraternity house, let Aye out, drive on to the storage garage and leave the Ford car at the place directed. It was his duty to deliver it there. He kept within the zone of his general duties. If he deviated from the direct route and temporarily abandoned his employment for his own pleasure, the evidence tends to prove that he resumed those duties when he started to the storage garage and that the accident occurred on the way. In this view of his testimony, the record does not disclose any actionable negligence while he was temporarily off duty. From the entire evidence and surrounding circumstances, the jury and the trial judge were at liberty to infer that Harris, if he temporarily abandoned his employer's business for his own purposes, resumed the duties of his employment before he negligently caused the collision and that he was thus engaged at the time. A well-recognized principle of law has been stated as follows:

"Notwithstanding the servant's deviation or departure from his employment for purposes of his own, if at the time of the act complained of the servant had fulfilled his purpose and resumed the prosecution of his master's business, the master will be liable for his act." 39 C. J. 1298, sec. 1495. See, also, *Weber v. Lockman,* 66 Neb. 469.

Defendant cited *Neff v. Brandeis*, 91 Neb. 11, but that case is distinguishable from the case at bar. There the chauffeur in charge of the car on his way back to the garage after a drive was the employee of the garage-keeper who was under contract with the owner of the car to "keep it at a garage, wash it, polish it, keep it ready for running at all times, and furnish a chauffeur" whenever the owner of the car might desire to use it. The chauffeur was in the employ of the garage-keeper. The owner of the car, not the garage-keeper, was the defendant.

Plaintiff herein made a *prima facie* case. The trial court, therefore, did not err in refusing to give a peremptory instruction in favor of defendant. The verdict is assailed as excessive, but it is sustained by sufficient evidence.

AFFIRMED.

GOOD, J., dissents.

NORMA A. MATTHEWS, APPELLANT, V. FRIEDRICH GUENTHER ET AL., APPELLEES.*

FILED FEBRUARY 27, 1931. No. 27000.

1. Mortgages: ACCELERATION CLAUSE: VALIDITY. A stipulation in a mortgage authorizing the mortgagee to accelerate the maturity of the mortgage debt if the taxes on the mortgaged premises are not paid at or before the time they become delinquent is not forbidden by statute, nor contrary to public policy, and may be enforced.
2. ———: BREACH: TAXES. Evidence examined, and *held* to establish a breach of the condition of the mortgage relative to the payment of taxes by the mortgagor at or before the time they became delinquent.
3. ———: ———: ———: PAYMENT. The payment of such delinquent taxes after the commencement of an action to foreclose the mortgage does not deprive the mortgagee of the right secured by the exercise of his option.

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

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*Note—See former opinion of affirmance, p. 849, *post.*

Courtright, Sidner, Lee & Gunderson, for appellant.

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

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

EBERLY, J.

Opinion on motion for rehearing and on the merits of an action to foreclose a second real estate mortgage of date May 28, 1925, executed and delivered by the defendants to plaintiff and plaintiff's assignee to secure payment of the sum of $18,250, evidenced by a promissory note of even date, due June 1, 1935, "with interest at the rate of ten per cent. per annum, payable annually, from date until paid." This action was commenced in the district court for Cedar county on the 28th day of August, 1928, and is based upon an alleged accelerated maturity caused by non-payment by the defendants of interest on the indebtedness accruing and due on June 1, 1927, and June 1, 1928, and also because of the failure of the defendants to "pay all taxes and assessments levied upon said real estate" covered by the mortgage in suit "before the same became delinquent." As to the condition of this mortgage, plaintiff in her petition alleges: "Said mortgage deed was by the terms thereof conditioned as follows: 'Subject to a mortgage of $17,000 to the Omaha Trust Company, of Omaha, Nebraska. The intention being to convey hereby an absolute title in fee simple including all the rights of homestead and dower. To have and to hold the premises above described, with all the appurtenances thereunto belonging unto the said D. A. and N. A. Matthews and to their heirs and assigns, forever; provided always, and these presents are upon the express condition that if the said Friedrich Guenther, his heirs, executors, administrators or assigns shall pay or cause to be paid to the said D. A. and N. A. Matthews, their heirs, executors, administrators or assigns, the sum of $18,250, payable as follows, to wit, $18,250 on or before the 1st day of June, 1935, with interest thereon at ten per cent. per annum, payable annually, according

to the tenor and effect of the one promissory note * * * of said Friedrich Guenther and Katie Guenther, bearing even date with these presents, and shall pay all taxes, and assessments levied upon said real estate, and all other taxes, levies and assessments levied upon this mortgage or the note which this mortgage is given to secure, before the same becomes delinquent, * * * then these presents to be void, otherwise to be and remain in full force.'

" 'It is further agreed: (1) That if the said mortgagor shall fail to pay such taxes * * * the said mortgagee may pay such taxes; * * * and the sum so advanced, with interest at — per cent. shall be paid by said mortgagor, and this mortgage shall stand as security for the same; (2) that a failure to pay any of said money, either principal or interest, when the same becomes due, or a failure to comply with any of the foregoing agreements, shall cause the whole sum of money herein secured to become due and collectible at once at the option of the mortgagee.' "

The defendants in their amended answer and cross-petition, filed January 3, 1929, set up and rely upon usury as their sole defense. They expressly admit the existence of an unpaid first or prior mortgage of $17,000; the execution and delivery of plaintiff's mortgage as alleged; in apt terms charge that the concurring agreements to pay the 10 per cent. by the terms of the note and mortgage, and in addition thereto to pay the taxes levied against the real estate involved, or such as might be levied against the mortgage and note in suit, constitute usury; that the defendants had paid interest at 10 per cent. on the $18,250 from date to June 1, 1926, in the sum of $1,700 ($1,825), and all taxes levied and assessed against said premises for 1926 and prior thereto; that on the 8th day of September, 1928, the defendants paid the taxes levied against the premises for 1927, and allege they are entitled to have the $1,700 ($1,825) thus paid credited upon the principal note, and deny the right of plaintiff to a foreclosure until the maturity of such note on June 1, 1935.

To this answer and cross-petition a reply was filed, which, in substance, may be considered a general denial,

On the trial the record discloses that there was no substantial dispute as to the facts in the case set forth in the petition of each of the parties hereto, and by stipulation a tax receipt for the payment of taxes on the west half of section 19, township 32, range 1, the premises in litigation, assessed for 1927, paid by the defendant Friedrich Guenther, was received in evidence. It disclosed that for that year the premises were valued for taxation at $23,655; taxes were assessed to the defendant Guenther thereon in the sum of $596.11, which with interest accrued at the time of payment in the sum of $17.94 made the total amount paid by that defendant, September 9, 1928, $614.05.

Upon conclusion of the evidence, and after consideration of the briefs and arguments of counsel, the trial court found generally for the defendants and dismissed plaintiff's petition and action. Plaintiff appeals.

In the absence of the defense of usury, our previous decisions are decisive of the rights of the litigants herein. Thus, under provisions of mortgages, substantially identical with the language of the instrument in suit, we have sustained foreclosures based on accelerated maturity occasioned by the nonpayment of interest. *Lowenstein v. Phelan,* 17 Neb. 429; *McCarthy v. Benedict,* 89 Neb. 293; *Moorehead v. Hungerford,* 110 Neb. 315; *Northwestern Mutual Life Ins. Co. v. Butler,* 57 Neb. 198; *National Life Ins. Co. v. Butler,* 61 Neb. 449. And as to the effect of default by the mortgagor under tax covenants identical with those here presented, we are likewise committed to the view that—"A stipulation in a mortgage authorizing the mortgagee to accelerate the maturity of the mortgage debt, if the taxes on the mortgaged premises are not paid at or before the time they become delinquent, is not forbidden by statute, nor contrary to public policy, and may be enforced." Further: "And the payment of such delinquent taxes after the commencement of an action to foreclose the mortgage does not deprive the mortgagee of the right secured by the exercise of his option." *Hockett v. Burns,* 90 Neb. 1. See *Crawford v. Houser,* 115 Neb. 62.

It may, therefore, be said with assurance that, in the absence of the defense of usury, the plaintiff here would be entitled to the benefit of an accelerated maturity on either of two grounds, viz., nonpayment of interest when due, and also nonpayment of taxes. However, the defense of usury is before us, and was sustained by the trial court, and all relief denied to plaintiff. It seems quite evident that in determining the transaction before it to be usurious the district court herein followed the views expressed by this court. It seems equally true that in denying plaintiff all relief and dismissing the action the trial court has fallen into error. In view of the facts hereinbefore set forth, it is the settled doctrine of this court that—"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. See *Quesner v. Novotny,* 116 Neb. 84; *Dwyer v. Weyant,* 116 Neb. 485; *War Finance Corporation v. Thornton,* 118 Neb. 797. But this doctrine in no manner denies all relief in equity to a mortgagee whose mortgage is tainted with usury. Our statute expressly provides: "If a greater rate of interest than is hereinbefore allowed shall be contracted for or received or reserved, the contract shall not, therefore, be void, but if in any action on such contract, proof be made that illegal interest has been directly or indirectly contracted for, or taken, or reserved, the plaintiff shall only recover the principal, without interest, and the defendant shall recover costs; and if interest shall have been paid thereon, judgment shall be for the principal, deducting interest paid." Comp. St. 1929, sec. 45-105.

In *Gibson v. Sherman County,* 97 Neb. 79, this court, speaking through Sedgwick, J., has approved the doctrine as to usury announced by the supreme court of the United States in *Ewell v. Daggs,* 108 U. S. 143, in effect holding, "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 its penalties

will be limited, supported and continued only when, and to the extent, the express terms thereof provide. Neither are the equities of the parties here in any manner affected by the fact that the taxes and assessments for 1927, properly assessable on the interest of each of the parties to this litigation, were combined by the county clerk in one assessment against the real estate. This was in accordance with the plain statutory provision. Comp. St. 1929, sec. 77-1503. Nor did the defendants suffer the slightest prejudice thereby. The tax laws of our state preserve for each ample opportunity to pay and discharge the taxes justly assessable against their respective interests. Indeed, the sum of the interest of each in the land constituted the taxable value of the land itself. *Bowen v. Holt County,* 101 Neb. 642. Their respective interests, therefore, were nothing more than undivided shares in the property assessed, made so by the express provisions of the statute. "The tax may be paid on an undivided share of real estate. In such case the treasurer shall designate on his record upon whose undivided share the tax has been paid." Comp. St. 1929, sec. 77-1903. It is admitted that the defendants wholly failed to take advantage of the express provisions above quoted, but made default in the terms of their covenant.

Under our statutes the facts in the instant case, therefore, do not invoke the application of the maxims that, he who comes into a court of equity must come with clean hands, or that, he who seeks equity must do equity. The controlling maxim here applicable is, equity follows the law. The statutes heretofore quoted expressly provide for controversies involving usury, and enjoin judicial action by the court with express directions as to what shall be done. These terms are controlling in a court of equity as well as in a court of law. Indeed, in *Stuart v. Durland, supra,* and cases following the rule announced therein, the right of foreclosure to the extent limited by the statute quoted was expressly recognized, approved and directed. In *Dawson County State Bank v. Temple,* 116 Neb. 727, Good, J., in delivering the opinion of this court, in a case involving

similar facts to those reflected in the present record, says, in part: "The defense of usury is sustained by the record. It appears that the mortgagee has paid taxes upon the mortgaged premises, a part of which would represent taxes upon the mortgagee's interest and a part on the mortgagors' interest in the real estate, but there is nothing apparent in the record from which it can be determined what portion of the tax paid was upon the respective interests of the mortgagors and the mortgagee in the real estate. * * * The judgment of the district court is reversed, and the cause remanded, with directions to allow plaintiff a decree of foreclosure for the principal of its mortgages without interest; also to allow plaintiff a recovery for that part of the tax which was paid upon the mortgagors' interest in the real estate and to adduce additional evidence to establish the amount thereof. *On this latter amount plaintiff is entitled to recover interest.*"

The implication which the above language sustains, as relates to the facts in the instant case, is obvious, but a stronger reason is to be found in the express provisions of the statute. Our tax laws provide: "All property in this state, not expressly exempt therefrom, shall be subject to taxation, and shall be valued and assessed at its actual value." Comp. St. 1929, sec. 77-201. "Taxes on all real property shall be a first lien thereon from and including the first day of December of the year in which they are levied until the same are paid." Comp. St. 1929, sec. 77-203. See *Taylor v. Harvey,* 90 Neb. 562; *Mutual Benefit Life Ins. Co. v. Siefken,* 1 Neb. (Unof.) 860; *Merriam v. Goodlett,* 36 Neb. 384.

Sections 77-1501 to 77-1505, Comp. St. 1929, contain special provisions relating to the assessment of real estate mortgages, and provide that in the absence of an agreement the interests of mortgagors and mortgagees shall be separately assessed. Even so, it is also therein provided: "In case of nonpayment of any tax levied upon the interest of the owner or mortgagee or assigns, the land upon which the tax is unpaid shall be sold at the time and in the manner provided by law for the sale of real

estate for delinquent taxes." Comp. St. 1929, sec. 77-1502. It is thus quite apparent that, whether assessed on the interest of the mortgagor or of the mortgagee, taxes must be deemed assessed upon the land. In construing these statutes, Hamer, J., in *Bowen v. Holt County,* 101 Neb. 642, employed the following language: "We think the manifest purpose of sections 6350, 6351 (Rev. St. 1913), above quoted, is to secure the assessment and taxation of the mortgagor's and mortgagee's interests separately. Each interest is an interest in the land. The sum of these interests is the value of the land itself. If the amount of the mortgage exceeds the value of the land, yet the value of the mortgage or any 'interest in real estate' cannot exceed the value of the real estate in which it is an interest, and ought not to be assessed at more than the value of the real estate. * * * It is manifest that the total assessed value of any real estate cannot exceed the interest of mortgagor and mortgagee."

We concede for the purpose of this opinion, but do not decide, that the defendants are entitled to have the interest paid by them ($1,825) credited on their principal note as of date of payment, and that no interest may be collected thereon. However, there is no contention that any attempt ever was, or will be, made to tax plaintiff's note and mortgage except as under our statute it became an interest in the real estate. Therefore, this leaves for our consideration the words of the tax covenant, a part of plaintiff's mortgage, to the effect that the mortgagors "shall pay all taxes and assessments levied upon said real estate * * * before the same become delinquent." It may be remembered that originally the object and purpose of the tax clause in a real estate mortgage was for the protection and preservation of the mortgage security. Such indeed still remains its mission. As a contract provision its true intent and scope must be determined from the language employed, the provisions of the statutes involved, the subject-matter, the object to be accomplished thereby, and the situation of the parties. So construed, "all taxes and assessments" can be given no other meaning

save and except that these terms shall include all taxes and assessments against the real estate without reference to the interests of the parties therein. Indeed, in the light of this evident object and purpose, this clause could be given no other construction in view of the provisions of the statute whereby, whether taxes be assessed against the mortgagor or the mortgagee, they are ultimately to be enforced against the real estate as a first lien. Then, too, this inference is strengthened by the allegations of the answer and cross-petition, and also the proof of taxes paid on part of the defendants. It follows, therefore, that the taxes of 1927 which the defendants allege were "all taxes levied against said real estate," and which they expressly stipulate they paid, must be deemed and taken as all taxes and assessments levied against all interests in said real estate, including all mortgagors and all mortgagees. If this be conceded, the defendants have wholly failed to establish a substantial performance of the terms of the covenant. Under its terms they were required to pay the taxes of 1927 before they became delinquent. They failed to do so, and thereupon an action for foreclosure was begun while the taxes were still delinquent and unpaid. Their sole defense now is usury, but usury, as we have already seen, only invalidates so much of the transaction as constitutes usury. In the language of the statute, "the contract shall not, therefore, be void." The evidence shows that the real estate in controversy was valued for taxation in 1927 at $23,655. Under the authority of *Bowen v. Holt County, supra,* to ascertain the value of plaintiff's mortgage we deduct the first mortgage of $17,000, which leaves the sum of $6,655. This was necessarily the extent of the assessed valuation of plaintiff's mortgage, and represents her proportionate part of the taxes assessed on the premises for the year 1927. The total taxes actually paid by the defendants for 1927 on the valuation of $23,655 was $614.05. Of this amount not to exceed $173 was the proportionate part representing the taxes and assessments on plaintiff's note and mortgage. The effect of the usury statute was to invalidate the tax covenant to the extent

of the usury involved, and no more. This would eliminate but $173 and leave a valid covenant, on the part of the defendants to perform, to pay the sum of $441. This was not done as required by the terms of the covenant. It follows that at the time of the institution of this action none of the taxes for 1927 had been paid, and the covenant to pay taxes had been breached by the defendants to the extent at least of $441, and plaintiff's cause of action had fully accrued. The payment of such delinquent taxes after the commencement of the action to foreclose the mortgage did not deprive the mortgagee of the right secured by the exercise of his option. *Hockett v. Burns,* 90 Neb. 1.

The motion for rehearing is overruled in part, the former judgment of this court is set aside, the judgment of the district court is reversed and the cause remanded, with directions for further proceedings in harmony with this opinion.

REVERSED.

LILLIAN G. NETUSIL, APPELLANT, V. JOHN J. NOVAK, APPELLEE.

FILED FEBRUARY 27, 1931. No. 27449.

1. **Judgment:** SETTING ASIDE DURING TERM. During the trial of a case, the court overruled a motion to direct a verdict for defendant and submitted the case to the jury. The jury returned a verdict for plaintiff and judgment was entered thereon. A motion for new trial was filed and argued, whereupon, at the same term, the court, on its own motion, set aside the verdict of the jury and the judgment and dismissed the action. *Held,* that the trial court had the right and power to vacate, set aside, amend or correct any judgments or orders made by it at the same term.
2. ———: ———. Such orders may be made upon the court's own motion as well as upon the motion of counsel for the parties.
3. **Animals:** VICIOUS DOG: LIABILITY OF OWNER. The law clearly recognizes the right of the owner of a vicious dog to keep it for the necessary protection of life and property. But as such a dog is inherently dangerous, one exercising the right to keep it must do so at his own risk, and is held strictly liable for any damage resulting to another.

4. ———: ———: ACTION FOR INJURIES: GRAVAMEN. In the case of injury, the gravamen of the action is the knowledge of the owner that the dog has vicious or mischievous propensities.
5. ———: ———: ———: NEGLIGENCE. Liability of an owner or keeper of a dog whose owner knows of its vicious or mischievous propensities is based upon negligence.
6. **Damages**: LIABILITY FOR FRIGHT. There is a liability for damages for physical injuries which are proximately caused by fright and terror produced by one who owes a legal duty to the one injured.
7. **Animals**: VICIOUS DOG: DUTY OF OWNER. The owner of a dog, known by him to have vicious and mischievous propensities, owes a legal duty to every one to protect them from injury. He especially owes this duty to a traveler passing along the highway adjacent to his premises.
8. **Appeal**: REVERSAL. Section 20-1926, Comp. St. 1929, provides that upon reversal the court shall remand the cause to the district court for such judgment as it should have rendered.
9. ———: ———. In a case such as this, where the trial court sought to correct a supposed error in overruling motion for directed verdict, by vacating verdict and judgment thereon and then by dismissing the action, this court will, upon reversing the judgment of dismissal, if no other error is presented by the record, remand the cause to the district court, with directions that the verdict and judgment be reinstated.

APPEAL from the district court for Douglas county: ARTHUR C. THOMSEN, JUDGE. *Reversed, with directions.*

North, Caldwell & Gillogly, for appellant.

Harry B. Fleharty, contra.

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

DAY, J.

This is an action for damages against the owner of a dog. The petition alleges that the dog was vicious, which fact was known by the defendant prior to the attack by said dog upon the plaintiff. The defendant's answer denies the allegations of the petition and further avers that the plaintiff's physical condition is not due to any attack or frightening by defendant's dog.

Upon a trial of the case, the court overruled a motion to direct a verdict at the close of all the testimony and submitted the case to the jury. The jury returned a verdict for the plaintiff. A motion for new trial was filed, argued and taken under consideration by the trial judge. Thereupon, the court, on its own motion, set aside the verdict of the jury and the judgment entered thereon, referred back to the motion to direct a verdict and dismissed the case.

In passing, we observe that the procedure followed by the trial court is in line with the modern prevailing tendency toward practicalism which seeks to shorten and to simplify judicial procedure. It is the well-established law of this state, as well as of others, that the trial court has the right and power to vacate, set aside, amend or correct any judgments or orders made by it during the same term. Such orders may be entered upon the court's own motion as well as upon the motion of counsel. *Douglas County v. Broadwell,* 96 Neb. 682; *Carmony v. Carmony,* 112 Neb. 651; *Occidental Building & Loan Ass'n v. Adams,* 96 Neb. 454; *Young v. Estate of Young,* 103 Neb. 418; *Harris v. State,* 24 Neb. 803; *Bradley v. Slater,* 58 Neb. 554; *Winder v. Winder,* 86 Neb. 495; *Zitnik v. Union P. R. Co.,* 95 Neb. 152. In this case, the trial court reached the conclusion after a verdict was rendered for plaintiff that its order overruling the motion of defendant for a directed verdict was erroneous. It had the right and power to vacate the judgment and verdict and make an order correcting its supposed error. No good reason suggests itself to us which would prevent a trial judge retracing his steps during the same term to make such orders as seem to him necessary to present a final record free from error. The foregoing action on the part of the trial court was occasioned by its conclusion that as a matter of law no recovery could be had for injuries received as the result of a shock from fright caused by the attack of a dog which did not bite. Had the attack in this case included a bite, there would be no doubt about the right of the plaintiff to recover. In the reported cases are found many glowing

tributes to the dog, similar to those enumerated by the learned trial judge in his opinion. In other cases the dog has been stigmatized as a worthless yelping cur. Mindful of the fact that there are dogs and also other dogs, just as there are people and other people, we attempt to retain our judicial poise and decide this case uninfluenced either by the good or bad dogs we have known.

In order to charge one with liability for the acts of a dog, it must of course be established that he is the owner or keeper. It is so established in this case. It then devolves upon the plaintiff to show that the dog was vicious and that the owner knew the dog to be vicious. The law clearly recognizes the right of the owner of a vicious dog to keep it for the necessary protection of life and property. But as such a dog is inherently dangerous, one exercising the right to keep it must do so at his own risk, and is held strictly liable for any damage resulting to another. 1 R. C. L. 1116, sec. 59. In the case of injury, the gravamen of the action is the knowledge of the owner that the dog has vicious or mischievous propensities. *Warrick v. Farley,* 95 Neb. 565; *Herbert v. Katzberg,* 104 Neb. 395; *Melicker v. Sedlacek,* 189 Ia. 946; *Domm v. Hollenbeck,* 259 Ill. 382. A statute now quite common makes the owner of a dog the insurer of any damage done by said dog, in which the basis of liability is not the negligence in the manner of keeping and confining the animal, but in keeping him at all. See *Wojewoda v. Rybarczyk,* 246 Mich. 641; *Reneau v. Brown,* 9 La. App. 375; *Bottcher v. Buck,* 265 Mass. 4; *Luick v. Sondrol,* 200 Ia. 728; *Miller v. Prough,* 203 Mo. App. 413; *Stine v. McShane,* 55 N. Dak. 745; *Silverglade v. Von Rohr,* 107 Ohio St. 75; *Pritsker v. Greenwood,* 47 R. I. 384. There are a few of the cases which discuss statutes abrogating the common-law rule requiring knowledge on the part of the owner. See note, 1 A. L. R. 1113. However, we have not yet such a statute and the common-law rule is still applicable in this state. Liability of an owner or keeper of a dog whose owner knows of its vicious or mischievous propensities is based upon negligence. Did this dog have vicious or mischievous propensities? There is

no other conclusion deducible from the evidence but that he did have such propensities. The evidence is that the dog bit a small boy in the "calf of his overalls * * * and on the shoes;" that he had attacked two different women at different times, one of whom was kept in her home for half a day through fear of the dog. The owner's knowledge is also well established. At least two people had complained about the dog, and the defendant finally admitted on cross-examination that somebody had complained about him keeping a vicious dog. These are questions of fact, which were presented to the jury, and the finding upon them was properly adverse to the defendant.

The appellee contends and the trial court ruled, that there could be no recovery for injury as a result of shock caused by the attack of a dog unless it was accompanied by a bite. We think this position untenable. Let us review briefly the evidence in this case. This dog had attacked her upon a previous occasion and had been dragged away from her by a member of defendant's family. At the time involved in this controversy, plaintiff was walking along the street where she had a right to pass without interference, when she heard the dog growl, saw him start toward her, crouch down and bare his teeth, whereupon she fainted and knew nothing more until she was picked up. The dog did not leave the owner's premises but was close to the sidewalk. As a result of the shock received from this attack, the plaintiff has suffered from nervous prostration. Much is made in argument of defendant about the small size of the Spitz dog which started this litigation. We may remark that the fear of a dog is not so much caused by his size or his bark as by his biting ability, and that a large part of the fear of a dog is caused by the popular apprehension of tetanic or hydrophobic poison from the bite and the evil results thereof. This is as obvious as that a small bandit behind a good gun will produce just as much fear as a large man. This also is a question of fact.

We have heretofore held that there is a liability for damages for physical injuries which are proximately caused by

fright and terror produced by one who owes a legal duty to the one injured. *Hanford v. Omaha & C. B. Street R. Co.*, 113 Neb. 423. We refer to this case for a thorough and comprehensive discussion of this question.

The owner of a dog, known by him to have vicious and mischievous propensities, owes a legal duty to every one to protect them from injury. He especially owes this duty to a traveler passing along the highway adjacent to his premises. The owner of a dog has no right to let such a dog run at large, attacking and assaulting persons upon the highway. *Nehr v. State*, 35 Neb. 638.

We reluctantly reach the conclusion that there was liability on the part of the defendant to the plaintiff for her injuries and that the action of the trial court in sustaining the motion for a directed verdict and dismissing the action was erroneous. Having reached this conclusion, it follows that the judgment must necessarily be reversed. Section 20-1926, Comp. St. 1929, provides that upon reversal the court shall remand the cause to the district court for such judgment as it should have rendered. In this case, the trial court considered the question of the liability of the plaintiff and instead of granting a new trial vacated the judgment and verdict and dismissed the action. The only question presented by the record is the one discussed herein. It necessarily follows that the first error of the trial court was committed by the entry of the order vacating the judgment and the verdict. In a case such as this, where the trial court sought to correct a supposed error in overruling motion for directed verdict by vacating verdict and judgment thereon and then dismissing the action, this court will, upon reversing the judgment of dismissal, if no other error is presented by the record, remand the cause to the district court, with directions that the verdict and judgment be reinstated. This rule finds support in *Roberson v. Reiter*, 38 Neb. 198, and *Iodence v. Peters*, 64 Neb. 425, although these cases are not strictly analogous. The rule is announced in 4 C. J. 1191, as follows: "Where the trial court reserved its decision on a motion to dismiss or nonsuit and then after a general ver-

dict for plaintiff granted the motion and set aside the verdict, the appellate court, on reversal of the dismissal or nonsuit, may reinstate the verdict and order judgment thereon."

In *Porter v. Sherman County Banking Co.*, 40 Neb 274, we held: "Except where the decision of an appellate tribunal necessitates a trial of an issue for which the Constitution guarantees a trial by jury, it rests in the discretion of the appellate tribunal, upon the reversal of a judgment, to enter in the appellate court a proper judgment, or to remand the case to the court from which it was appealed, either with directions to enter a specific judgment, for a retrial of particular issues, or for a new trial of the whole case." See, also, *Armstrong v. Mayer*, 61 Neb. 355.

The judgment of the trial court in dismissing the action is reversed and the cause remanded, with directions to the trial court to reinstate the verdict and judgment thereon. Since the trial court has not yet ruled upon the motion for new trial, it will then be its duty to pass upon said motion.

REVERSED.

NICK SALISTEAN, APPELLANT, V. W. T. FENTON, WARDEN, APPELLEE.

FILED MARCH 6, 1931. No. 27690.

APPEAL from the district court for Lancaster county: LINCOLN FROST, JUDGE. *Affirmed.*

John Adams, Jr., for appellant.

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

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

PER CURIAM.

This is a proceeding to review the action of the district court for Lancaster county in denying petitioner's application for discharge under a writ of habeas corpus.

The question upon which petitioner relies, viz., error alleged to have been committed by the district court for Douglas county in discharging a jury in a criminal case, then engaged in the trial of a felony, without the consent of the defendant then on trial and without first judicially determining from evidence adduced the necessity therefor, was heretofore presented by the present petitioner in a direct proceeding in error from the action of the trial court referred to, and in *Salistean v. State,* 115 Neb. 838, determined adversely to the contention now made, both as to fact and law. The judgment of affirmance then entered in this court is a final adjudication of the matters involved therein and not subject to review by habeas corpus.

The action of the district court for Lancaster county in the denial of petitioner's application is correct and is

AFFIRMED.

STATE OF NEBRASKA V. THOMAS J. KASTLE.

FILED MARCH 6, 1931. No. 27624.

1. **Criminal Law:** INSTRUCTIONS: REVIEW. When no bill of exceptions, showing the evidence, is presented on review under section 10192, Comp. St. 1922, instructions that might have been proper under any evidence legally admissible under the issues raised by the information and plea of not guilty will not be held erroneous.
2. ———: ———: ———. In the absence of a bill of exceptions showing the evidence, an instruction cannot be considered proper if it states the law erroneously when applied to the particular fact or facts clearly indicated by the instruction itself.
3. **Banks and Banking:** INSOLVENCY: RECEIVING DEPOSITS: STATUTE. Section 8010, Comp. St. 1922, denouncing the receiving of deposits in an insolvent state bank, is not otherwise modified except by the act amended in section 4, ch. 30, Laws 1925, allowing the guaranty fund commission power to manage a bank legally taken over by it "as a going concern, without regard to its solvency."

ERROR to the district court for Dodge county: LOUIS LIGHTNER, JUDGE. *Exceptions allowed in part, and denied in part.*

C. A. Sorensen, Attorney General, E. L. Mahlin and *Frank S. Howell,* for plaintiff in error.

J. C. Cook, Eugene O'Sullivan and *Frank Gaines, contra.*

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

GOSS, C. J.

The defendant was acquitted by the jury. This is a proceeding brought by the state as plaintiff in error to review alleged errors in instructions. It is provided for by sections 10192, 10193, and 10194, Comp. St. 1922.

No bill of exceptions showing the evidence is before us. The bill of exceptions, settled and allowed by the trial judge, consisted of the usual transcript of the record, the items of which it is unnecessary to list here.

The defendant was charged in each of the eight counts of the information with unlawfully receiving a deposit, knowing the bank to be insolvent. Comp. St. 1922, sec. 8010. While count one was dismissed, it contains the description of the bank, incorporated by reference into each of the other seven counts. As it is typical of those submitted to the jury, we quote it:

"In Dodge county, Nebraska, on or about January 7, 1928, the First State Bank of North Bend, Nebraska, a banking corporation organized, existing and transacting a banking business under the laws of said state relating to banks, did unlawfully accept and receive into said banking corporation on deposit from one E. A. Hoff, subject to his checking thereon, money, bank bills, United States currency, checks, drafts and credits in the sum and value of one hundred thirty-seven and 25/100 ($137.25) dollars, the exact character and description thereof complainant is unable to more fully give, said banking corporation being, at said time, insolvent. On said date, Thomas J. Kastle, defendant, then being president, director, officer, agent and employee of said banking corporation, by virtue whereof he had custody, charge, direction and control of

the business affairs of said banking corporation, did then and there, then and there being, by virtue of said official positions, knowingly, unlawfully, and feloniously accept and receive, and cause to be accepted and received, into, and on deposit in, said banking corporation, the aforesaid deposit in manner aforesaid, knowing that said banking corporation was then and there insolvent."

The state assigns as error the giving by the court of instruction No. 12, as follows:

"12. Even though you find from the evidence and beyond a reasonable doubt that the First State Bank of North Bend was in fact insolvent on the 7th, 9th and 10th of January, 1928, when it is alleged in the information that the deposits in question were received by the defendant Kastle, and that the defendant Kastle knew it to be insolvent, nevertheless, if you further find that the department of trade and commerce knew substantially as much about the condition of said bank as defendant Kastle knew about it, and permitted it to remain open, and if you further find that defendant Kastle, on and prior to the 7th, 9th and 10th of January, 1928, believed and expected in good faith, and on reasonable grounds, that he could strengthen its condition and continue it in business as a going concern and eventually, and within a reasonable time, restore it to a condition of solvency, then and in such case, you would not be justified in finding the defendant guilty."

The state also assigns as error the giving by the court of instruction No. 13, as follows:

"13. You are instructed that the allegation of the information that the defendant Kastle was in control of the bank in question is not a material allegation. If you find from the evidence and beyond a reasonable doubt that defendant Kastle, personally and voluntarily and of his own free will and choice, received one or more of the seven deposits referred to in the information knowing the bank to be insolvent at the time, you would be justified in finding against him as to such element of the crime. If, on

the other hand, you find that in receiving the deposits, or any of them, he was not acting freely and voluntarily but as a mere agent or employee or under the direction of some other person or agency, or if there is a reasonable doubt in your minds as to such question, you should find him not guilty."

All the instructions given by the court are shown in the record. In instruction No. 5 the court had instructed the jury as to the elements of the crime necessary to be proved by the state beyond a reasonable doubt before finding the defendant guilty on any count. Briefly stated, these are: (1) That the bank accepted and received the deposit on or about the date stated; (2) that the defendant was president, director, officer, agent or employee of the bank at the time; and (3), as such, accepted and received, or caused to be accepted and received, into such bank, such deposit; and (4) that the defendant then knew said bank to be insolvent.

The brief of defendant in error filed by counsel appointed by the trial judge under the authority of section 10192, aforesaid, and his oral argument on the hearing, challenge the right of the state to have the instructions reviewed in the absence of a bill of exceptions showing the evidence presented at the trial. That brief says: "We find no quarrel with any of the propositions of law cited by counsel as abstract propositions. The difficulty is in applying these propositions to the material facts in the case, *and we have no facts.*" Defendant in error cites no cases or precedents.

The state takes the position that each of the instructions complained of shows on its face that it is erroneous—that, assuming the ultimate facts, as stated by the court, to be found by the jury, this would not lead to the conclusion that the defendant was not guilty.

Before concluding what the applicable rule is, it is necessary to determine what the issues of fact and the law were. Shortly stated, the defendant was charged, as we have shown by the quoted typical count, with receiv-

ing deposits, knowing that the bank was insolvent. The issue was joined by his plea of not guilty. It is presumed that the state's evidence made out at least a *prima facie* case by proving the necessary elements involved in the charge. Otherwise, the cause would not have been submitted to the jury. The defendant then had the right, under his plea of not guilty, to offer any competent evidence tending to show that he was not guilty of the offense charged. In the absence of a bill of exceptions containing the evidence, what is the law as to what must be considered by us as having been presented by the evidence to the jury?

When no bill of exceptions, showing the evidence, is presented on review, instructions that might have been proper under any evidence that might have been legally admissible under the pleadings or information will not be held prejudicial and erroneous. The presumption of law is in favor of the instructions. *Connor v. Schreiner-Flack Grain Co.*, 2 Neb. (Unof.) 188; *Willis v. State*, 27 Neb. 98; *Oltmanns v. Findlay*, 47 Neb. 289; *Home Fire Ins. Co. v. Weed*, 55 Neb. 146; *Clary v. State*, 61 Neb. 688; *Meyers v. Menter*, 63 Neb. 427. By our own decisions we seem to be consistently committed to this rule and it is unnecessary to cite cases from other jurisdictions on this point.

However, no instruction can be considered proper under the evidence if it states the law erroneously when applied to the particular fact or state of facts clearly indicated by the instruction itself. This seems legally self-evident, because in such a situation the error of law appears on the face of the instruction itself. In *Willis v. State, supra*, it was said that, in such circumstances, the instructions "will be presumed to be correct, unless they misstate the law and contain propositions which could not be held correct in any possible case made by the proof under the complaint or information upon which the prosecution was founded."

The department of trade and commerce is an executive and administrative branch of the state government. Comp.

St. 1922, sec. 7243. It is given general supervision of banks and banking under the laws of the state. Comp. St. 1922, sec. 7982. It may under certain conditions take charge of a state bank and turn it over to the guaranty fund commission. Laws 1925, ch. 30, sec. 1, amending Laws 1923, ch. 191, sec. 11.

The guaranty fund commission, created by chapter 191, Laws 1923, was, under section 18, as amended by section 4, ch. 30, Laws 1925, given power to manage any bank, which it had taken over from the department of trade and commerce, "as a going concern, without regard to its solvency, and, through employees, perform all duties and acts of the officers and directors of such bank while managing the same."

The offense of receiving a deposit when a bank is insolvent is not a crime of itself but it is a felony created by the statute relating to banks. Moral turpitude is not involved. Good motive is not a defense. The statutes give no authority to the department of trade and commerce to receive, or to authorize the receiving of, deposits by an insolvent bank. The statutory power or authority to receive deposits in such a bank resided alone, at the time in question, in the guaranty fund commission. It had no authority over any bank until it was taken over by it. Not the bank or any of its officers, nor the department of trade and commerce or any of its agents, had such power or authority. Moreover, it was the statutory duty of the department of trade and commerce, when it took over a bank, to place it in charge of the guaranty fund commission.

Under his plea of not guilty the defendant might have relied on lack of evidence on the part of the state to prove beyond a reasonable doubt the essential elements of the offense charged; or he might have produced evidence that he was absent at the time the offense was committed, that he was incompetent to commit the act, that another committed the act, that the guaranty fund commission was in charge of the bank, operating it "as a going concern,

without regard to its solvency," and that he was, at the time the deposit was received, an employee of the commission and received the deposit under its direction.

By instruction No. 12 the court advised the jury in effect that the evidence justified them in finding (1) that the department of trade and commerce knew substantially as much about the insolvency of the bank as the defendant knew but permitted the bank to remain open; and (2) the defendant at the time of receiving the deposits had reasonable ground for believing in good faith that he could continue the bank in business as a going concern and restore its solvency; and (3) if they found these facts, the court instructed them, as a matter of law, they would not be justified in finding the defendant guilty.

From what has gone before we have seen that the department has no authority to operate an insolvent bank or to authorize a bank, its officers or employees, to violate the criminal laws by receiving deposits when they know the bank is insolvent. Good faith and hopefulness, though ever so patent as facts, are impotent as defenses. Assuming that these facts stated in the instruction were derivable from the evidence, they did not in any degree justify the conclusion of law that the defendant was not guilty. The instruction was erroneous, as is shown on its face.

By one alternative of instruction No. 13 the court advised the jury, in effect, that there was evidence that, in receiving deposits for the insolvent bank, "he was not acting freely and voluntarily but as a mere agent or employee or under the direction of some other person or agency;" and they were instructed, as a matter of law, that if they so found, or if there was a reasonable doubt in their minds as to such question, they should find the defendant not guilty. On account of the absence of the evidence and because this instruction does not bear internal evidence of all the facts the court had in mind, we are unable definitely to say that all of this part of the instruction is erroneous. We know however that, as we have demonstrated

elsewhere in this opinion, there was only one "person or agency" that could legally direct a banker to accept a deposit in an insolvent state bank on or about January 7, 1928—that was the guaranty fund commission. The department of trade and commerce could not. If, as implied in the previous instruction, the true facts showed that the guaranty fund commission was not in charge of the bank, then this part of instruction No. 13 ought not to have been given.

The state also suggested as error the refusal of the trial court to give an instruction requested by the state. That instruction refers to certain arguments of counsel, states that there "is no evidence before you to justify such remarks of counsel," etc., and asks the jury to disregard such arguments. As the evidence is not before us, we cannot say that there was any error in the refusal to give this requested instruction. The court may have decided the alleged remarks were not made or that the state took no exception to them or that their effect had been taken care of at the time they were made.

Under section 10194, Comp. St. 1922, the judgment here does not in any manner affect the judgment of the district court. But the decision here determines the law governing similar cases pending or those that may arise hereafter. As indicated in the opinion, the exceptions are allowed in part and otherwise denied.

EXCEPTIONS ALLOWED IN PART, AND DENIED IN PART.

EBERLY, J., dissenting.

To the conclusions above set forth and to the extent that the disposition of this case by the majority involves the sustaining of any exceptions on the part of the state, I respectfully dissent. The proceedings under consideration are governed by sections 29-2021, 29-2314 to 29-2316, Comp. St. 1929. We are not here concerned with the provisions of our declaratory judgment statute. The sections referred to, and here exclusively controlling, were enacted in 1873 as part of the Criminal Code. In substance they

provide: "The county attorney may take exceptions to any opinion or decision of the court during the prosecution" of a criminal case; "and the bill containing the exceptions, upon being presented, shall * * * be signed and sealed by the court, *which bill shall be made a part of the record,* and be in all respects governed by the rules established as to bills of exceptions in civil cases, except as herein provided." And they further provide procedure for the presentation and review of the exceptions thus taken, and as to the effect of the determination made. The Civil Code, reference to which was above made, in force at the time of the enactment of these statutes, contains, among others, the following pertinent provision: "No particular form of exception is required. The exception must be stated, with so much of the evidence as is necessary to explain it, and no more, and the whole as briefly as possible." Civil Code of 1866, sec. 309. The statute, it may be said, contemplated the hearing of the exceptions thus taken, only after entry of final judgment, and limited this court to the determination of "the law of the case." *State v. Badberg,* 108 Neb. 816.

The records of this court will further disclose that, so far as the subject of pleading may be material, the approved method of presenting the state's exceptions, established by more than a half century of substantially uniform usage and custom, is: The usual transcript containing the final order or judgment to which the bill of exceptions is attached shall be filed, together with a pleading in the nature of a petition in error. Strawn, Supreme Court Practice and Forms, 268-276. In the instant case the state has wholly failed to conform to this established practice; no evidence taken at the trial has been preserved; no final order or judgment appears in the transcript. No authentic record whatever is presented disclosing a history of the action taken by the trial court, and the so-called bill of exceptions has never been filed in nor made a part of the record of the case in the district court, as expressly required by the terms of the statute. True, we

do not overlook the presence here of what purports to be a "transcript of judge's notes," but this court is committed to the view that for the purpose of appeal the trial court speaks only by its journal. We have uniformly denied the competency of "judge's notes" to evidence the history of judicial procedure or establish the fact of a final judgment as a prerequisite to review, both in civil and criminal cases. *Anderson v. Griswold,* 87 Neb. 578; *Union Central Life Ins. Co. v. Saathoff,* 115 Neb. 385.

It might be admitted that the sole basis presented here for review is a copy of an information verified and filed April 4, 1930, properly charging the defendant in separate counts, as an officer of an insolvent bank, with receiving eight separate deposits "on or about" certain dates set forth therein, then knowing such bank to be insolvent; together with a copy of instructions to the jury given and refused by the trial court judge, and a copy of a verdict of the jury determining the defendant not guilty. The condition of the record thus submitted, including the absence of a bill of exceptions containing evidence received in the court below, necessarily precludes us from investigating the transactions involved, determining the facts thereof and the rule of criminal law applicable thereto which their nature may invoke. This renders it impossible for this tribunal to properly determine the "law of the case" tried and disposed of in the district court for Dodge county.

The function of this court in cases of this nature is limited to the "determination of the law of the case" under consideration. *State v. Badberg,* 108 Neb. 816; *State v. Krasne,* 103 Neb. 11; *State v. DeWolfe,* 67 Neb. 321. "The only authority this court has to take cognizance of crimes is given by the Constitution in the grant of appellate jurisdiction." *State v. Missouri P. R. Co.,* 64 Neb. 679; *State v. Union P. R. Co.,* 67 Neb. 141; *Bell v. Templin,* 26 Neb. 249; *Edney v. Baum,* 70 Neb. 159; *State v. Hall,* 47 Neb. 579; *Western Union Telegraph Co. v. State,* 86 Neb. 17.

Jurisdiction of the supreme court is limited in both original and appellate proceedings, the former by Constitution and the latter by statute. *Johnson v. Parrotte*, 46 Neb. 51. We are further expressly denied the exercise of other than appellate judicial powers in criminal cases. Const. art. II, sec. 1.

As to the "doctrine of the law of the case" as a controlling precedent, the following is submitted for consideration: "The doctrine of *stare decisis* contemplates only such points as are actually involved and determined in a case, and not what is said by the court or judge outside of the record or on points not necessarily involved therein. Such expressions, being *obiter dicta*, do not become precedents. It is a maxim not to be disregarded, that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit where the very point is presented for decision." 7 R. C. L. 1003, sec. 31. Again: "The authority of a former decision as a precedent must be limited to the points actually decided on the facts before the court." 15 C. J. 939. "*Mere abstract questions of law cannot be made the subject of litigation, so that, when once determined, the determination must be applied in all subsequent litigation between other and different parties merely because the same question of law is involved.* The positive authority of a decision is coextensive only on the facts on which it is founded, and it can apply only in subsequent cases in which the issues are similar. Accordingly, in applying the rule of *stare decisis* to a former decision, the language of the opinion in the earlier case must be construed with reference to the particular facts presented in that case." 15 C. J. 941. The rule has received full recognition in Nebraska, and this tribunal has even held that points stated in the syllabi, unless this rule is complied with, are to be considered mere *dicta*. *Wilson v. Ulysses Township*, 72 Neb. 807; *State v. Marsh*, 107 Neb. 637.

This rule we have also applied to proceedings of the nature now before us. In *State v. Moore,* 1 Neb. (Unof.) 213, decided in 1901, which was unanimously approved by the court, appears the following statement of the controlling limitation applicable to questions presented by the present record: "In proceedings under section 515 of the Criminal Code, this court will confine itself to the record as in other cases." In the opinion supporting this syllabus appears the following well-considered observations: "But we deem it unwise to go beyond the record in any case, more especially in cases of this character. *Dictum* is generally mischievous, even in cases involving a real controversy, and, in the nature of things, must be more so in proceedings like this which are *ex parte* in character." The sole purpose which the statutes under consideration serve is to enable this court, as a court, and in a manner and under conditions which give to its pronouncements the authority of a precedent, to determine the law "to govern any similar case" hereafter arising. To render a statement of law thus made entitled to authority as a precedent, it must be involved in and presented by the facts of the case, and disclosed by the record then for consideration and be made a controlling point of any judgment rendered therein. Manifestly this requirement is impossible to conform to, in view of the condition of the record before us, in which we are wholly unadvised as to the actual facts involved in the case presented. Nor are we able to accept the proposition that the question of proper instructions in the instant case is to be determined as a question of abstract law, without reference to any concrete case, on the theory that the instructions presented for review were erroneous, no matter what the facts might be.

This court is committed to the view that "An instruction which is correct in its application to the evidence will be upheld, and this, it has been held, is so, although it may be erroneous as an abstract proposition." 38 Cyc. 1622; *Nichols & Shepard Co. v. Steinkraus,* 83 Neb. 1.

Nor is the question here presented one as often raised by demurrer to an information or indictment, but it is one in which the controlling facts of the exact dates of the receipt of the deposits, as established by the evidence at the trial, are necessary to determine the criminality of the act and the punishment required by the legislation in force at the time of the actual commitment. The record before us affords no basis to determine the statutory provisions in force on the day the crime was actually committed, assuming that fact to have occurred. True, the information filed on the 4th day of April, 1930, says the crimes charged therein were committed "on or about" certain dates specified. But, under such charge, it was not necessary that the offense be proved to have been committed on the date alleged in the indictment. It was sufficient to have proved it to have been committed within three years prior to the finding of the indictment or the filing of the information. *Yeoman v. State,* 21 Neb. 171. In the instant case evidence establishing the commission of the crime charged on or after April 4, 1927, and prior to April 4, 1930, would be competent and support the conviction, provided the date actually established by the evidence was one on which a law punishing the offense was then in force and effect. Now, the bank act in force April 4, 1927, was quite different from that which was in force April 4, 1930. By an amendment effective April 30, 1929, radical changes were made, both in the provisions of statute as to the management and control and operation of banks and in the nature of crimes punishable by the act. The majority opinion seeks to cover the question here suggested by the words "at the time in question," yet neither in the opinion nor in the record is there aught which in the slightest degree suggests a logical answer to the simple question, "When did it occur?" or in any manner identifies the precise statute involved.

Judicial pronouncements, though in form of opinions, as to law not involved in or arising from facts then before a court, are not and cannot be deemed properly judi-

cial in character. The power exercised is indeed legislative and the result, as in the instant case, is, in fact, if not in form, a declaratory enactment. We do not overlook the statement from the bar, at the time of the first argument of this cause by the representatives of the state, that an opinion was necessary in this matter to secure conviction in a score of offenses charged under the banking act, heretofore committed and now pending in the several district courts of this state. It is respectfully submitted, however, that the majority opinion may not be considered as the "law of the case," being *obiter dictum,* nor can it evidence the "law of the land."

"By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial." 2 Cooley, Constitutional Limitations (8th ed.) 736. This court knows nothing of the facts involved in the present pending score of prosecutions referred to, just as the majority know nothing about the facts involved in the instant case. This court has heretofore in the most solemn manner declared that the constitutional right of appeal in a criminal case involves the right of the accused to be heard in this court on both fact and law, in person or by attorney. Still as a necessary and intended result of the majority opinion now adopted, in fact, if not in form, in each of the pending prosecutions, this court, so far as the questions of law involved are concerned, has responded to the demand made upon it, and, without inquiry in effect condemned, without hearing rendered judgment, and without trial interpreted the law, all without the presence of any of the accused persons. In substance and in spirit, if not in form, the action taken is a substantial violation of sections 3 and 11, art. I, and of section 1, art. II, of the Constitution of this state.

Even so, we are impressed with the view that, considered as a mere abstract proposition, the conclusion announced in the majority opinion is erroneous.

We are not here concerned with the Criminal Code of this state, but solely with the provisions of the Civil Administrative Code, being originally enacted as chapter 190, Laws 1919. The section relied upon by the state to support a conviction in this case is section 30, art. 16, title V, ch. 190, Laws 1919, being but a single section of a complete "Civil Administrative Code." The situation presented renders imperative the application of certain rules of construction to determine the legislative intent evidenced by section 30 involved, in the light of the entire enactment. They may be epitomized as follows: (1) All sections of this Code, including section 30, which make up the entire enactment, together with subsequent amendments thereto, must be construed together. (2) Section 6, art. IV of the Constitution, is also important in view of the conceded rule that, "When a Constitution gives a general power, or enjoins a duty, it also gives, by implication, every particular power necessary for the exercise of the one or the performance of the other." 1 Cooley, Constitutional Limitations (8th ed.) 138. (3) As unquestionably remedial legislation the Administrative Code, as to its declaratory and directory provisions, must be liberally construed. *Buckmaster v. McElroy*, 20 Neb. 557; *McIntosh v. Johnson*, 51 Neb. 33; *Becker v. Brown*, 65 Neb. 264. (4) "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. (5) Special provisions of a statute in regard to a particular subject will prevail over general provisions of the same or other statutes, so far as these are in conflict. *Albertson v. State*, 9 Neb. 429; *State v. Clarke*, 98 Neb. 566. (6) "A statute may be remedial in one part and penal in another. And the same statute may be remedial for certain purposes, and liberally construed therefor, and at the same time be of such a nature, and operate with such harshness upon a class of offenders subject to it, that they are entitled to invoke the rule of strict construction." 2 Lewis' Sutherland, Statutory Construc-

tion, p. 645, sec. 337. (7) "But one provision (of a statute) may be qualified by another, though it does not profess to have that effect. Words expressive of a particular intent incompatible with other words expressive of a general intent will be construed to make an exception." 2 Lewis' Sutherland, Statutory Construction, p. 660, sec. 345. (8) "General words may be cut down when a certain application of them would antagonize a settled policy of the state." 2 Lewis' Sutherland, Statutory Construction, p. 662, sec. 347. In the last above cited section it is further stated (page 664): "In determining the scope of general provisions there is a leaning to prevent absurdity, for it cannot be deemed intended; also injustice, for like reason."

Reading chapter 190, Laws 1919, as amended, and as an entirety, it is plain that the legislative intent is thereby evidenced that the administration of all laws embraced within this Code was by its terms vested in the governor. For the purpose of aiding him in this task and making executive control efficient and practical and exclusive, executive and administrative departments were created, of which the department of trade and commerce constituted one. For a similar reason the governor was provided with a secretary of the department of trade and commerce, who, subject to the provisions of this chapter, was under the direction and control of the governor, and, as his authorized representative, executes the powers and discharges the duties vested by law in his department. And the chief executive is expressly vested with the power, and charged with the duty of enforcing, through the agency of the secretary of the department of trade and commerce created by this act, all the provisions contained in this title and all provisions which may be hereafter enacted as amendatory thereof. Laws 1919, ch. 190, title V, art. 1, sec. 1. These provisions thus referred to include all provisions relating to banks and banking, including section 30 above quoted, which business is expressly declared by the terms

of this enactment to be a quasi public business and subject to regulation and control by the state.

This Administrative Code, by acts supplemental and amendatory thereto, was in 1923 and 1925 amended to include therein the provisions of law relative to the guaranty fund commission with their several duties and powers. As provided by article 1, title V, ch. 190, Laws 1919, this guaranty fund commission then was, and continued to be, nothing but a governmental agency expressly by the terms of the constitutional provision referred to and of the statute placed under the supervising control and direction of the governor, to be exercisable either by himself in person, or through the secretary of the department of trade and commerce as his representative.

This necessarily involved the right and power of the chief executive and the right and power of his representative, the secretary of the department, to determine the necessity for and to give and impose direction authoritative and final either upon the membership of the guaranty fund commission, or upon a representative of that commission in actual charge of an institution, to conduct it as a going concern (whether solvent or insolvent), and, as an incident thereto, to accept and receive deposits made in the usual course of business. To deny it would in effect be to deny the constitutional power of the executive to take care that the law be faithfully executed, and to deny his constitutional power to carry out the policy evidenced by the statute, and securing the efficient and economical administration of the public laws.

Therefore, we submit that the sole conclusion which the Civil Administrative Code as an entirety supports is that, whatever the guaranty fund commission might do, it was at all times under the supervising constitutional control and statutory direction of the chief executive of the state; that the secretary of the department of trade and commerce was his proper representative, authorized to act as to all matters governed by the banking act for the executive and in his behalf. While the secretary of the de-

partment of trade and commerce was necessarily strictly subordinate to the governor, whatever they or either of them directed, within the scope of their powers, it was the mandatory duty of this subordinate agency, the guaranty fund commission, to carry out and perform. Everything the guaranty fund commission did, or could do, was no more than the exercise of delegated constitutional and statutory powers vested in the executive, in the manner approved by the legislature, and agreeable to the will of the governor. Whatever the terms of the statute authorized the executive in person or by subordinates to do, direct, or authorize to be done, which were in fact so done or authorized, could not be within the criminal sanction of section 30, nor subject to its penalties, because the statutes involved must be construed as an entirety, liberally as to directory provisions, and, so far as penalties were concerned, with strictness. The special provisions of the statute relating to conducting the business of an insolvent bank as a going concern, if in apparent conflict with the general provisions of that statute defining the penalties provided for violations of its terms, will prevail.

It is respectfully submitted, therefore, that the majority opinion erred in stating the following as a conclusion, viz.: "The statutes give no authority to the department of trade and commerce to receive, or to authorize the receiving of, deposits by an insolvent bank. The statutory power or authority to receive deposits in such a bank resided alone, at the time in question, in the guaranty fund commission." And it is further respectfully submitted that, during the existence of the guaranty fund commission, there was never a time that the governor of this state, either in his own capacity or through the secretary of the department of trade and commerce, had not the supreme right and power to expressly direct and demand and authorize the reception of deposits by an insolvent bank, either by or through his secretary of the department of trade and commerce, through the guaranty fund commission, or even by the direct action of the chief executive

or secretary transmitted to the agents of the state in charge of the insolvent institution.

As to the effect of the act of 1929 providing for the repeal of the guaranty fund commission law upon the appointees of that commission who, when the last named act became effective were solely engaged in discharging their statutory duties of managing an insolvent bank "as a going concern" without regard to its solvency, and as an incident thereto of accepting and receiving deposits, we express no opinion.

In view of the conclusion announced herein by the majority, the concluding sentence of section 8, ch. 38, Laws 1929, which reads: "Appointees of the guaranty fund commission shall become and continue the appointees of the secretary of the department of trade and commerce with the same duties and compensation until otherwise directed by said secretary"—is respectfully referred to their future consideration.

DAY, J., joins in this dissent.

STEWART MOTOR COMPANY, APPELLANT, V. CITY OF OMAHA ET AL., APPELLEES.

FILED MARCH 6, 1931. No. 27801.

Constitutional Law: SUNDAY CLOSING ORDINANCE. Ordinance No. 13638 of Omaha, a city of the metropolitan class, prohibiting the selling or exchanging of motor vehicles and the keeping open of a place of business on Sunday for such purposes is a valid exercise of police power under the laws of the state, and is not invalid under article I of the state Constitution, nor under the Fourteenth Amendment to the Constitution of the United States.

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

Swarr, May & Royce, for appellant.

John F. Moriarty, Thomas J. O'Brien and *Johnson, Rine & Marshall, contra.*

Fradenberg, Stalmaster & Beber, Oscar T. Doerr and *Philip M. Klutznick, amici curiæ.*

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

GOSS, C. J.

This suit involves the validity of ordinance No. 13638 of the city of Omaha. The first section of the ordinance makes it unlawful for any person, firm or corporation, or their agents or employees, to sell, barter, or exchange any motor vehicle, whether new or second hand, on Sunday; the second section prohibits the keeping open on Sunday of any place of business by such parties for such purposes; and the third section makes the violation a misdemeanor and provides penalties of $50 to $100 or imprisonment for not more than 10 days.

The cause arose on injunction below. The decree held the ordinance valid and constitutional. It is presented here on a case stated, under our printed rule No. 9, paragraph c, which allows any case so submitted to be advanced for hearing, if both parties desire. Appellant attacks the ordinance as class legislation, as discriminatory, and as contrary to the Fourteenth Amendment to the Constitution of the United States and to article I of the state Constitution.

Omaha is a city of the metropolitan class. The legislature delegated to such a city the power by ordinance, "To make and enforce all police regulations for the good government, general welfare, health, safety, and security of the city and the citizens thereof, in addition to the police powers expressly granted herein, and in the exercise of the police power, may pass all needful and proper ordinances; and shall have power to impose fines, forfeitures, penalties, and imprisonment at hard labor for the violation of any ordinance; and to provide for the recovery, collection and enforcement thereof; and in default of payment to provide for the confinement in the city or county prison, workhouse or other place of confinement with or

without hard labor as may be provided by ordinance." Comp. St. 1929, sec. 14-102, subd. XXV.

In *Liberman v. State,* 26 Neb. 464, the defendant was convicted of keeping his dry goods and notion store open on Sunday in violation of a Lincoln city ordinance exempting certain kinds of business, said by defendant to be competitive. This court said: "An ordinance prohibiting persons from engaging in certain kinds of business on the first day of the week, commonly called Sunday, is not void by reason of such discrimination; the prohibited business not being of public necessity."

In *State v. Somberg,* 113 Neb. 761, the defendant was convicted of keeping his store open on Sunday and of selling groceries and meats and articles usually sold in grocery stores and meat markets, contrary to an Omaha ordinance prohibiting such stores to be open and such goods to be sold on Sunday. Under the authority of *Liberman v. State, supra,* we held that the ordinance was not discriminatory and was a valid exercise of the police power.

It should be stated that in each of the ordinances upon which the above two cases were based there was a provision exempting from its operation those who conscientiously observe the seventh day of the week, instead of the first, as the Sabbath; and that there is no such provision in the ordinance now under consideration. But, in July, 1917, as shown in *State v. Murray,* 104 Neb. 51, the defendant was convicted in Omaha of keeping his shop open and carrying on the business of a barber contrary to chapter 234, Laws 1917, now section 28-940, Comp. St. 1929. That act was complete in itself, referred only to barbers, and contained no exemption to those who chose to observe another day of the week. It was held that the act was not discriminative class legislation.

If the question were new, we might feel more inclined to draw the lines a little more closely than they have been drawn, but our court seems to be committed to a liberal construction of the application of the Constitution to ordinances of this nature. The legislature of the state has delegated to the city the power to legislate by ordinance on

the subject of Sunday closing in any way not in conflict with the federal or state Constitution or with the statute. So long as the ordinances enacted are not violative of the powers given, they are to be overruled or nullified, not by the courts, but by repeal at the hands of those representing the people of the city in their legislative council.

We are of the opinion that the ordinance in question is not invalid under the federal or state Constitution nor contrary to the laws of the state.

The judgment of the district court is

AFFIRMED.

JOHN M. ZYNTEK, APPELLANT, V. BOARD OF COUNTY COMMISSIONERS OF HOWARD COUNTY, APPELLEE.

FILED MARCH 6, 1931. No. 27605.

1. **Highways:** OPENING: PETITION. A petition for the opening of a highway on a section line is not essential to jurisdiction of the county board to take such action.
2. ———: VACATING: PETITION. A petition to vacate a highway is not demurrable, if drawn in compliance with the statutory form. Comp. St. 1929, sec. 39-104.

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

Haggart & Haggart and *B. J. Cunningham,* for appellant.

W. F. Spikes, contra.

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

ROSE, J.

This is a proceeding in which petitioners who joined in a single petition prayed the county board of Howard county to close an old zigzag road and open a new road on a section line running in the same general direction as the old road. Upon a hearing the county board overruled a remonstrance to the granting of the relief prayed and made an order complying with the prayer of the petition. John

M. Zyntek, a remonstrant, appealed to the district court. There he demurred to the petition "for the reason that the same contains a misjoinder of two alleged causes of action." The district court overruled the demurrer. Zyntek elected to stand upon his demurrer and appealed to the supreme court.

On appeal it is argued that "A petition to establish a road cannot be joined with a petition to vacate another road, when the two are not on the same route." That position is untenable in the present instance for the following reasons: It is well-settled law that a petition praying the county board to open a highway on a section line is not essential to jurisdiction to take such action. *Rose v. Washington County*, 42 Neb. 1. The petition for the closing of the old road complies with the statutory form. Comp. St. 1929, sec. 39-104.

AFFIRMED.

NELLIE C. DETWEILER, APPELLANT, V. MASHA FORMAN ET AL., APPELLEES.

FILED MARCH 6, 1931. No. 27527.

1. **Usury.** When the sum named in a promissory note, which was given for a loan of money, exceeds the sum actually loaned by the lender to the borrower, and such excess represents a commission demanded of and paid by the borrower which, when added to the interest, aggregates more than the rate of interest lawfully allowed for such loan, namely, 10 per cent. per annum, the note is thereby tainted with usury.
2. ———: NOTE: RENEWAL. When an initial note given for a loan of money is usurious, a renewal of such note is likewise tainted with usury.
3. ———: ———: RECOVERY. Where usury has been practiced, the plaintiff is not entitled to recover any interest, but can recover only the actual amount of money loaned by him, diminished by payments of principal and interest on the debt. *Male v. Wink*, 61 Neb. 748.
4. ———: ———: ———. Evidence examined, discussed in the opinion, and *held* to sustain a finding that the loan of money to defendant was charged with usury to such extent that the plaintiff has thereby forfeited her right to recover on such loan.

APPEAL from the district court for Douglas county: FRANCIS M. DINEEN, JUDGE. *Affirmed.*

Weaver & Giller, for appellant.

Leon & White, George B. Thummel and *Merrow & Murphy, contra.*

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

DEAN, J.

February 2, 1925, Celik Forman and Masha Forman, husband and wife, executed and delivered a mortgage deed to John O. Detweiler in the principal sum of $18,770, to secure the payment of two certain promissory notes in the several sums of $12,770 and $6,000, respectively, for a loan of money made by Detweiler to the Formans. Each of the above notes by their respective terms bears interest at the rate of 7 per cent. per annum until due, and 10 per cent. per annum after the due dates and from thence until paid in full. The $12,770 note was assigned and delivered by Detweiler to his wife, Nellie Detweiler, May 9, 1927, and she is now the owner and holder of the note. And the $6,000 note above mentioned was sold, assigned, and delivered by Detweiler to Eva Beach, who is now the owner thereof. Celik Forman died in June, 1927, and John O. Detweiler died the same year.

Nellie Detweiler began this action in the district court for Douglas county against Masha Forman and the estate of Celik Forman, deceased, to foreclose the $18,770 mortgage. And Eva Beach, by her cross-petition, alleges that she is an innocent purchaser for value of the $6,000 note, and she seeks to recover the amount due her on the above note, with accrued interest. Masha Forman, in her answer, admitted the making and execution of the mortgage and the notes herein above named. But she contends that the money was loaned by Detweiler to her and her husband jointly, for the payment of a commission and interest which together exceeded the lawful rate of 10 per cent. And she further alleges that the notes and obligations arising there-

from were and are so tainted with usury that nothing is therefore due thereon.

The trial court found that the above $18,770 mortgage represented a renewal of three prior mortgages and notes thereto attached, but that all of the indebtedness arising from the obligations under the terms of the $12,770 note had been paid off and discharged and that nothing was due and owing from the defendant Masha Forman to plaintiff Nellie Detweiler. But, in respect of the $6,000 note owned by Eva Beach, the court found that this note was bought by the purchaser without knowledge that it was tainted with usury and that she should therefore recover for the face value of the note with interest. And the court also decreed that Eva Beach, as the owner of the $6,000 note, should have a prior mortgage lien on the mortgaged premises to secure her loan. From the judgment so rendered Nellie Detweiler has appealed.

Mrs. Forman alleges that the $18,770 mortgage represented the balance due to Detweiler on three prior notes, above mentioned, that were later merged into and evidenced by the two notes in suit, in the sums of $6,000 and $12,770, respectively. The three notes above mentioned represented loans by Detweiler to the Formans in the following sums, namely, one for $3,600, one for $5,800, and one for $14,000. In her answer, however, Masha Forman alleges that only $3,300 was ever handed over to her and her husband on the above named $3,600 loan, and that the $300 difference was a commission charged by Detweiler; that $12,000 only was actually paid to them on the $14,000 loan, and that $2,000 represented a commission; and that only $5,200 and no more was actually loaned to her and her husband on the $5,800 note, and that the difference of $600 represented a commission which Detweiler charged for making the loan. Plaintiff Nellie Detweiler, however, denies that the three original notes were tainted with usury and that the two renewal notes in suit were therefore likewise usurious.

In respect of the note for $14,000, that being one of the three loans later evidenced by the $18,770 mortgage, as

hereinbefore pointed out, Mrs. Forman testified that her husband solicited a loan for only $12,000, but that Detweiler told the Formans he would not consider making such a loan for less than a $2,000 commission, and the note was thereupon drawn up pursuant to Detweiler's proposal in the sum of $14,000, to the end that the $2,000 commission should be included therein.

The total amount of interest paid on the $14,000 note appears from the record to have been $3,988.31. But the total amount of money actually loaned to the Formans on the $14,000 note appears to have been only about $12,153.34, as shown by canceled checks. The difference between the amount of $14,000 named in the note and the $12,153.34 actually loaned approximates $1,846, and the latter sum represents Detweiler's commission which, with the interest of $3,988.31 included, makes a total sum of $5,834.31 paid to Detweiler. This exceeds the 10 per cent. maximum interest which the law allows upon a loan of money and clearly taints the $14,000 note with usury.

Substantially the same computation was employed in arriving at the amount of interest and commission charged by Detweiler on the $3,600 and $5,800 notes, which were later merged into the $18,770 mortgage in suit.

The ultimate proposition to be determined in the present case is whether the loans by Detweiler to Forman exceeded the lawful rate of interest at 10 per cent. per annum and, if so, whether the three original notes or loans tainted the later mortgage and loans with usury. In this jurisdiction we have long held to this proposition:

"Every subsequent security given for a loan originally usurious, however remote or often renewed, is subject to the plea and proof of usury; and when the proof of usury in such case is sufficient, the court will apply all payments of interest upon such usurious loan as a payment, *pro tanto*, of the principal thereof." *Nelson v. Hurford*, 11 Neb. 465. See, also, *Knox v. Williams*, 24 Neb. 630; *Exeter Nat. Bank v. Orchard*, 39 Neb. 485; *McDonald v. Aufdengarten*, 41 Neb. 40; *Farmers Bank of Kearney v. Oliver*, 55 Neb. 774.

In *Allen v. Dunn*, 71 Neb. 831, we held that the taking of interest more than one year in advance to the end that

more than the legal rate of interest might be obtained constituted an unlawful and usurious transaction. And it has long been established that where usury has been practiced the plaintiff is not entitled to recover any interest, but can recover only the actual amount of money loaned by him, diminished by payments of principal and interest on the debt. *Male v. Wink,* 61 Neb. 748; *Brewster v. Bank of Ainsworth,* 43 Neb. 79; *Koehler v. Dodge,* 31 Neb. 328; *Interstate Savings & Loan Ass'n v. Strine,* 58 Neb. 133; *Vail v. Van Doren,* 45 Neb. 450.

In the present case the sums of money named in the promissory notes in suit exceed the sums actually loaned to the defendant and her deceased husband, and such excess represents commissions demanded by Detweiler and paid by Forman which, when added to the interest, aggregate more than the rate of interest at 10 per cent. per annum. It follows that the notes in suit were and are thereby tainted with usury. And when an initial note given for a loan of money is usurious, a renewal of such note is likewise tainted with usury. It is elementary that, where usury is established, as in the present case, the amount of the commission which the lender obtained and all interest payments as well are to be applied on the principal indebtedness. From the fact that it clearly appears that the excess payments demanded of the borrower and the amounts paid by him as interest and commissions exceed the amount of the note as executed therefor, it follows that the defendant cannot recover anything on her $12,770 note, that having been satisfied in full before this action was commenced. In respect of the $6,000 note, however, it is clearly shown that Eva Beach purchased such note without knowledge of the fact that it was tainted with usury, and it therefore follows that she is entitled to recover the amount of her note with lawful interest.

The judgment is right and is in all things

AFFIRMED.

LANCASTER COUNTY, EX REL. EMILE G. ROSEWELL ET AL., APPELLEES, V. DANIEL R. GRAHAM, APPELLANT.

FILED MARCH 6, 1931. No. 27561.

1. **Appeal.** Questions not presented to nor passed upon by the trial court will not, ordinarily, on appeal to the supreme court, be considered.
2. ———. Reversible error cannot be predicated on the admission of incompetent or immaterial evidence in equity cases. The trial court is presumed to have disregarded any such evidence.
3. **Highways:** PRESCRIPTION. A public highway by prescription may be established by continuous adverse use thereof by the public for a period of ten years.

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

H. J. Whitmore, for appellant.

Farley Young and *R. H. Hagelin, contra.*

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

GOOD, J.

This is an action to enjoin defendant from closing a highway or interfering with its use, as such, by the individual plaintiffs. Defendant denied that there was a highway at the point claimed by plaintiffs, and averred that land on which plaintiffs claim a highway is farm land, owned by defendant in fee simple. The trial court found for plaintiffs and granted the injunction. Defendant has appealed.

Defendant contends that the action is not prosecuted in the name of the real party in interest; that the action is by the county of Lancaster alone, and that it has no interest in the case; that Rosewell and Jappert are relators merely and are not parties to the action. An examination of the petition discloses that Rosewell and Jappert are not only relators but are individual plaintiffs. The suit was heard and determined on that theory and will be so treated in this court.

It is further urged that the evidence discloses that defendant was the owner of but an undivided one-fourth interest in the land over which the road was alleged to exist, and that defendant's coowners were necessary parties to the action. A sufficient answer to this contention is that the point was not raised in the trial court, and, furthermore, it does not appear that any one, other than defendant, is questioning the existence of a highway or threatens to close it to the public use or to interfere with plaintiffs' use thereof as a highway.

Complaint is made of errors in the admission of evidence over objection. It is a familiar rule that in the trial of equity cases the court is presumed to have disregarded any incompetent or immaterial evidence that may have been admitted.

It is urged that error was committed in the exclusion of evidence. The record discloses no prejudicial error in that respect.

The principal question for determination is whether there was, under the evidence, a highway established by prescription. There is no contention that any highway was ever laid out or action taken by the public authorities to establish a highway in the location involved. The highway in question, if it exists, is a continuation westward of Hill street in the city of Lincoln. The eastern end of the disputed highway is at Eighth street in the city of Lincoln, and extends to a point that would be represented by Fourth street if extended. It appears that many years ago the Lincoln Street Railway Company ran its street railway lines over Hill street and west over the controverted road. What right was granted to the company, or the nature thereof, does not appear in the record. A few years ago the street railway company removed one of its tracks and rails and later entirely abandoned whatever right it had to use this particular strip of ground. After its abandonment, defendant obtained from the street railway company a quitclaim deed, presumably to the land over which its tracks had formerly existed.

Defendant contends that, since the street railway company had a right of way, no part thereof could be ac-

quired by adverse possession. This court has so held with reference to the right of way of railroads. *Edholm v. Missouri P. R. Corporation,* 114 Neb. 845.

The record is barren of any evidence showing the nature and extent of the right of the street railway company to occupy and use the strip of ground as a right of way. For aught that appears, it may have been a mere permission or license. There is nothing to show the width of the so-called right of way. It is true that a year or two before the commencement of this action the Lincoln Traction Company, successor to the Lincoln Street Railway Company, executed to defendant a quitclaim deed to a strip of land, 66 feet wide, running westward from the west end of Hill street in the city of Lincoln. It is problematical if the street railway or the traction company had any right or title that it could convey. There is a vast volume of evidence showing that this strip of land was used as a highway by a considerable portion of the public for a long period of time, dating back to more than ten years prior to the commencement of this action, and that for the last seven or eight years it has been used very extensively as a highway; that the county authorities have within recent years done some work and grading in putting the highway in order. There is undisputed evidence that defendant, on one occasion, stated that his father had given permission to the street railway company to construct its tracks along this strip, but on the condition that it should also be used as a highway. It is well known that street railway companies acquire rights to lay tracks and operate their cars thereon in the streets of cities, but they do not, by so doing, obtain an exclusive use of the streets, and the public is at liberty to travel over, and has an equal right with the street railway company to the use of, the streets.

In the absence of any evidence that the street railway company ever acquired any title to the strip in controversy, a quitclaim deed from the successor to the street railway company is insufficient to establish title in the grantee of such quitclaim deed. The record discloses that

the public has continuously used this strip of land as a highway for more than ten years previous to the commencement of this action. A highway may be established by prescription when used adversely by the public continuously for a period of ten years or more.

We reach the conclusion that the strip of land in controversy has, by user, become, and is now, a public highway. It necessarily follows that defendant could not lawfully close the road or interfere with its use by the plaintiffs. The injunction was properly granted.

The judgment of the district court is

AFFIRMED.

ELMER D. DELOISTED, APPELLEE, V. EMMITT H. HILSON ET AL., APPELLANTS.

FILED MARCH 6, 1931. No. 27569.

1. **Religious Societies:** COURTS. The only grounds upon which civil courts will interfere with the internal affairs of a religious organization are for the protection of civil or property rights.
2. ———: ———. The courts will not review the judgment or acts of a religious organization with reference to its internal affairs for the purpose of ascertaining their regularity or conformity with the discipline and usages of such organization.
3. ———: RIGHTS OF MEMBERS. Individual members of a voluntary unincorporated association, such as the Salem Baptist Church, have no severable right in the property of said association. The individual member has no right to the use of said property except by virtue of his membership.

APPEAL from the district court for Douglas county: FRANCIS M. DINEEN, JUDGE. *Reversed.*

W. H. Hatteroth, for appellants.

Webb, Kelley & Lewis, contra.

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

DAY, J.

The plaintiff brings this suit on behalf of himself and seventeen other persons against the pastor and members

of the official board of the Salem Baptist Church, to enjoin them from interfering with their membership rights in the use of the church property and records, attending church and exercising their rights as members of such church. The trial court entered a decree in favor of the plaintiffs.

The plaintiff and his associates were excluded from the membership of the church and by this suit they seek to nullify the action of expulsion. The rule is that the only grounds upon which civil courts interfere with ecclesiastical cases are for the protection of civil or property rights. The courts will not review the judgment or acts of a religious organization with reference to its internal affairs for the purpose of ascertaining their regularity or accordance with the discipline or usages of such organization. This rule is supported by the overwhelming weight of authority. Our court has so held in the following cases: *Pounder v. Ashe,* 44 Neb. 672; *Powers v. Budy,* 45 Neb. 208; *Wehmer v. Fokenga,* 57 Neb. 510; *Bonacum v. Harrington,* 65 Neb. 831; *Bonacum v. Murphy,* 71 Neb. 487; *St. Vincent's Parish v. Murphy,* 83 Neb. 630; *Rogers v. Tangier Temple,* 112 Neb. 166. In the latter case this court held that the individual member of a voluntary, unincorporated association has no severable right in the property of said association. The appellee relies upon the case of *Jones v. State,* 28 Neb. 495. That case is distinguished in *Rogers v. Tangier Temple,* 112 Neb. 166, and was distinguished on the ground that in that case the court inquired into the validity of expulsion from church membership to protect the civil rights of the defendant. In this case the plaintiffs were expelled from membership in the Salem Baptist Church, a voluntary, unincorporated association. There are no civil or property rights involved and the case is controlled by *Rogers v. Tangier Temple,* 112 Neb. 166.

The court, after a careful consideration of the evidence in this case and the law applicable thereto, has reached the conclusion that the plaintiff is not entitled to a decree restoring him to the privileges of membership and the judgment of the trial court is accordingly

REVERSED.

CLARENCE G. BLISS, SECRETARY OF THE DEPARTMENT OF TRADE AND COMMERCE, APPELLEE, V. BESSIE M. WOODS, APPELLANT.

FILED MARCH 6, 1931. No. 27786.

Master and Servant: INJURY TO EMPLOYEE: SETTLEMENT. The dependents of the injured employee are not necessary parties in interest in an action for compensation brought during the lifetime of such employee. His settlement of such an action, with prejudice, while in full possession of his mental faculties, and in the absence of fraud, is binding to that extent upon his dependents.

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

Sanden, Anderson, Laughlin & Gradwohl, for appellant.

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

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

PAINE, J.

These two cases are appeals from a decree and judgment of dismissal entered by the district court for Lancaster county. Two suits were brought against the guaranty fund commission of the state of Nebraska under the provisions of the workmen's compensation law, the first suit being brought by the widow of Charles D. Woods, deceased, for amounts due her after the death of her husband.

The second suit was brought by Bessie M. Woods, as administratrix, to recover any amounts due prior to the death of the deceased. The facts in the case, as alleged by the plaintiff, may be stated briefly as follows: Charles D. Woods, the husband of Bessie M. Woods, appellant, was employed by C. A. Bryant, head of the real estate department of the guaranty fund commission of Nebraska, in July, 1927, at a monthly salary and expenses, and while driving his own automobile near Johnstown, Cherry county, on September 24, 1927, with his wife and a prospect to whom he had shown a piece of land near Tryon,

he dropped into a rut, which caused his jaw to strike the steering wheel of the car, causing osteomyelitis; that he did not notify his employer for some time thereafter, and he died on May 29, 1929. The guaranty fund commission, through Mr. C. A. Bryant, paid Mr. Woods $50, after the accident, but the guaranty fund commission and the department of trade and commerce have at all times asserted that the illness which caused the death of the deceased was Bright's disease, and in no wise caused by the alleged accident.

The said Charles D. Woods filed a petition before the compensation commissioner, but before a hearing thereon the said Woods dismissed said petition with prejudice to any further action thereon, and the compensation commissioner entered judgment, dismissing the action, on January 17, 1929.

The day before said Charles D. Woods and wife filed a petition in the district court for Lancaster county, in which it is set out that they elected to proceed at common law for damages in the sum of $5,000 against the guaranty fund commission. At the same time, to wit, January 16, 1929, the plaintiffs, through their attorneys, Burkett, Wilson, Brown, Wilson & Van Kirk, entered into a stipulation for a settlement and dismissal of said suit with I. D. Beynon, attorney for defendant, in which a payment of $1,200 was made and accepted, and the action dismissed with prejudice.

Thereafter the two actions now on trial were brought before the compensation commissioner, and from his decision, entered September 27, 1929, appeals were taken to the district court, where a trial was had.

The questions to be determined before the district court were, first, whether Woods received injuries as claimed; second, the validity of the dismissal of the case by Woods before the commissioner without hearing; and, third, whether the dismissal of Woods was binding upon his wife under the statute upon dependents, section 48-124, Comp. St. 1929.

The district court held in effect that the dependents of the injured employee are not necessary parties in interest in an action for compensation brought during the lifetime of such employee. His settlement of such an action, with prejudice, while in full possession of his mental faculties, and in the absence of fraud, is binding to that extent upon his dependents.

The trial court finds that Woods was represented by able lawyers and that there was much dispute in their minds whether this was a matter falling under the workmen's compensation law or created a liability at common law. The defendant insisted that it was not liable under either, but made settlement to avoid litigation. The settlement was made by Woods when he was in full possession of his mental faculties and joined in by his wife, and the court held that this settlement was binding upon all parties. A discussion of the many cases cited in the briefs would not add any new law to this subject, and the judgment of the district court of dismissal is therefore

AFFIRMED.

FLOYD BROTT, APPELLANT, V. W. T. FENTON, WARDEN, APPELLEE.

FILED MARCH 13, 1931. No. 27616.

APPEAL from the district court for Lancaster county: LINCOLN FROST, JUDGE. *Affirmed.*

Adams & Adams and *J. A. Hayward,* for appellant.

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

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

PER CURIAM.

This is an application for a writ of habeas corpus against the warden of the Nebraska state penitentiary. The trial court refused the issuance of the writ.

Brott was tried, convicted and sentenced to the penitentiary for a period of two years and six months for chicken stealing by the district court for Lancaster county. He prosecuted a proceeding in error to the supreme court and was released on bond. While free on bond, he went to Hall county, where he was convicted in the district court for stealing a calf and sentenced to three years in the penitentiary. He commenced serving this sentence December 19, 1927. Nine days later the supreme court affirmed the conviction of the district court for Lancaster county and issued its mandate. The Hall county sentence was completed April 11, 1930, whereupon appellant was held to serve the previous sentence.

The appellant has served no part of his sentence imposed by the Lancaster county court. The delay was caused by his prosecution of error proceedings to this court and his interim conviction in Hall county. In *Riggs v. Sutton,* 113 Neb. 556, we held: "The time for the beginning of a sentence of imprisonment in a criminal action is not an essential part of the judgment." See the recent case of *Volker v. McDonald, ante,* p. 508. Appellant relies on *King v. Fenton,* 119 Neb. 872, which was decided upon a question of fact and does not hold, as he contends, "that two or more sentences shall run in their proper sequence * * * in the absence of specific directions of the court to the contrary." See *Mercer v. Fenton, ante,* p. 191. The appellant's liability to the state of Nebraska was, under the two sentences in this case, five years and six months. He had discharged this liability for penal servitude to the extent of three years upon the 11th of April, 1930. He has served but a few days of the first sentence. This case is controlled by *State v. Ryder,* 119 Neb. 704, wherein we held: "When sentence is pronounced upon one already serving a sentence from another court, the second sentence does not begin to run until the sentence which the prisoner is serving has expired, unless the court pronouncing the second sentence specifically states otherwise." When the mandate of this court was issued which affirmed the judgment and sentence of the Lancaster county court, the appellant was then serving another sentence.

The appellant was not entitled to a discharge on a writ of habeas corpus, and the judgment of the district court is

AFFIRMED.

PAINE, J., not participating.

CRETE MILLS, APPELLANT, V. LACLEDE STEVENS, APPELLEE.

FILED MARCH 13, 1931. No. 27570.

1. **Judgment:** DUTY OF CLERK. When a verdict is general, it is the official duty of the clerk to render judgment in conformity to the verdict, unless otherwise ordered by the court. Comp. St. 1929, sec. 20-1313.
2. **Appeal:** JUDGMENT: ENTRY: REVIEW. A mistake, neglect or omission of the clerk, in entering a judgment on a verdict, is not a ground of error until presented and acted upon in the court in which it occurred. Comp. St. 1929, sec. 20-1928.
3. **Judgment:** VACATING AFTER TERM. A district court has power to vacate or modify its own judgments after the term where the mistake, neglect or omission therein was that of the clerk of the court. Comp. St. 1929, sec. 20-2001, subd. 3.
4. ———: MISTAKE OF CLERK. As between the parties to a suit, one of them, who is without fault, cannot be deprived of his rights therein through official fault, mistake, neglect or omission; in such a case the court will put the parties in the same position they would have occupied had such official fault not been committed.

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

John L. Mattox, for appellant.

E. H. Evans, contra.

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

GOSS, C. J.

This is an action by plaintiff for damages for breach of written contract to purchase 420 barrels of flour, and by defendant on his cross-petition, asking for damages for breach of implied warranty on another carload of flour delivered by plaintiff to defendant.

There have been two jury trials of this case, one before Judge Tewell and the second before Judge Nisley.

On the first trial the jury returned a verdict November 16, 1928, for the plaintiff on its petition, for $369.85, and for the defendant upon its set-off in the sum of $405.37. On the same day plaintiff filed a motion for judgment on the cross-petition, notwithstanding the verdict, and filed a motion for a new trial, both of which the court overruled at the same term by a journal entry dated January 15, and filed on February 2, 1929. This journal entry was not artfully drawn, but, as we interpret the order, it denied a new trial on plaintiff's cause of action which had, in effect, been admitted in the answer except as to the amount; the entry further said that the evidence was insufficient to sustain the damages of $403.37 found by the jury in favor of defendant on its set-off, but found the evidence was sufficient to sustain $300 as damages on the set-off, and that defendant should, within five days, file a remittitur of $103.37, "and that, failing to file said remittitur within said time, a new trial shall be granted * * * upon the cause of action set forth in defendant's answer, and new trial denied as to the cause set forth in plaintiff's petition." The discrepancy of $2 in the figures above recited as to the verdict for the defendant is not of our making, but is taken from the record as we find it. Defendant filed no motion for new trial.

The record does not show, but we assume, from the fact of a second trial, that no remittitur was filed. No formal judgment on the verdict was ever entered, nor was there any judgment entered on the failure of defendant to file a remittitur. There is no journal entry in the record between that of Judge Tewell of January 15, 1929, just quoted, and that showing the beginning of a new trial before Judge Nisley on February 24, 1930, when a jury was impaneled and a new trial begun.

By his instructions on the first trial, Judge Tewell had directed the jury to find in favor of the plaintiff on its cause of action an amount which, with interest as directed by him and correctly computed by the jury, amounted to

$369.85, as fixed by the jury. At the beginning of the second trial plaintiff and its counsel assumed that a judgment had been entered on the plaintiff's cause of action in accordance with the verdict and the later finding and order of the court, and so was a long way from home, without witnesses and unprepared for trial except on the counterclaim. After the impaneling of the jury on February 24, 1930, plaintiff moved in open court for judgment in its favor on its cause of action in accordance with the verdict of the jury in the first trial, and proved by the clerk of the court the state of the record. In effect, the court overruled the motion, in that he required plaintiff to proceed on the petition and, on plaintiff's refusal to do so, took under advisement the defendant's motion for a judgment upon plaintiff's petition and that the same be dismissed at plaintiff's costs. Later in the trial the court sustained defendant's motion and dismissed the petition. The trial proceeded on the cross-petition and resulted in a verdict and judgment for the defendant for $375.

When the verdict was returned in the first trial it was the duty of the clerk under the Code of Civil Procedure to render judgment in conformity to the verdict, unless the court order the case to be reserved for future argument or consideration. Comp. St. 1929, sec. 20-1313. While it is true that section 20-1316, Comp. St. 1929, requires that, in the case of a counterclaim or set-off, when it exceeds the plaintiff's claim established at the trial, judgment should be given defendant for the excess, yet it is the approved practice for the judgment entry to show the findings of the verdict for each party as a basis for the computation of the judgment for the excess suggested by the Code. Moreover, when Judge Tewell, in ruling on the motion of plaintiff for new trial, denied a new trial as to the recovery on plaintiff's cause and denied it as to defendant's cause, unless the latter should file the specified remittitur within five days, it was in effect a pronouncement of judgment for plaintiff on the recovery on his petition. It was the duty of the clerk to enter a proper judgment accordingly on the plaintiff's recovery when the five

days had elapsed without the filing of the remittitur. This procedure would have preserved plaintiff's rights on the petition already fully litigated and ordered by the judge presiding on that trial to be entered as a judgment. The failure to enter the judgment was the basis for the fundamental error that runs through this proceeding.

This mistake, neglect or omission of the clerk was fully presented to the trial court on the second trial and plaintiff thus preserved his right to present the ruling of the court in failing to correct the record so as to show plaintiff's judgment and in dismissing plaintiff's petition. Comp. St. 1929, sec. 20-1928. That the term had ended, in which the proceedings on the first trial were had, did not deprive the court in the second trial from correcting the journal so as to make it show the judgment it should have shown in favor of the plaintiff. This comes under the power of the court at a subsequent term to modify its judgments and particularly, under the third subdivision of the section hereinafter cited, "for mistake, neglect or omission of the clerk." Comp. St. 1929, sec. 20-2001; *Clark & Leonard Investment Co. v. Rich,* 81 Neb. 321; *Hyde v. Michelson,* 52 Neb. 680; *Calloway v. Doty,* 108 Neb. 319. Even without this statute as to the neglect or omission of the clerk, it is the law that, where a party to an action is without fault, he cannot, as between the parties, be deprived of his rights therein through official fault. A familiar illustration of the application of this principle is found in those cases where a new trial is granted on failure of an official stenographic reporter to furnish a bill of exceptions until after the upset date allowed by statute. *Curran v. Wilcox,* 10 Neb. 449; *State v. Gaslin,* 32 Neb. 291; *Holland v. Chicago, B. & Q. R. Co.,* 52 Neb. 100; *Zweibel v. Caldwell,* 72 Neb. 47.

The cross-petition alleged a set-off. The right of action on that was independent of plaintiff's right of action on his petition. For convenience the law permits both actions between the same parties to be tried together. It also provides that, when the jury return a verdict for plaintiff on its petition and for defendant on its set-off,

the judgment shall be for the excess and in favor of the one allowed the larger amount. But where, as here, the court ordered a new trial as to one but denied it as to the other, there was no occasion for retrying the issue as to the independent cause of the other. The judgment should have been entered in favor of plaintiff and held to await the determination of defendant's action on his set-off. The dismissal of the petition of plaintiff and the failure to recognize its cause of action as adjudicated was erroneous.

After the jury were impaneled and the case stated to the jury, an additional attorney for defendant appeared at the counsel table. Plaintiff objected to the entry of new counsel after the jury were impaneled and sworn. Regular counsel for defendant explained to the court that he was afflicted with an attack of laryngitis and expected his voice to fail before the trial was over and so had asked counsel to sit in with him in case of emergency. The court overruled the objection. Plaintiff took no action to reexamine the jury on account of the presence of new counsel, nor otherwise than to state his objection and to take an exception when the court overruled his objection. We find no proper record here upon which to base prejudicial error.

Plaintiff argues that the evidence on behalf of defendant was insufficient to make out a *prima facie* case on the cross-petition and was insufficient to sustain the verdict for $375 thereon. We think there was sufficient evidence to submit the alleged damages to the jury. The jury is the tribunal to pass upon facts properly submitted. We cannot say that the damages assessed are excessive. Therefore we do not disturb the amount shown by the verdict to be due on the set-off but affirm that feature of the case.

Because of the error in refusing to recognize, as already adjudicated, the cause of action in plaintiff's petition, it will be necessary to reverse the judgment of the district court. However, the record affords ample data to direct what judgment should be entered, so as to do away with the necessity of another trial. The judgment for the plaintiff should have been entered as of November 16, 1928, for $369.85. The judgment on the verdict on the counter-

claim of defendant was $375, as of February 25, 1930. On the last named date the said judgment of plaintiff amounted to $402.85. The excess in favor of plaintiff is $27.85. Effect can be given to the law by vacating the order dismissing the petition and by entering judgment for the plaintiff for $27.85, with interest at 7 per cent. from February 25, 1930, and costs.

For the reasons stated in the opinion, the judgment of the district court is reversed and the cause remanded, with direction to reinstate the petition of plaintiff and to enter judgment for plaintiff for $27.85, with interest from February 25, 1930, and costs.

REVERSED.

BERT R. SPEARMAN V. STATE OF NEBRASKA.

FILED MARCH 13, 1931. No. 27563.

Banks and Banking: BOOKS OF ACCOUNT: FALSE ENTRIES. Under Nebraska statutes relating to banks and banking, a conviction for the making of a false entry in a book of a state bank requires evidence that the entry was false and that it was wilfully and knowingly made, or caused to be made, by an officer or agent of the bank with intent to deceive a person authorized by law to inquire into the bank's affairs, and evidence omitting any of those elements of the statutory offense will not support a verdict of guilty.

ERROR to the district court for Morrill county: EDWARD F. CARTER, JUDGE. *Reversed and dismissed.*

G. W. Irwin and *Patrick & Smith,* for plaintiff in error.

C. A. Sorensen, Attorney General, C. G. Perry and *F. S. Howell, contra.*

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

ROSE, J.

In a prosecution by the state in the district court for Morrill county, Bert R. Spearman, defendant, was accused of making a false entry in the teller's journal of the Nebraska State Bank at Bridgeport March 21, 1928, while

an officer and agent thereof, with intent to deceive the secretary of the department of trade and commerce and any person authorized by law to examine into the affairs of the Nebraska State Bank. The entry that defendant was thus charged with making was in the following form:

"LOANS AND DISCOUNTS	CITY NATIONAL BANK
"Adj. City Natl. Bk. $10,056.43	Note adj. $2,350.00 "Carman paper adj. 5,775.00 "C. Herzberg note 1,931.43"

According to the information presented by the county attorney, this alleged false entry in the teller's journal stated in substance, intent and effect that the City National Bank of Lincoln had returned to the Nebraska State Bank at Bridgeport loans and discounts aggregating $10,056.43, which the former had previously received from the latter. Defendant pleaded not guilty, but was convicted and sentenced to serve a term of one year in the state penitentiary. As plaintiff in error he has presented for review the record of his conviction.

The principal question for determination is the sufficiency of the evidence to sustain the verdict and sentence. The prosecution arose under the statute relating to banks and banking. The particular section of the law which defendant was accused of violating provides:

"Any person who shall wilfully and knowingly subscribe to, or make, or cause to be made, any false statement or false entry in the books of any corporation transacting a banking business under this article, or shall knowingly subscribe to or exhibit false papers, with the intent to deceive any person or persons authorized to examine into the affairs of any such corporation, or shall make, state or publish any false statement of the amount of the assets or liabilities of any such corporation, shall be deemed guilty of a felony and upon conviction thereof, shall be imprisoned in the state penitentiary not less than one year nor more than ten years." Comp. St. 1929, sec. 8-133.

Defendant was cashier of the Nebraska State Bank at Bridgeport, hereinafter called the "state bank," and as such officer and agent was amenable to the statute quoted, but he was not guilty as charged in the information unless the state proved beyond a reasonable doubt that he "wilfully and knowingly" made, or caused to be made, the entry mentioned, that it was false, and that he made it or caused it to be made "with the intent to deceive any person or persons authorized to examine into the affairs" of the state bank. The falsity of the entry, the making of it wilfully and knowingly and the intent to deceive were all elements of the felony charged. A failure to prove any one of those elements would be fatal to a lawful conviction. In arriving at a conclusion on the sufficiency of the evidence, a critical examination of the entire record was required, including, as it did, testimony, documents and book entries relating to four other charges of which defendant was acquitted by the jury in the same prosecution.

From 1923 until April 10, 1928, defendant was actively engaged in the service of the state bank as cashier. On the latter date the department of trade and commerce took charge of it. From April 18, 1928, to July 1, 1928, it was operated by agencies of the state as a commercial bank. Being insolvent, a receiver was appointed to wind up its affairs. While defendant was its cashier, the City National Bank of Lincoln, hereinafter called the "city bank," was a correspondent of the state bank which kept a checking account in the city bank and drew drafts against it. From time to time in the regular course of the banking business between the two banks, the state bank made deposits, borrowed money, pledged notes as collateral security, rediscounted notes, received credit therefor, and otherwise participated in customary transactions between a country state bank and a city correspondent bank. The state bank was regularly examined by state bank examiners and its condition was disclosed by them and reported to the department of state in control of state banks. A year before the state bank was closed, bank examiners and

defendant knew there was a discrepancy as to the amount the state bank had on deposit with the city bank as shown by the books of each. The books of the state bank showed in its favor a balance of more than $12,000 in excess of the balance disclosed by the books of the city bank. Defendant was unable to balance his books. He was not a capable bookkeeper, but at times made book entries himself and at other times gave directions to a subordinate officer or to a regular bookkeeper.

In the condition of affairs outlined, the entry under consideration was made. Defendant defended it at the trial as an honest, truthful entry of actual banking transactions over which he had control without reference to anything shown by the books of the city bank, the intent being a partial correction of errors in his own books—errors previously known to state bank examiners and to the city bank.

Expert witnesses agree with defendant that the effect of the entry in question was to make the books of the state bank show a decrease of $10,056.43 in the balance of its deposits in the city bank. That item was made up of the three other items in the adjacent column. Each of the three items is described in the evidence.

The first item was explained by defendant as "Note adj. $2,350." According to his testimony it was composed of notes held by the state bank and found in the note case, but not previously entered on the books as assets—evidence not disproved.

The second item, "Carman paper adj. $5,775," represented an actual note executed by Carman in favor of the state bank. It had not been previously entered on the bank books. The evidence shows without dispute that Carman was a wholesale merchant engaged in shipping poultry by the carload, and that he transacted business weekly at the state bank, giving notes and drawing drafts which he attached to bills of lading. He was a witness and admitted on cross-examination by defendant that he gave a note for $5,775. He did not admit the date, but the note itself is evidence of its date which, if erroneous, does

not prove a false entry March 21, 1928. The identical note thus dated fell into the hands of the receiver.

The third item, "C. Herzberg note, $1,931.43," was a renewal of a former note. The proper inference is that the old note was surrendered and that the new one was an asset, as indicated by the entry on the teller's journal.

The sum of the three items is the exact amount of the item "Adj. City Natl. Bk. $10,056.43." According to defendant's understanding and intent, as shown by his testimony and his records, the entry described in the information indicated a reduction of $10,056.43 in the state bank's deposits in the city bank, a corresponding increase of assets in possession of the state bank and a correction of errors in the latter's books to that extent. If defendant did not pursue the proper method of bookkeeping in his attempt to make a partial correction, he nevertheless, in making it, dealt with actual notes in his hands, entered the correct amounts of those assets on the teller's journal and thus made his records speak the truth. According to his own understanding and testimony in connection with the entire record, the entry was not false. There is no direct evidence of criminal intent, and a reasonable inference of a purpose to deceive cannot properly be drawn from the evidence as a whole.

It is charged in the information, however, that the entry in the teller's journal stated in substance, intent and effect that the city bank had returned to the state bank loans and discounts aggregating $10,056.43, which the former had previously received from the latter. This is not stated on the face of the entry itself. The information so intimated, and the prosecution, in attempting to prove the charge, called experts who said in substance that technical bookkeeping implied that the entry had some connection with the city bank's books and the return of commercial paper which the city bank had previously received from the state bank in banking transactions, while notes mentioned in the entry had not been so returned. The state failed to prove that defendant so understood the entry or that he knowingly and wilfully made it with intent to de-

ceive a person authorized by law to examine into the state bank's affairs or that the entry was false as understood by defendant. The evidence does not prove that any bank examiner or the state department in charge of banking was in fact deceived. Bank examiners knew defendant's books were out of balance. There was no motive for deceit. An attempt at deception in this particular would have been futile. The evidence indicates that an official inquiry directed to the city bank would have exposed such an attempt. Criminal intent essential to a conviction was not proved.

On five separate counts of the information the prosecution was skilfully and earnestly conducted in good faith, but the evidence does not support the verdict and sentence for the making of a false entry. The judgment is reversed and the prosecution dismissed.

REVERSED AND DISMISSED.

PLATNER LUMBER COMPANY, APPELLEE, V. ARTHUR THEODORE ET AL., APPELLEES: NELLIE C. DETWEILER, APPELLANT.

FILED MARCH 13, 1931. No. 27592.

1. **Payment.** At the time of making a payment, a debtor may designate its application to a particular debt, and the creditor is required to make such application.
2. **Mechanics' Liens:** PAYMENTS. Where one claiming a lien for material furnished for the construction of a building has applied a payment made on the account for such material to another account of the debtor, but without intent to thereby obtain an excessive lien, such misapplication of the payment will not invalidate the entire lien; but, in an action to foreclose such lien, credit will be allowed for the payment so misapplied.
3. ———. Inclusion in a materialman's lien of an item not furnished by him for the particular building, without intent to perpetrate a fraud, will invalidate the lien only to the extent of such item.
4. **Usury.** The defense of usury is available to a mortgagor in an action for foreclosure of the mortgage, if he is a party thereto and liable for deficiency judgment, notwithstanding he has been

divested of title to the mortgaged premises by judicial sale in another action.

5. ———. In an action to foreclose a mortgage securing a usurious note, the holder cannot defeat the defense of usury by offering to waive right to a deficiency judgment.

APPEAL from the district court for Douglas county: FRANCIS M. DINEEN, JUDGE. *Affirmed as modified.*

Weaver & Giller, for appellant.

Johnson, Rine & Marshall, David O. Matthews, Waldron, Silverman & Newkirk and *DeLamatre & DeLamatre, contra.*

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

GOOD, J.

This action involves the validity, amount and priority of liens on realty. Plaintiff sought foreclosure of a lien for material furnished for the erection of an apartment building on real estate located at 2940 Woolworth Avenue, in Omaha. Defendant M. A. Disbrow & Company sought foreclosure of a lien for material furnished for the same building. Defendant Detweiler sought foreclosure of a mortgage on the same premises, and asserted that her lien was superior to those of plaintiff and M. A. Disbrow & Company. Defendant Theodore, at the time the action was commenced, was the owner of the premises in controversy. Some time after the commencement of the action Isadore Shafer intervened and alleged that, by purchase at judicial sale, he had become the owner of Theodore's interest.

The validity of plaintiff's lien is assailed on the ground that it had negligently failed to give credit for payments made, and that, therefore, it should be denied any lien because it did not come into court with clean hands, but, in any event, that its lien should be reduced by the amount of $1,000 for payments made upon the account. The lien of M. A. Disbrow & Company is assailed because it was not filed in time, and because it includes an item of $1,350 for material which was not furnished for the particular

building. It is contended that this lien should be held invalid because of an attempt to include therein items not properly chargeable in the lien, and that, in any event, the amount of the lien should be decreased on account of items claimed that are alleged not to have been furnished for the particular building. The mortgage of defendant Detweiler is assailed as being usurious.

A trial of the issues resulted in a finding and decree for the plaintiff and defendant M. A. Disbrow & Company in the full amount of their respective liens. Defendant Detweiler's mortgage was held to be usurious and she was awarded a decree for the net amount of money loaned, less payments which had been made thereon. Her lien was decreed subject to the liens of plaintiff and M. A. Disbrow & Company. Defendant Detweiler alone appeals.

The record discloses that Arthur Theodore had constructed a number of apartment houses in Omaha, four of them on Dodge street and the building in question at 2940 Woolworth Avenue. The Dodge street apartments were first constructed and were nearly completed when the construction of the apartment building on Woolworth Avenue was begun. An oral agreement was entered into between Theodore and the plaintiff for the furnishing of lumber and material for the construction of the building at 2940 Woolworth Avenue. Plaintiff contends that the contract was for all material to be used in the building which was handled by plaintiff in its business. Theodore contends that materials were furnished at different times under separate and distinct contracts.

From an examination of the record, we are inclined to the view that the material was furnished pursuant to one general contract. Prior to the construction of the building, Theodore had placed a mortgage thereon, negotiated through the Peters Trust Company, the money to be advanced and used for the construction of the building. During the progress of the construction, Theodore gave to the plaintiff orders on the Peters Trust Company for money to be applied on the account. The orders were given to plaintiff in the following form: "Peters Trust Com-

pany. Pay to the order of Platner Bros. One Thousand & no/100 Dollars. Being for material furnished building 2940 Woolworth Ave." Plaintiff took these orders to the Peters Trust Company and received a check for the amount of each order. At the time these orders were received, Theodore was owing plaintiff on other accounts than for the Woolworth Avenue apartments. One of the orders, for $1,000, was credited upon those other accounts.

In *City of Lincoln v. Lincoln Street R. Co.*, 67 Neb. 469, it was held: "A creditor cannot divert a payment by his debtor from the appropriation made by him, upon mere equitable considerations that do not amount to an agreement between the parties giving the creditor a right to appropriate the payment otherwise than directed by the debtor, though mere equitable considerations may control where the payment is made without designating its application." In the body of the opinion it was said (p. 491):

"'The debtor may, at or before the time of payment, prescribe the application of such payment, and it is the duty of the creditor to so apply it.' 18 Am. & Eng. Ency. Law (1st ed.) 234.

"'If the creditor receives money with a direction from the debtor to appropriate it to a particular debt, it must go to that debt, no matter what the creditor may say at the time; and an appropriation once made by the debtor cannot be changed by the creditor without the debtor's consent.' 18 Am. & Eng. Ency. Law (1st ed.) 235."

In *Davis v. Hall*, 70 Neb. 678, it was held: "The burden of proof is on defendant to establish payments, and on plaintiff to show that an admitted payment was properly applied on another debt."

In the instant case, the $1,000 which was not credited upon the Woolworth Avenue apartment account was clearly designated by Theodore as a payment upon that account. It should have been so applied. Therefore, the lien filed, and for which decree was entered below, was for $1,000 in excess of the amount to which plaintiff was entitled. When the check for $1,000 from the Peters Trust Company was received, it was not indicated thereon to what account it

should be applied. The bookkeeper was, under the circumstances, excusable for not applying it in accordance with Theodore's instructions. We find that the evidence does not sustain the charge that the payment was purposely misapplied and with intent to obtain a lien for a greater sum than plaintiff was entitled to. We find plaintiff's lien to be valid, less the $1,000 credit thereon.

Defendant Theodore contracted with M. A. Disbrow & Company for a considerable amount of millwork, used in the construction of the apartments on Dodge street. He also contracted with Disbrow & Company for millwork for the Woolworth Avenue apartments. It appears that Theodore had on hand, of his own, a large amount of millwork which he had previously acquired; that some of this was used in the Dodge street apartments and some of the millwork, furnished for the Dodge street apartments by Disbrow & Company, was not used thereon. Theodore owed a balance to Disbrow & Company on account of millwork furnished the Dodge street properties slightly in excess of $1,350. By agreement between Disbrow & Company and Theodore, some of the millwork furnished for the Dodge street apartments was removed by Theodore and used in the construction of the Woolworth Avenue building; and in the Disbrow lien is a charge for $1,350, not itemized, representing balance due on the Dodge street contract, and supposed to have been used in the Woolworth Avenue apartments. So far as the record discloses, no one knows how much or what particular items, furnished by Disbrow & Company for the Dodge street properties, was removed to and entered into the construction of the Woolworth Avenue apartments. In any event, so far as the record discloses, the millwork furnished for the Dodge street properties had been charged to and had become the property of Theodore.

Section 52-101, Comp. St. 1929, provides: "Any person who shall * * * furnish any material * * * for the construction * * * of any house, * * * by virtue of a contract or agreement, expressed or implied, with the owner thereof or his agents, shall have a lien to secure the pay-

ment of the same upon such house, * * * building or appurtenance and the lot of land upon which the same shall stand."

So far as the material represented by the charge of $1,350 is concerned, it was furnished by Disbrow & Company for the Dodge street properties. It was not furnished for the Woolworth Avenue apartments, and no lien can properly attach to the latter property for the material furnished for the construction of the Dodge street apartments. The lien awarded by the trial court to Disbrow & Company is excessive to the extent of this charge. With respect to the remainder of the lien, we conclude from the evidence that all of the other material was furnished pursuant to one general contract; that the Disbrow lien was filed within time, and that, by reason of the agreement entered into between Disbrow & Company and Theodore, there was no intent to fraudulently obtain an excessive lien. We conclude and find that the Disbrow lien is valid, except as to the $1,350 item.

During the time that the building on Woolworth Avenue was in process of construction and when nearly completed, Theodore went to John O. Detweiler to secure a loan of $10,000 on a second mortgage on the property. Detweiler agreed to procure the loan, but informed Theodore that it would be necessary for him to have some other person to whom the note and mortgage should run. Theodore procured one Chapman to accompany him to Detweiler's office, where a note and mortgage were drawn and executed on the 30th of November, 1925, to Chapman, who immediately thereafter assigned the same to defendant Nellie C. Detweiler, the wife of John O. Detweiler. The note was for $10,000 and provided that it should be paid at the rate of $200 on the first day of January, 1926, and on the first day of each month thereafter; that out of such payments should first be paid the accrued interest, and payments were to be credited on the principal only in the sum of $100 or multiple thereof.

It was agreed that $1,125 should be deducted from the principal as a commission, leaving $8,875 net, which Theo-

dore should receive. None of this amount was paid to Theodore at the time the note was executed, but it was paid to him subsequently in eight different instalments at times, ranging from five days to a month and fifteen days after the date of the note. The note provided that interest should be paid from its date on the full $10,000.

Calculation of monthly payments discloses that it would require 59 monthly payments of $200 each, and a sixtieth payment of $76.50 to discharge the note in full, according to its terms. The total amount of these payments would be $11,876.50. If we add to this the so-called commission of $1,125, it would make a total payment of $13,001.50, or $3,001.50 paid as interest. Calculation also discloses that the average term of the loan was just a trifle more than 32 months. It thus appears that the interest charge is in excess of 10 per cent., the maximum allowed by statute, without considering the time that interest was paid before the money was received by Theodore, and also without reference to the fact that, out of the monthly payments, an average of $44 or $45 a month would be retained by the holder of the note, without applying it on the principal until a credit of $100, or multiple thereof, could be made.

Clearly, the contract was usurious. The total amount received by Theodore on the loan was $8,875. The record discloses, without dispute, that $2,300 had been paid thereon. If the plea of usury is available as a defense in this action, then defendant Detweiler was entitled to a decree for $6,575, for which amount she was awarded a decree.

Defendant Detweiler asserts, however, that neither Theodore nor Shafer is in a position to raise the question; that Theodore cannot do so because all of his rights in the premises have been cut off by the judicial sale and vested in Shafer, and that he, therefore, has no interest in the question of the amount of lien on the premises; that Shafer cannot raise the question because the plea of usury is personal and can be raised only by the party to the contract or those in privity with him, and she contends that Shafer is not in privity with Theodore.

We need not consider the latter contention. At the time the action was begun and at the time defendant Detweiler filed her cross-petition, Theodore was the owner of the record title to the premises. Theodore executed the note and mortgage, and, if the property did not sell for sufficient to pay the entire Detweiler lien, he would be liable for a deficiency judgment. He, therefore, had an interest in protecting himself against this liability. Defendant Detweiler seeks to overcome this by striking from her cross-petition a prayer for a deficiency judgment, and by adding thereto, near the close of the trial, a statement that she waived any right to a deficiency judgment. This was not a waiver, but an offer to waive, which was not accepted by Theodore. Had Theodore elected to accept this waiver, it is possible that he might have precluded himself from setting up and relying on the defense of usury. He did not do so, but insisted upon usury as a defense. This he had a right to do.

We therefore reach the conclusion that the decree for defendant Detweiler should have been for the amount found by the trial court.

A rather feeble attempt is made to avoid the consequences of usury, upon the theory that defendant Detweiler is an innocent holder of the note and mortgage, for value, before maturity, without notice of defect. The record discloses unmistakably that her husband, John O. Detweiler, was acting for her; it was he who made the loan; he who advanced the money; he who received the payments; he was her agent; his knowledge was her knowledge. Under the record, she cannot be classed as an innocent holder for value, without notice.

One other question remains, as to the priority of liens. Defendant Detweiler insists that her mortgage should be decreed a lien superior to those in favor of plaintiff and M. A. Disbrow & Company. The record discloses that the contracts between plaintiff and Theodore and Disbrow & Company and Theodore for the furnishing of the material had been entered into prior to the date of the Detweiler mortgage, and that a large part of the material was fur-

nished prior to the giving of the Detweiler mortgage. Under the record, clearly the mortgage of defendant Detweiler was junior and subsequent to the liens of plaintiff and M. A. Disbrow & Company.

Plaintiff was entitled to a decree for a lien in the sum of $1,601.28, plus interest thereon at 7 per cent., commencing six months after the date of the last item, or from July 7, 1926, to the date the decree was entered, to wit, March 5, 1930. The amount for which decree should have been entered is $2,011.65, as of date March 5, 1930, with interest on that amount thereafter at 7 per cent.

Defendant M. A. Disbrow & Company was entitled to a lien for $406.20, together with interest thereon at 7 per cent. from six months after date of the last item, or from November 5, 1926, to date of the decree, to wit, March 5, 1930. The amount of the decree, as of date of March 5, 1930, is $499.80, to bear interest at the rate of 7 per cent. from the latter date. Each party will be required to pay his own costs in this court. The cause is remanded to the district court, with directions to modify its decree to conform to this opinion.

As modified, the judgment of the district court is affirmed.

AFFIRMED AS MODIFIED.

WILLIAM CLAUS, APPELLANT, V. PAUL DEVERE, APPELLEE.

FILED MARCH 13, 1931. No. 27737.

1. **Master and Servant:** WORKMEN'S COMPENSATION LAW: "BUSINESS." One engaged in the buying and shipping of poultry in carload lots to distant markets is engaged in a "business," within the meaning of that term, as used in the workmen's compensation law.
2. ———: ———: "EMPLOYEE." Where a person is employed as a caretaker of a carload of poultry, being shipped by the owner to a market in another state, and where the owner contracts with the railway company for the car, and retains the right to have the car stopped at other points for the purpose of receiving poultry, and has the right to control the destination of the car, its routing, and the right to divert it to another market, such caretaker is, within the meaning of the work-

men's compensation law, an employee, and not an independent contractor.

3. ———: ———: COMMERCE. In the absence of federal legislation, the Nebraska workmen's compensation law is applicable to a caretaker of live poultry which is being transported from one to another state, and is not violative of subdivision 3, sec. 8, art. I, of the federal Constitution.

4. ———: ———: SERVICES OF WIFE AS NURSE. Under the workmen's compensation law, an injured employee cannot recover for services as a nurse rendered him by his wife in their home, while he is incapacitated because of an injury received in the course of his employment.

5. ———: ———: PENALTY. Where a reasonable controversy exists between an employer and an employee, as to the former's liability under the workmen's compensation act, the employer is not liable for the penalty for waiting time during the time the cause is pending in the courts for final determination.

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

Flansburg & Lee and *John O. Sheldahl,* for appellant.

Sanden, Anderson, Laughlin & Gradwohl, contra.

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

GOOD, J.

This action arises under the workmen's compensation law. Plaintiff was the employer; defendant the employee. In his petition plaintiff sought the vacation of an award of compensation made to defendant by the compensation commissioner. As grounds for the vacation plaintiff alleged that defendant did not sustain to him the relation of an employee, but was an independent contractor; that, at the time defendant was injured, he was employed in interstate commerce, and that the workmen's compensation law, as applied to those engaged in interstate commerce, is in violation of subdivision 3, sec. 8, art. I, of the federal Constitution, which gives to congress the power to regulate commerce among the several states. The trial court found for defendant and awarded compensation. Plaintiff has appealed, and defendant has filed a cross-appeal for re-

fusal of the trial court to allow him penalty for waiting time and to allow for nursing services furnished defendant by his wife while he was suffering from his injuries.

Plaintiff is engaged in the buying and shipping of live poultry and maintains two or more places of business in the state of Nebraska. The poultry is shipped in carload lots to various markets. It is the custom to have a caretaker, who has charge of the poultry, feeding, watering and caring for it, accompany each carload shipment. Defendant has at different times been employed by various firms engaged in the poultry business as a caretaker accompanying shipments of live poultry. He solicited plaintiff for work of this character. Plaintiff had no shipments at that time, but informed defendant that he probably would have a little later. A short time thereafter he called defendant by telephone and requested that he be ready to go with him the next morning. On the following morning defendant accompanied the plaintiff and another employee in the plaintiff's automobile from Lincoln, Nebraska, to Belle Fourche, South Dakota. Plaintiff informed defendant that he would have a car for him, but that he did not know at that time from what particular place the car would start. On the way to Belle Fourche the parties stopped at Alliance and other points, where plaintiff visited the poultry dealers from whom he purchased, and introduced defendant as one of his new men with whom they were to deal. At Belle Fourche the other employee was left to take charge of a car, and plaintiff and defendant returned to Crawford, Nebraska, at which place plaintiff had ordered a car for the shipment of live poultry to New York. Defendant was placed in charge of the car, and he and plaintiff remained there that day, loading about 6,000 pounds of poultry for the shipment. Plaintiff then directed the car to proceed to Alliance, where defendant would receive additional poultry, with instructions that, if sufficient poultry to make a carload should not be obtained there, the car should be stopped at either Grand Island or York, Nebraska, in order to pick up sufficient poultry to make a carload. Plaintiff was to direct at which place they should

stop. Defendant was injured in the course of his employment at Alliance and was unable to perform work thereafter. Another person was, by plaintiff, put in charge of the car, and it proceeded to its destination.

It appears that defendant furnished certain articles, such as a rake, hoe and scoop, and his own cooking utensils and bedding. It appears also that curtains are used to place on the sides of the car when necessary to protect the live poultry from rain or snow, and that these curtains were furnished by plaintiff; that plaintiff purchased and paid for the feed for the poultry en route to destination; that he routed the car from its initial point to destination, and had the right to divert it from one point to another, and to control the time when the poultry should be sold, and he made the arrangements with the parties to whom the poultry should be sold.

Plaintiff contends that defendant was to receive for the entire round trip the sum of $70; that plaintiff was concerned only with results; that defendant was, therefore, an independent contractor, and not an employee. Defendant testified that no compensation for his services was agreed upon, but that the customary and reasonable wage paid was $8 a day from the time of starting until the caretaker had returned to Lincoln. Plaintiff testified that it was his uniform custom, in all of his shipments, to pay $70 for the round trip. The evidence discloses that sometimes a trip to New York could be made, and the caretaker return, in five days; that the average time from Lincoln was seven days; that from the western part of the state the usual time consumed was eight days.

We do not regard the matter of payment, whether it was $70 for the round trip or $8 a day, as decisive of the question, but it would appear that defendant's contention is the more reasonable and probable. If, for any reason, the price for the poultry was not satisfactory at the point of destination, plaintiff had the right to hold over the shipment for a later market, or to divert it to another market. The caretaker, in that event, would necessarily be required to remain with the car and care for the poultry.

It is possible that a trip might consume much more than the usual time. It seems more reasonable to suppose that the compensation would be based upon the time necessarily consumed than upon the round trip which might be twice as long in one case as in another.

There is no hard and fast rule by which to determine whether one sustains the relation of employee or that of an independent contractor. It has frequently been held by this and other courts that the relation must be determined by the facts in the particular case. *Knuffke v. Bartholomew*, 106 Neb. 763; *Barrett v. Selden-Breck Construction Co.*, 103 Neb. 850.

Section 48-114, Comp. St. 1929, *inter alia*, provides: "The following shall constitute 'employers' subject to the provisions of this article: * * * Every person, firm or corporation, * * * who is engaged in any trade, occupation, business, or profession as described in section 97 of this chapter (48-106) and who has any person in service under any contract of hire, express or implied, oral or written, and who prior to the time of the accident to the employee for which compensation under this article may be claimed, shall not, in the manner provided in section 103 of this chapter (48-112), have elected not to become subject to the provisions of Part II, of this article."

Section 48-115, Comp. St. 1929, *inter alia*, provides: "The terms 'employee' and 'workman' are used interchangeably and have the same meaning throughout this article. The said terms * * * shall be construed to mean: * * * Every person in the service of an employer who is engaged in any trade, occupation, business or profession as described in section 97 (48-106) of this chapter, under any contract of hire, express or implied, oral or written."

Clearly, one engaged regularly in the buying and shipping of poultry in carload lots to distant markets is engaged in a "business," within the meaning of the workmen's compensation law. It is also clear that the defendant was employed by and working for the plaintiff in that business. Plaintiff had the right to control when and where the car should stop to take on poultry and to what

destination it should go, and the right to divert it. He contends that, because defendant furnished a part of his tools and equipment for the work and used his own judgment as to when and how often he would feed and water the poultry, he was an independent contractor. So far as the tools are concerned, it is customary for every brick mason or carpenter to have his own tool kit. The fact that he furnishes his own tools with which to perform labor does not make him an independent contractor. The fact that the employee must use his own judgment in the manner of performing his work does not, of itself, make him an independent contractor. Every driver of a vehicle must, in the nature of things, use his own judgment. Every carpenter must, of necessity, use his own judgment as to whether a particular piece of material is fit for the place where it has to be used. Every brick mason must determine and use some judgment as to whether the mortar furnished is of the right consistency and whether a particular brick is fit for the wall which he is laying. These facts do not convert him from an employee into an independent contractor. We have no hesitancy in concluding, as did the trial court, that, under the circumstances disclosed by the record, defendant was an employee, and not an independent contractor.

As to the question of the applicability of the Nebraska workmen's compensation law to the facts in this case, it may be observed that plaintiff was not engaged in the work of interstate transportation. He was not employed by the railway company; he had no part in the operation of the trains or of any railroad work. His work was to feed, water and care for plaintiff's poultry. It may be conceded that, where congress has occupied the legislative field covering this phase of interstate commerce work, it is probable that the state law would be inoperative. However, where congress has not, by legislation, entered or occupied the particular field, the state is at liberty so to do. *Hendrick v. Maryland,* 235 U. S. 610; *Clark v. Poor,* 274 U. S. 554. Congress has occupied the field with reference to employment in interstate transportation and to those

engaged in maritime work. So far as we are advised, it has not undertaken to regulate the work of caretakers of live stock and poultry which is being carried from one to another state.

Again, the operation of the Nebraska workmen's compensation law is optional and, in effect, contractual. The employer may elect to be subject to it, or not, as he sees fit to contract.

We conclude that the workmen's compensation law is applicable to the situation of the parties in this case, and that it is not violative of subdivision 3, sec. 8, art. I of the federal Constitution.

Was defendant entitled to recover for the value of services rendered by his wife as a nurse? The rule is that the husband is entitled to the services of the wife. He is not liable to her; nor could she sue and recover from him for any service rendered him as a wife and a member of his household. The trial court, we think, properly refused to make any award to defendant on account of services rendered him by his wife as a nurse in their home. If defendant's wife had been a professional nurse, carrying on her separate profession, and was called as a nurse to care for her husband in a hospital where she was employed, or from her work in the hospital to care for him in his home, a different question would be presented. The evidence, however, shows that defendant's wife had no such occupation. Her occupation was that of the ordinary housewife.

We also think that defendant was not entitled to recover the penalty for waiting time. It is a well-established rule in this jurisdiction that, where a reasonable controversy exists between an employer and an employee as to the former's liability under the workmen's compensation act, the employer is not liable for waiting penalty during the time necessarily required for the hearing of a cause upon appeal. *McGuire v. Phelan-Shirley Co.*, 111 Neb. 609; *McCrary v. Wolff*, 109 Neb. 796; *Swift & Co. v. Prince*, 106 Neb. 358; *Osborn v. Omaha Structural Steel Co.*, 105 Neb. 216; *Updike Grain Co. v. Swanson*, 104 Neb. 661.

In the instant case, the question of the liability for compensation to persons acting as caretakers of poultry, moving in interstate commerce, has not been hitherto determined by this court, nor, so far as we are aware, by any other court. There was a reasonable controversy between the parties as to the plaintiff's liability under the workmen's compensation act.

We find no error in the record. Defendant is entitled, however, to recover an attorney's fee, to be taxed as part of the costs. The sum of $100 is awarded to defendant for attorneys' fee in this court.

The judgment of the district court is

AFFIRMED.

WILLIAM R. LINCH, APPELLANT, V. NEBRASKA BUICK AUTOMOBILE COMPANY, APPELLEE.

FILED MARCH 13, 1931. No. 27573.

1. **Witnesses:** MEMORANDA. Where, as in this case, the witness is totally lacking in present recollection and cannot renew it by stimulation, but there was a time when he did have knowledge of the facts and they were recorded, he can adopt this record, vouch for its accuracy, refresh his recollection and testify to the facts contained therein. The essential thing is that he should be able to guarantee that the record actually represented the truth at the time it was made and as now standing is accepted, verified and adopted by the witness.
2. **Tender.** In order to make a valid tender of property, either the property or the evidence of its ownership must be actually produced and offered to the party entitled thereto; a mere offer to deliver being insufficient, and the tenderer must place the property in such a position that his control over it is relinquished for a sufficient time to enable the tenderee, if he so desires, to reduce it to possession by merely reaching out and laying hold of it.
3. **Trial:** INSTRUCTIONS. An instruction is erroneous which submits to the jury questions not within the issues in the case.

APPEAL from the district court for Lancaster county: LINCOLN FROST, JUDGE. *Reversed.*

Burkett, Wilson, Brown, Wilson & Van Kirk, for appellant.

Max V. Beghtol and *J. Lee Rankin, contra.*

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

DAY, J.

Linch brings this action to recover damages from the Nebraska Buick Automobile Company for breach of a written contract to deliver an automobile purchased for $1,530, upon which $530 was paid at the time of the making of the contract by the delivery of another automobile. The contract:

"Nebraska Buick Automobile Co.

Lincoln, Nebr., 4-15-29.

"Please deliver to me at 4828 Baldwin Ave., on ——— 192— or as soon as possible thereafter, one automobile as specified below:

1 Model 29-27 Fully Eqt.	Price $1,530
24-41	530
	$1,000

"Cash deposit of $——— accompanies this order as part of the purchase price, the balance to be paid on delivery of car unless otherwise specified in this order.

"Sold by W. W. White.

"Approved by Fred Sidles.

"(Signed) W. R. Linch."

It is admitted that the plaintiff never paid the balance of $1,000 due on the contract and that the 29-27 Buick designated in the contract was never delivered. Each of the parties contends that the other breached the contract first. The verdict of the jury found for the defendant.

For the purpose of proving that the defendant had cars on hand of the kind specified in the contract and were able to make delivery, it offered the testimony of a witness who was permitted, over objection by the plaintiff, to testify as to the number of such cars on hand each month from April 30, 1929, to December 30, 1929, refreshing his memory by referring to memoranda which were later received in evidence. The plaintiff's examination of this

witness developed that he was cashier and had charge of the accounting department of the car division for the defendant; that he made a monthly report of the number of cars owned by the defendant and on hand to the executives of the defendant company; that he could not tell without using the memoranda the number of cars that the defendant owned at any time during the period; that the memoranda were prepared by a stenographer under his supervision and direction from the factory invoices, from the sales made by the company, and from other sources. This witness also testified that he checked these memoranda at the time they were made and that he knew they were correct. These memoranda did not constitute a book of original entry so that they come within the rule announced in *Nye-Schneider-Fowler Co. v. Chicago & N. W. R. Co.*, 105 Neb. 151. But it is sufficient if the witness could refresh his memory by an examination of memoranda to recollect the circumstances at the time they are made. It should be remembered that it is not the memoranda that are the evidence but the recollection of the witness. When the witness made an examination after the memoranda were prepared and determined that it was correct, it becomes for him a correct record. 2 Wigmore, Evidence, (2d ed.) sec. 748. Where, as in this case, the witness is totally lacking in present recollection and cannot renew it by stimulation, but there was a time when he did have a knowledge of the facts and they were recorded, he can adopt this record, vouch for its accuracy, refresh his recollection and testify to the facts contained therein. The essential thing is that he should be able to guarantee that the record actually represented the truth at the time it was made and as now standing accepted, verified and adopted by the witness. Greenleaf, Evidence (16th ed.) sec. 439a. As herein outlined, the memoranda involved in this case were prepared by another under the supervision and direction of the witness and contained information which was secured from the invoices and other sources which were checked by the witness at the time they were prepared and the witness vouched for the correctness of

the facts stated therein. It was not error for the trial court to permit the witness to refresh his memory by reference to these memoranda.

Another assignment of error urged is predicated upon the giving of what is designated as an "additional instruction" by the court to the jury, as they had been deliberating for some time. It was occasioned by a communication to the court by the jury in the following terms: "The jury are disagreed by the fact that they believe plaintiff should get possession of his old car without cost, should a verdict in favor of defendant be reached." After consultation with the attorneys for both parties, the judge in reply to the above communication from the jury gave an "additional instruction" as follows:

"The jury are instructed that the defendant has tendered the old automobile to plaintiff in open court without restriction; that in case you find under the evidence and the law a verdict for the defendant the plaintiff would be entitled to possession of his old car, without cost in connection with its recovery."

The jury thereupon returned a verdict in favor of the defendant. We believe that the additional instruction was the inducement for the verdict.

The "additional instruction" was clearly erroneous for the reason that it assumes a fact not in evidence, no tender of the old automobile having been made in open court without restriction by the defendant to the plaintiff. The only reference to this matter was when at the close of the defendant's testimony its attorney stated: "The defendant now renews the tender it made to Mr. Linch of the automobile on December 21, 1929, and offers to deliver the car to him at the courthouse or wherever he wants it, at any reasonable place." The only other reference to this matter was in the testimony of the plaintiff concerning a conversation with Mr. Sidles of the defendant company, which is as follows: "I was to have this new style car about 60 days after the contract was made and I said, 'White said I was to take a 29-27,' and he said, 'Well, I will tell you what we will do, we will do one of three things: I will give you a 51;' that is a bigger car than the

one I was supposed to get and I pay the difference, I forget what it was, or he said, 'I will give you one of these new cars for,' I think about $175 or $180 difference, or, he says, 'I will give you your old car back.' " There is testimony that this offer required a payment of a repair bill. There was no valid tender of a return of the used automobile involved in this case either on December 1, 1929, or at the time of the trial. The general rule has been stated as follows: In order to make a valid tender of property, either the property or the evidence of its ownership must be actually produced and offered to the party entitled thereto, a mere offer to deliver being insufficient, and the tenderer must place the property in such a position that his control over it is relinquished for a sufficient time to enable the tenderee, if he so desires, to reduce it to possession by merely reaching out and laying hold of it. 38 Cyc. 143. However, it must be remembered that this was not a suit in rescission by which it was sought to recover the old car which the plaintiff had delivered to the defendant, but was rather a suit for damages. Both parties to the litigation were proceeding upon the theory that the contract had been breached. Upon such a theory of the case the tender of the car back by the defendant was not proper, but was highly prejudicial to the plaintiff. The right to the possession of the car was not within the issues in the case, and since both parties by their pleadings were treating the contract as breached, the question for the jury to determine was whether or not the plaintiff was entitled to damages for such breach. This instruction submitted to the jury a question which was not within the issues and not for their determination. It injected into the case a matter concerning which the court could not render judgment. It therefore follows that the giving of the "additional instruction" was prejudicially erroneous.

Since it will be necessary that this case be remanded for a new trial, other errors assigned, which may not occur at a future trial, are not discussed. For the reasons given, the judgment of the district court is reversed and the action is remanded for further proceedings.

REVERSED.

PEARL DOBNEY, ADMINISTRATRIX, APPELLEE, V. CHICAGO & NORTHWESTERN RAILWAY COMPANY, APPELLANT.

FILED MARCH 20, 1931. No. 27625.

1. **Pleading:** DEMURRER. A demurrer to a pleading does not admit its legal conclusions.
2. **Executors and Administrators:** POSSESSION OF PERSONALTY. Under section 30-406, Comp. St. 1929, an executor or administrator has the right to the possession of the personal estate of the deceased until delivered over by order of the county court to those entitled to it.
3. ———: ALLOWANCE TO WIDOW. The surviving wife is entitled, under the first subdivision of section 30-103, Comp. St. 1929, to the chattels therein specified (including exempt wages) and also to $200 in cash from her husband's estate, and said property is not assets in the hands of the executor or administrator. *In re Estate of Fletcher*, 83 Neb. 156.
4. ———: POSSESSION OF WAGES. As against an employer, an executor or administrator of the estate of the employee has a right to the possession of the wages due from the employer to the employee at the time of his death; in a suit by an administrator to recover the amount of the wages, it is no defense for the employer to plead that he paid the amount on a bill for burial expenses at the request of a son of the deceased.
5. **Costs:** ATTORNEY'S FEES. Under section 20-1801, Comp. St. 1929, a reasonable amount for attorney's fees may be taxed in this court upon recovery on a claim of $300 or less against any person or corporation doing business in this state, for wages, for services rendered, or labor done.

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

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

J. D. Friedman, contra.

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

GOSS, C. J.

Fred Dobney, a brakeman for the defendant, died February 24, 1928. There was due him from defendant as

current wages the sum of $53.98. Pearl Dobney, his widow, as administratrix, sued for this sum with interest.

The defendant admitted the employment and that said amount was due deceased for wages at the time of his death and admitted that plaintiff is the administratrix. Further answering, the defendant alleged that, at the time of her husband's death, Pearl Dobney was in a hospital suffering from a severe gunshot wound and remained there for several days; that therefore one George E. Dobney, a son of Fred Dobney, assumed charge of the funeral arrangements and submitted to the defendant a bill of the funeral directors on account of the funeral and burial of the deceased and requested defendant to pay said $53.98 to the undertaker in part payment of the funeral expenses; that defendant, pursuant to said request, so paid said sum. Defendant further alleged that such funeral expenses were and are a valid and preferred claim against the estate, that the wages were a part of the estate, that the funeral bill was necessarily incurred, that plaintiff was not then administratrix and was totally incapacitated, that public decency and order require the burial of deceased persons promptly, that it would be contrary to public policy to wait until an administrator should be appointed before embalming and burying a deceased person and incurring the expenses thereof as if incurred by authority of such administrator; and therefore defendant alleges that it acted in good faith in paying such wages to the funeral directors, that the money has been lawfully applied in payment of a first claim against the estate, and that plaintiff has no lawful standing to demand a second payment of the wages from the defendant.

To this answer the plaintiff demurred. The demurrer was sustained. Defendant refused to plead further. Judgment was entered against defendant, its motion for new trial was denied, and it appealed. It assigns error in sustaining the demurrer to the answer and in entering judgment for plaintiff.

A demurrer to a pleading does not admit its legal conclusions. Plaintiff's demurrer to the answer merely ad-

mitted the truth of such facts as were well pleaded in the answer for the purpose of determining their sufficiency as a defense, but did not admit the correctness of the conclusions of law drawn therefrom by the pleader. *American Water Works Co. v. State,* 46 Neb. 194; *State v. Ramsey,* 50 Neb. 166; *Bresee v. Preston,* 91 Neb. 174; *Salsbury v. City of Lincoln,* 117 Neb. 465.

Under the statute an executor or administrator has the right to the possession of the personal estate of the deceased until delivered over by order of the county court to those entitled to it. Comp. St. 1929, sec. 30-406. The widow is entitled to property that was exempt to the deceased, at the time of his death, from execution or attachment. Comp. St. 1929, sec. 30-103. To the extent of 90 per cent. thereof, the wages of deceased as head of the family were so exempt. Comp. St. 1929, sec. 20-1559. There is nothing in the record to show what the general assets of the estate were, nor does it show that any creditor was seeking to sequester the nonexempt one-tenth of the wages due the deceased. While the wages of the deceased belonged ultimately to the widow, it was the duty of the administratrix and it is the approved practice to require the employer to pay such wages to the administratrix to be distributed by order of the county court to the one found entitled to it. "No person, whether he be legatee, next of kin, heir, or creditor, is, as against a personal representative, entitled to the possession of the personalty pending administration." Dame, Probate and Administration (3d ed.) sec. 287.

Defendant argues that funeral expenses are a first claim against this estate and cites section 30-615, Comp. St. 1929. That section makes necessary funeral expenses up to $250 a first preferred claim "if the assets which the executor or administrator may have received and which can be appropriated to the payment of debts be not sufficient." The argument is therefore answered by the fact that these exempt wages are not assets of the estate that can be so appropriated to the payment of debts. Indeed, it has been held a number of times that, in addition to the exempt

property, even the wearing apparel, ornaments, household furniture, and "other personal property," to be selected, not exceeding $200 in value, as described in the first subdivision of section 30-103, Comp. St. 1929, do not constitute assets of the estate in the hands of the executor or administrator. *In re Estate of Fletcher*, 83 Neb. 156; *In re Estate of Manning*, 85 Neb. 60; *Judson v. Creighton*, 88 Neb. 37.

It follows that the defendant paid to the funeral directors the wages due the deceased without authority. This did not discharge the debt. The administratrix had a legal right to recover the amount due. The decision of the district court was right.

Plaintiff prayed in her petition for an attorney's fee. The claim, amounting to less than $300, being against a corporation doing business in this state, and for wages for services rendered or labor due, is eligible for the allowance of an attorney's fee in this court. Comp. St. 1929, sec. 20-1801. We therefore fix $50 as such a fee.

For the reasons stated, the judgment is affirmed and appellee is allowed an attorney's fee of $50 to be taxed as costs.

AFFIRMED.

CITY OF LINCOLN, APPELLEE, V. JOSEPHINE STRODE LOGAN-JONES ET AL., APPELLANTS.

FILED MARCH 20, 1931. No. 27622.

1. **Municipal Corporations:** ZONING ORDINANCES. The enactment of a reasonable zoning ordinance of a city is a valid exercise of police power in furtherance of public health, safety and general welfare.
2. ———: RESIDENTIAL ZONE: GREEK LETTER FRATERNITY HOUSE. A Greek letter fraternity violates the zoning ordinance of a city when it occupies and uses in an exclusive residential district a residence as a chapter house.

APPEAL from the district court for Lancaster county: ELWOOD B. CHAPPELL, JUDGE. *Affirmed.*

Max V. Beghtol and *J. Lee Rankin*, for appellants.

Frank A. Peterson and *Lloyd E. Chapman, contra.*

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

ROSE, J.

This is a suit in equity for an injunction preventing the use and occupancy of the residence at the southwest corner of Nineteenth and D streets in the city of Lincoln as a fraternity house. The petition contains a plea that the property described is located in an exclusive, residential district and that it is used and occupied by a college fraternity as a chapter house in violation of the zoning ordinance. The city of Lincoln is plaintiff. Josephine Strode Logan-Jones and Carlisle Logan-Jones, owners of the premises, and Alpha Sigma Phi, lessees, are defendants. The latter demurred to the petition. The district court overruled the demurrer. Defendants elected to stand on the demurrer and refused to plead further. An injunction was granted as prayed by plaintiff and defendants appealed to the supreme court.

Defendants resist the application for the injunction on the ground that the city in passing and enforcing the zoning ordinance exceeded the bounds of police power and invaded property rights protected by the Constitution. The defense is untenable for the following reasons: The enactment of the ordinance assailed was a reasonable exercise of police power in furtherance of public health, safety and general welfare. *City of Lincoln v. Foss,* 119 Neb. 666.

A Greek letter fraternity violates a zoning ordinance when it occupies and uses in an exclusive, residential district a residence as a chapter house. *Pettis v. Alpha Alpha Chapter of Phi Beta Pi,* 115 Neb. 525. Injunction was a proper remedy.

AFFIRMED.

LEON DARLING, APPELLEE, V. WILLIAM T. FENTON, WARDEN, APPELLANT.

FILED MARCH 20, 1931. No. 27785.

1. **Habeas Corpus**: ERRORS: CORRECTION. Where a defendant, upon his plea of guilty to the charge of first degree murder, was sentenced by the trial judge to serve a term of 99 years in the penitentiary, and, after having served more than 10 years of such sentence, the defendant seeks to obtain his release on the grounds, first, that his plea of guilty was induced by fear of mob violence, and, second, that he did not have a jury trial. *held* that, under such circumstances, habeas corpus is not the proper procedure therefor.
2. ———: ———: ———. "If the proceedings subsequent to conviction are erroneous, such errors can be reviewed and corrected by proceedings in error in the regular course of the law, but not by the writ of habeas corpus." *In re Application of Cole*, 103 Neb. 802.

APPEAL from the district court for Lancaster county: LINCOLN FROST, JUDGE. *Reversed.*

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

John Adams, Jr., contra.

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

DEAN, J.

The defendant Leon Darling was charged and convicted, in the district court for Lincoln county, of having committed murder in the first degree and, upon his plea of guilty, he was sentenced by the trial judge to serve a term of 99 years in the penitentiary. He has filed this application for a writ of habeas corpus to obtain release from the penitentiary, where he has been confined ever since March 24, 1920. As grounds for his release, the defendant contends, first, that his plea of guilty was induced by fear of mob violence at the time of his arrest, and, second, that he was denied a jury trial.

From an order of the district court granting the writ and remanding the defendant to Lincoln county for further

proceedings, the state has appealed. And the defendant has filed a cross-appeal from that part of the judgment which remanded him to Lincoln county.

The record discloses the following pertinent facts. Defendant was arrested in September, 1919, and held in jail at North Platte for a short time. From thence he was removed to the Hall county jail because of threatened mob violence. Subsequently he was again removed from Hall county for the same reason. Soon after his arrival in Lincoln county, the defendant pleaded guilty to the charges which were there filed against him, and the court thereupon sentenced him, as above noted, to serve a term of 99 years in the penitentiary.

In view of the salient facts and the law applicable thereto, it appears to us that the court erred in ordering the defendant released from the penitentiary and in remanding him to Lincoln county for further proceedings. We have held:

"The writ of habeas corpus is not a corrective remedy, and is never allowed as a substitute for appeal or writ of error." *State v. Crinklaw,* 40 Neb. 759. And, in a comparatively recent case, we said:

"If the proceedings subsequent to conviction are erroneous, such errors can be reviewed and corrected by proceedings in error in the regular course of the law, but not by the writ of habeas corpus." *In re Application of Cole,* 103 Neb. 802.

And likewise, in *Fuller v. Fenton,* 104 Neb. 358, citing *McCarty v. Hopkins,* 61 Neb. 550, we held that the regularity of proceedings leading up to the sentence of a defendant cannot be inquired into on an application for a writ of habeas corpus, but that if the court was clearly clothed with jurisdiction the action of the court in such case can be properly assailed only in a direct proceeding. An accepted rule appears to be that the writ of habeas corpus may be applied "to determine the question of the jurisdiction and lawful power of the custodian to hold petitioner in custody; it is not available as a substitute for an appeal or writ of error or other revisory remedy for the

correction of errors either of law or fact, at least, not in the absence of exceptional circumstances." 29 C. J. 25.

In *Ex parte Tanner,* 219 Ala. 7, where the trial judge personally fixed a term of punishment, it was held that such action on the part of the judge was contrary to the statute requiring the jury to fix the punishment, but that it did not render the judgment void, and the defendant was not entitled to release on habeas corpus proceedings instituted therefor. And, in *Ex parte Pelinski,* 213 S. W. (Mo.) 809, it was held that the writ of habeas corpus will not issue when issuance thereof would be futile, or where it is obvious that "upon a final hearing the petitioner must be remanded to custody." *In re Boardman,* 169 U. S. 39; *Ex parte Shaw,* 7 Ohio St. 81; *In re Allen,* 91 Ohio St. 315. "A judgment of conviction by the circuit court, upon a plea of guilty, of murder in the first degree, and the fixing of punishment, without the intervention of a jury, are erroneous, but not void, and cannot be attacked collaterally on habeas corpus." *Lowery v. Howard,* 103 Ind. 440. See *In re Voight,* 130 Wash. 140.

The defendant cites *Wilson v. State,* 117 Neb. 692, but we do not think the case is applicable to the facts in the present case. In the *Wilson* case, defendant was sentenced by the trial judge without a jury and, upon proceedings in error, was granted a trial to a jury. In the present case, however, the defendant, upon his plea of guilty to the charge of first degree murder, was sentenced by the trial judge to serve a term of 99 years in the penitentiary, and, after having served more than 10 years of such sentence, the defendant seeks to obtain his release on the grounds, first, that his plea of guilty was induced by fear of mob violence, and, second, that he did not have a jury trial. Under such circumstances, we do not think that habeas corpus is the proper procedure.

The order of the district court granting the writ and remanding the defendant to Lincoln county for further proceedings must be and it hereby is

REVERSED.

STATE OF NEBRASKA V. JAMES HAVEL.

FILED MARCH 20, 1931. No. 27627.

1. **Contempt:** CORRUPTING WITNESSES. When one induces and arranges with and influences witnesses to testify falsely in an action not then but thereafter pending, and in accordance with said plans at the time of the trial calls the said witnesses to testify in his behalf, and they testify falsely, such action constitutes contempt.
2. **Criminal Law:** EXCEPTIONS TO RULINGS. In a case brought to this court under the provisions of section 29-2314, Comp. St. 1929, permitting the county attorney to present exceptions to the rulings of the trial judge in a criminal case where the defendant was acquitted, the only function of the court is to determine the law of the case.

ERROR to the district court for Fillmore county: ROBERT M. PROUDFIT, JUDGE. *Exceptions sustained.*

Guy A. Hamilton, for plaintiff in error.

Sloans, Keenan & Corbitt and *Bartos, Bartos & Placek, contra.*

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

DAY, J.

The county attorney of Fillmore county presents to the supreme court the bill of exceptions taken under the provision of the Code for the decision of such court upon the points presented therein under section 29-2314, Comp. St. 1929. One Havel was charged with contempt of court in that he had committed the offense of subornation of perjury in another action previously tried in the same court and before the same trial judge. Upon a trial upon the charge of contempt, at the close of the state's case, a demurrer to the evidence by the defendant was sustained by the trial court.

The record presents this question for our determination: Should the demurrer to the evidence have been sustained? This court will not consider the credibility of witnesses or the weight of testimony in passing on a de-

murrer to the evidence. In passing upon the question as to the sufficiency of the evidence to support plaintiff's cause, on a demurrer thereto, the court will draw every reasonable inference from the facts in evidence that may be indulged in favor of the cause of action. If there is any competent evidence tending to support the issues, the sustaining of the demurrer is erroneous. The same rule applies as in the case of a dismissal, nonsuit, or direction of verdict. This rule is established in this state in numerous cases. *Paxton v. State,* 59 Neb. 460; *Nothdurft v. City of Lincoln,* 66 Neb. 430; *Central Nat. Bank v. Ericson,* 92 Neb. 396; *Schmelzel v. Leecy,* 104 Neb. 672; *Kimble v. Roeder,* 115 Neb. 589.

Simply expressed, the state's evidence, to which defendant demurred, conclusively shows that, at the time when the defendant induced certain witnesses to testify falsely, the action was pending in the county court. The transcript of the proceedings in the county court had not yet been filed in the district court, and thereafter, upon a trial of said cause, defendant called these witnesses to testify in his behalf. When he called the witnesses to testify in his behalf and they testified falsely, in accordance with arrangements theretofore made, the contempt was committed. When one induces and arranges with and influences witnesses to testify falsely in an action not then pending, and in accordance with said plans, at the time of the trial, calls the said witnesses to testify in his behalf and they testify falsely, such action constitutes contempt.

The procuring of false testimony hinders and interferes with the administration of justice. It puts the witnesses and the procurer in the position of standing out against the authority of the court and defeats its effort and purpose to do justice between the parties. It follows that the ruling of the trial judge was erroneous and the exception thereto by the county attorney ought to be sustained.

The state's attorney asks that we remand the cause for further proceedings. This cannot be done. In a case brought to this court under the provisions of section 29-2314, Comp. St. 1929, permitting the county attorney to

present exceptions to the rulings of the trial judge, in a criminal case, where the defendant was acquitted, the only function of the court is to determine the law of the case. *State v. Badberg*, 108 Neb. 816.

EXCEPTIONS SUSTAINED.

GOOD and EBERLY, JJ., dissent solely on the ground that, in view of the nature of the proceeding, this court has no jurisdiction to determine the question presented.

FEDERAL FINANCE COMPANY, APPELLANT, V. BAXTER CASS ET AL., APPELLEES.

FILED MARCH 20, 1931. No. 27203.

1. **Fraud:** FALSE PROMISE. Ordinarily, a false promise, upon which fraud may be predicted, must be of an existing fact, or a fact alleged at the time to exist, and cannot consist of a mere promise to be performed in the future; but, if the intention not to perform the promise be shown to have existed at the time the promise was made, the promise is fraudulent.
2. ———: ———. INTENT. The existence of the evil intent at the time the promise was made may be inferred from the failure to comply with the promise, and the promisor may be presumed to have intended when he made the promise to do what he finally did.

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

Drake & Drake, for appellant.

N. M. York, contra.

Heard before GOSS, C. J., ROSE, DEAN, GOOD and DAY, JJ., and JAMES and WRIGHT, District Judges.

JAMES, District Judge.

This is a suit in equity commenced by the Federal Finance Company, a corporation, appellant, hereinafter referred to as the plaintiff, against Baxter Cass and Mabel Cass, husband and wife, appellees, hereinafter referred to as defendants. Plaintiff has its office in Kearney, Nebraska. The defendants reside at Tabor, Iowa. The object of the suit is to foreclose a real estate mortgage. The

mortgage was given by the defendants to the plaintiff upon real property belonging to Baxter Cass and located in McPherson county, Nebraska. Both note and mortgage bear date of November 29, 1926, the note maturing November 25, 1927. The mortgage is for the sum of $525. The petition of plaintiff is in the usual form for suits foreclosing real estate mortgages. The defendants' amended answer admits the execution and delivery of the note and mortgage as set out in plaintiff's petition, but denies all other allegations. Defendants then pleaded as a defense to the mortgage that the plaintiff procured the execution and delivery thereof by fraud and false representations made to the defendants. Plaintiff represented to the defendants that their son, Wayne Cass, was charged with having obtained from one Frank W. Thomas two automobiles, of the total value of $1,400, by false representations. A criminal charge had been filed against Wayne, and he was at that time out on bond. Plaintiff further represented that Wayne Cass was very much in need of financial assistance in order to prevent his prosecution for issuing a no-fund check for the cars which he had purchased. Plaintiff further represented that if the defendants would execute to the plaintiff a note and mortgage for the sum of $525 plaintiff would then advance the sum of $500 to Frank W. Thomas, the man from whom Wayne had purchased the cars, which sum would aid in effecting a settlement and relieve the son from further prosecution. The defendants, with a view to preventing the prosecution of their son under said criminal charges and believing and relying upon said representations and promises made by plaintiff, executed and delivered the note and mortgage to plaintiff. Plaintiff caused this mortgage to be recorded and it is the mortgage at issue in this case. Defendants charge that plaintiff, in violation of the agreement, kept and appropriated said note and mortgage to its own use, and did not pay the said Frank W. Thomas the $500 or any other sum, and that neither Thomas, the defendants, nor either of them, ever received any credit for the amount of said

mortgage. They further state that said mortgage was tainted with usury.

The district court by its decree canceled the note and mortgage, quieted the title in Baxter Cass and dismissed plaintiff's cause of action.

The evidence introduced at the trial tends to establish the following facts, over which there is but little, if any, dispute: On November 5, 1926, plaintiff wrote a letter to B. B. Cass, at Tabor, Iowa, in which he recited the transaction relative to Wayne Cass purchasing the two cars; stating that the son had undertaken to pay for the cars by giving a no-fund check for $1,400; that the son had then come to plaintiff to procure a loan. Plaintiff made the loan, taking a mortgage on the cars purchased as security, but the son, instead of using the money for the purpose of taking care of the no-fund check, used it for other purposes; that in case of a showdown the plaintiff could step in and take all the cars that it had loans on and which Wayne had sold, and thereby protect itself, but that there would still be the criminal liability, and that they did not want to take such action; that Wayne was now at the end of his string and must raise the money to take care of this check and perhaps a little more immediately. In answer to this letter the defendant, B. B. Cass, wrote that he was not in shape to help his son at the present time, and asked them to give the son a chance and be as lenient with him as they could. On November 26, 1926, the plaintiff again wrote the defendant a letter, addressed to Tabor, Iowa, in which he again gives a history of the case, and asks that the defendants put up a mortgage on the half section of land they owned near Gandy for the sum of $1,050, which it was believed would clear the charge in connection with the check given for the cars, in the total amount of $1,488; Thomas would accept that amount, and that the principal thing which was now pressing the son was the check which could now be settled for $1,000, and with that and an amount to settle some more outstanding accounts Wayne would be able to go back to work as well as being relieved of criminal charges being filed against him. The letter said:

"I believe that if you can possibly raise the $500 in cash to be applied on the Lexington account, it should be done, but it would have to be done before the 3d of December as his hearing is set on that date, and the man who has filed the charges is just the type that would sooner lose the money and see Wayne spend time in the pen than to be lenient in any manner."

Plaintiff inclosed to defendants a mortgage covering the property and a note for the sum of $1,050, $50 being for commission for making the loan, and the balance of $1,000 to prevent the prosecution. Defendants refused to execute or deliver any mortgage on the entire half section of land, claiming that the father was an old man and unable to take care of such matters. After plaintiff had failed in procuring the execution of the $1,050 mortgage, it prepared the mortgage in controversy and sent to the defendants for execution. This was plaintiff's third effort, and after reducing the amount from $1,400 to $525 it was successful in having a mortgage signed by defendants. This $525 mortgage was placed on the quarter section owned by the father.

Up to this point there is no conflict in the evidence as to what took place. Wayne, the son, was in trouble, having purchased the cars and given in payment thereof a no-fund check; was later arrested and then prosecuted. Defendants were approached and solicited by plaintiff to raise some money or make a mortgage to plaintiff, so that plaintiff might stop the prosecution of the defendants' son. From the evidence it appears that plaintiff procured a bond for the son, but afterwards surrendered him to the authorities and he was placed in jail. The son was finally taken before the court and pleaded guilty to the charge, but instead of being sentenced was paroled. Of the $525 represented by the mortgage, none of it was ever paid to Frank W. Thomas, the man who was prosecuting Wayne, but was paid out as follows: $100 check executed by plaintiff and made payable to Wayne Cass; check for $200, executed by plaintiff and made payable to James T. Keefe; check for $95, made payable to the Central National Bank of Kearney, Nebraska; check for $105, payable to the order of

Wayne Cass, the balance of $25 being retained by plaintiff.

The defendant, B. B. Cass, took the witness-stand in his own behalf and, so far as material in establishing fraud, testified as follows:

"Q. What do you remember about that mortgage, how it was explained to you, about what it was for? A. Well, my son was in trouble and there had to be something done. It referred to this Frank Thomas deal, told me about the deal, about the $1,400. That isn't the words that was said in the letter, but that was the substance of the matter, that he was in trouble and wanted help. * * * Q. What did you do pursuant to that letter? Did you execute a note and mortgage? A. No; I didn't execute it; they executed it and sent it to me. Q. They drew it and sent it to you for execution? A. Yes, sir. Q. What did you do? A. I remailed it back to them, or sent it by—I would rather think I sent it by mail. Q. How does it come to be in your possession now? A. They sent it back to me; also, sent the $525 mortgage." It appears from the evidence there was a letter accompanying this $525 note and mortgage, but it has been lost. "Q. What were you signing it for? A. To help out on this Frank Thomas deal. Q. What did they say to you in the letter? A. They said it was for that purpose. Q. How did you come to sign the $525 note and mortgage? A. I signed it for the purpose of helping out on this $1,400 Thomas deal."

The transactions relative to the boy being in trouble, the purchase of the cars, giving in payment a no-fund check, charged with a criminal offense and being arrested, were all true, and the representations as set out in the letters are not denied by any of the parties.

There is no conflict in the evidence as to what use was made of the $525. None of it went to Frank W. Thomas. Representations were made by plaintiff to defendants "that, if you can possibly raise the $500 in cash to be applied on the Lexington account, it should be done, but it would have to be done before the 3d of December as his hearing is on that date." The Lexington account was the Thomas account. The father and mother were anxious to save their son from the penitentiary. That was the moving

cause and the only purpose for which they executed the note and mortgage in controversy. They would not have signed the note and mortgage for any other purpose. They were led to believe, and did believe, it was for that one purpose only.

The principal question is: Did plaintiff deceive defendants and by such deception procure the note and mortgage and use the proceeds for another purpose than that promised? There can, under the evidence in this case, be but one answer, and that is that it did. It is true, as a general rule, that fraud must be based upon an existing fact and cannot be based upon a promise to perform something in the future unless the intention to defraud existed at the time the promise was made. This court has on such a proposition held:

"Ordinarily, a false promise upon which fraud may be predicated must be of an existing fact or a fact alleged at the time to exist, and cannot consist of a mere promise to be performed in the future; but if the intention not to perform the promise be shown to have existed at the time the promise was made, the promise is fraudulent." *Pollard v. McKenney*, 69 Neb. 742. See, also, *Cerny v. Paxton & Gallagher Co.*, 78 Neb. 134.

The fact that plaintiff expected to otherwise use the fund is shown by correspondence and telegrams had and received by plaintiff with other creditors and their representatives.

It has been held in the case of *Larmon v. Knight*, 140 Ill. 232, that the existence of evil intent at the time the promise was made may be inferred from a failure to comply with the promise, and that the promisor may be presumed to have intended when he made the promise to do what he finally did do. The *Larmon* case was cited and approved in the *Pollard* case.

Upon a full and careful consideration of all the facts and circumstances presented at the trial of this case, we are of the opinion that the decree of the district court is correct and should be and is hereby

AFFIRMED.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1930.

JENNIE NELSEN, APPELLANT, V. WILSON B. REYNOLDS ET AL., APPELLEES.

FILED JUNE 6, 1930. No. 27296.

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

E. L. Mahlin and *Robins & Yost*, for appellant.

Cook & Gumb and *F. Dolezal, contra.*

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

PER CURIAM.

Plaintiff brought this action in the district court for Dodge county to enjoin defendants from converting certain real estate owned by them from residence to business property. The trial court denied an injunction and plaintiff has appealed.

We have carefully considered the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

SARAH ATKINSON, APPELLANT, V. BURFORD J. ATKINSON: GEORGE N. GIBBS ET AL., APPELLEES.

FILED JUNE 6, 1930. No. 27322.

APPEAL from the district court for Lincoln county: ISAAC J. NISLEY and J. LEONARD TEWELL, JUDGES. *Affirmed.*

C. D. Ritchie, for appellant.

George N. Gibbs, William E. Shuman, Halligan, Beatty & Halligan and *Perry, Van Pelt & Marti, contra.*

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

PER CURIAM.

This is an appeal by plaintiff from an order of the district court for Lincoln county fixing attorneys' fees for her attorneys, appellees herein, who had appeared for her in a divorce action in which she was granted a decree of divorce from defendant Burford J. Atkinson.

We have carefully examined the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

BERTHA IRENE NINE, APPELLANT, V. YOUNG MEN'S CHRISTIAN ASSOCIATION OF YORK, APPELLEE.

FILED JUNE 6, 1930. No. 27368.

APPEAL from the district court for York county: HARRY D. LANDIS, JUDGE. *Affirmed.*

C. E. Sandall, for appellant.

George M. Spurlock and *W. W. Wyckoff, contra.*

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

PER CURIAM.

This is a proceeding under the workmen's compensation law to recover for the death of plaintiff's husband, who was employed as a janitor by defendant. The compensation commissioner awarded plaintiff compensation. On appeal to the district court for York county the award of the commissioner was set aside and the proceeding dismissed. Plaintiff has appealed.

We have carefully considered the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

FRED SOPER, APPELLEE, V. NEBRASKA MUTUAL INSURANCE COMPANY ET AL., APPELLEES: NATIONAL AMERICAN FIRE INSURANCE COMPANY, APPELLANT.

FRED SOPER, APPELLEE, V. AETNA INSURANCE COMPANY ET AL., APPELLEES: NATIONAL AMERICAN FIRE INSURANCE COMPANY, APPELLANT.

FRED SOPER, APPELLEE, V. GLOBE & RUTGERS FIRE INSURANCE COMPANY ET AL., APPELLEES: NATIONAL AMERICAN FIRE INSURANCE COMPANY, APPELLANT.

FRED SOPER, APPELLEE, V. UNION FIRE INSURANCE COMPANY ET AL., APPELLEES: NATIONAL AMERICAN FIRE INSURANCE COMPANY, APPELLANT.

FILED JUNE 12, 1930. NOS. 27212, 27213, 27214, 27215.

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

Ziegler & Dunn, for appellant.

Bernard McNeny, Stiner & Boslaugh and *Edmund P. Nuss, contra.*

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

PER CURIAM.

The above four cases were consolidated by this court and have been briefed and argued together. Each case presents substantially the same questions for consideration. Plaintiff in each case seeks to recover the proceeds of fire insurance policies covering property owned by him on which defendant National American Fire Insurance Company held a mortgage. The district court for Adams county found in favor of plaintiff and the mortgagee has appealed.

We have carefully examined the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

CHARLES B. KIRBY ET AL., APPELLEES, V. THOMAS R. KIMBALL ET AL., APPELLANTS.

FILED JUNE 12, 1930. No. 27325.

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

Battelle, Morgan, Strehlow & Anderson, for appellants.

Byron G. Burbank and *Verne W. Vance, contra.*

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

PER CURIAM.

Plaintiffs brought this action in the district court for Douglas county to enjoin defendants from using their premises in the city of Omaha as a chicken farm, alleging that such use constituted a nuisance. The trial court found for plaintiffs and defendants have appealed.

We have carefully examined the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

THOMPSON, J., not participating.

AUGUSTANA PENSION AND AID FUND ET AL., APPELLEES, V. FREDERICK H. CARLSON, APPELLANT.

FILED JUNE 12, 1930. No. 27332.

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

Richard Steele, for appellant.

Frank P. Voter and *J. F. Green, contra.*

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

PER CURIAM.

This is an appeal by defendant Frederick H. Carlson from a judgment of the district court for Knox county

confirming a judicial sale under a mortgage foreclosure.

We have carefully examined the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

FRED KELLY ET AL., APPELLANTS, V. ILER C. JENSEN, APPELLEE.

FILED JUNE 12, 1930. No. 27427.

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

C. H. Hendrickson and *Robert G. Fuhrman,* for appellants.

Mullen & Morrissey and *Alfred D. Raun, contra.*

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

PER CURIAM.

This is an action brought by plaintiffs as taxpayers by which they sought to oust defendant from the office of sheriff of Thurston county because of alleged misconduct. The district court for Thurston county found in favor of defendant and plaintiffs have appealed.

We have carefully examined the record and find it to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

RUTH KOUKAL ET AL., APPELLANTS, V. SWIFT & COMPANY, APPELLEE.

FILED JUNE 12, 1930. No. 27450.

APPEAL from the district court for Douglas county: FRANCIS M. DINEEN, JUDGE. *Affirmed.*

D. O. Dwyer, for appellants.

Brown, Fitch & West and *George H. Winn, contra.*

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

PER CURIAM.

This is an action under the workmen's compensation law to recover for the death of John A. Koukal, resulting from injuries alleged to have been sustained while in the employ of defendant company. At the close of plaintiffs' testimony the district court for Douglas county sustained a motion of defendant to dismiss the action and plaintiffs have appealed.

We have carefully examined the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

HENRY B. JOHNSON V. STATE OF NEBRASKA.

FILED JULY 1, 1930. No. 27373.

ERROR to the district court for Hamilton county: HARRY D. LANDIS, JUDGE. *Affirmed.*

Edward F. Hannon, for plaintiff in error.

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

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

PER CURIAM.

This is a proceeding in error brought to this court by Henry B. Johnson for a review of the judgment of the district court for Hamilton county wherein he was convicted of the offense of unlawfully manufacturing intoxicating liquor.

We have carefully examined the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

ANTHONY BLATCHFORD, APPELLEE, V. GILBERT A. PALMER: FRANK MCGINTY, APPELLANT.

FILED JULY 1, 1930. No. 27438.

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

O'Sullivan & Southard, for appellant.

Carl T. Self and *John A. McKenzie, contra.*

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

PER CURIAM.

This is an appeal by defendant Frank McGinty from a judgment rendered against him in the district court for Douglas county in an action brought by plaintiff against four defendants to recover damages for alleged fraud in an exchange of real estate.

We have carefully examined the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

DAY, J., dissents.

TELOCVICNA JEDNOTA SOKOL, APPELLEE, V. DOUGLAS COUNTY ET AL., APPELLANTS.

FILED JULY 3, 1930. No. 27340.

APPEAL from the district court for Douglas county: FRANCIS M. DINEEN, JUDGE. *Affirmed.*

W. W. Slabaugh, Henry J. Beal, John F. Moriarty, Thomas J. O'Brien and *B. J. Boyle,* for appellants.

Votova & McGroarty, contra.

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

PER CURIAM.

Plaintiff brought this action in the district court for Douglas county to have its real estate exempted from taxation on the ground that the same is used solely for charitable, educational and philanthropic purposes. Plaintiff asked that the taxes for the year 1927 and thereafter be canceled and collection enjoined. The trial court found in favor of plaintiff and defendants have appealed.

We have carefully examined the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

MARGARET HALL, APPELLEE, V. CITIZENS STATE BANK OF SUPERIOR, APPELLANT.

FILED JULY 3, 1930. No. 27345.

APPEAL from the district court for Nuckolls county: ROBERT M. PROUDFIT, JUDGE. *Affirmed.*

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

Bernard McNeny, contra.

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

PER CURIAM.

Plaintiff brought this action in the district court for Nuckolls county seeking to impress a trust upon the assets of defendant bank for the amount of a cashier's check issued by the bank while it was a going concern. The trial court found for plaintiff and defendant has appealed.

We have carefully examined the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

NORMA A. MATTHEWS, APPELLANT, V. FRIEDRICH GUENTHER ET AL., APPELLEES.*

FILED JULY 9, 1930. No. 27000.

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

Courtright, Sidner, Lee & Gunderson, for appellant.

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

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

PER CURIAM.

Plaintiff brought this action in the district court for Cedar county to foreclose a real estate mortgage. The defense was that the contract was usurious. The trial court found in favor of defendants and plaintiff has appealed.

We have carefully examined the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

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*Reversed on rehearing, see opinion, *ante,* p. 742.

AUGUST CAPPEL, APPELLEE, V. HENRY JOHNSON ET AL., APPELLANTS.

FILED JULY 9, 1930. No. 27342.

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

Scott & Scott, for appellants.

C. D. Ritchie, contra.

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

PER CURIAM.

Plaintiff brought this action to enjoin defendants from trespassing upon certain land along the Republican river and to quiet title to a portion of an island in the river. The district court for Red Willow county found in favor of plaintiff and defendants have appealed.

We have carefully examined the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

CLARKE FOYT V. STATE OF NEBRASKA.

FILED JULY 9, 1930. No. 27383.

ERROR to the district court for Nemaha county: JAMES T. BEGLEY, JUDGE. *Affirmed.*

D. W. Livingston, A. P. Moran and *Ernest F. Armstrong,* for plaintiff in error.

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

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

PER CURIAM.

This is a proceeding in error brought to this court by Clarke Foyt for a review of the judgment of the district court for Nemaha county wherein he was convicted of the crime of rape.

We have carefully examined the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

STATE, EX REL. C. A. SORENSEN, ATTORNEY GENERAL, V. FARMERS STATE BANK, APPELLEE: RICHARD H. THESING, APPELLANT.

FILED JULY 9, 1930. No. 27388.

APPEAL from the district court for Polk county: HARRY D. LANDIS, JUDGE. *Affirmed.*

H. G. Wellensiek, for appellant.

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

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

PER CURIAM.

Richard H. Thesing, appellant, filed his claim in the district court for Polk county seeking to have the assets of the Farmers State Bank of Polk impressed with a trust in the amount of $1,298.20. The trial court found the deposit to be a general claim, and Thesing has appealed.

We have carefully examined the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

HENRY E. MASON, APPELLEE, V. THOMAS H. MCDOWELL ET AL., APPELLEES: HEDWALL-SUNDBERG COMPANY, APPELLANT.

FILED JULY 17, 1930. No. 27315.

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

H. A. Dano, for appellant.

Beeler, Crosby & Baskins, contra.

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

PER CURIAM.

This action was brought in the district court for Keith county to enjoin Hedwall-Sundberg Company from selling certain land to satisfy a decree in its favor. The trial court granted the injunction and Hedwall-Sundberg Company has appealed.

We have carefully examined the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

BESS W. DUTCH, APPELLANT, V. DOUGLAS B. WELPTON ET AL., APPELLEES.

FILED JULY 17, 1930. No. 27320.

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

Beeler, Crosby & Baskins, L. A. DeVoe and *C. J. Thurston,* for appellant.

Halligan, Beatty & Halligan and *C. E. Herring, contra.*

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

PER CURIAM.

Plaintiff brought this action in the district court for Douglas county under a trust agreement executed by Hester Welpton and Welpton Investment Company. The trial court found for defendants and dismissed plaintiff's action. Plaintiff has appealed.

We have carefully examined the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

IN RE ESTATE OF CAROLINE A. REEVES.
LUCY JANE GRAY, APPELLEE, V. THOMAS REEVES MORROW ET AL., APPELLANTS.

FILED JULY 17, 1930. No. 27327.

APPEAL from the district court for York county: HARRY D. LANDIS, JUDGE. *Affirmed.*

J. A. Singhaus and *Clarence G. Miles,* for appellants.

Kirkpatrick, Good & Dougherty, contra.

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

PER CURIAM.

This is an appeal by Thomas Reeves Morrow and Annie C. Morrow, his guardian, from a judgment of the district court for York county admitting to probate the will of Caroline A. Reeves.

We have carefully examined the record and find it to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

SEPTEMBER TERM, 1930

STATE, EX REL. R. B. HASSELQUIST, APPELLANT, V. WILLIAM D. MCHUGH, APPELLEE.

FILED OCTOBER 10, 1930. No. 27731.

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

Rosewater, Mecham, Burton, Hasselquist & Chew, for appellant.

W. H. Herdman, contra.

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

PER CURIAM.

Relator brought this action in mandamus to require respondent as election commissioner for Douglas county to issue him a certificate of nomination and to cause his name to be placed on the ballot at the general election to be held on November 4, 1930, as a candidate for the office of a member of the board of directors of the Metropolitan Utilities District (of the City of Omaha).

The district court for Douglas county found for respondent and relator has appealed. We have carefully examined the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

LUCY COTTON, APPELLANT, V. BEN COTTON, APPELLEE.

FILED OCTOBER 17, 1930. No. 27090.

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

George B. Thummel, for appellant.

Crossman, Munger & Barton, contra.

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

PER CURIAM.

This is an action by a divorced wife to collect from her former husband certain instalments of alimony accruing over a period of years and alleged to be delinquent. The district court for Douglas county found for defendant and plaintiff has appealed.

We have carefully examined the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

THOMPSON, J., dissents.

JOHN REIMER, APPELLEE, V. EMIL ENGDAHL ET AL., APPELLANTS.

FILED OCTOBER 17, 1930. No. 27171.

APPEAL from the district court for Knox county: CHARLES H. STEWART, JUDGE. *Affirmed.*

W. A. Meserve, P. H. Peterson and *Fred S. Berry,* for appellants.

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

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

PER CURIAM.

Plaintiff brought this action in the district court for

Knox county to recover damages for alleged fraud in the sale of certain bank stock. From a verdict and judgment in favor of plaintiff the defendants have appealed.

We have carefully examined the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

STEPHEN E. AUKER, APPELLEE, V. HERMAN RITZE ET AL., APPELLANTS.

FILED OCTOBER 17, 1930. No. 27263.

APPEAL from the district court for Wayne county: DEWITT C. CHASE, JUDGE. *Affirmed.*

North, Caldwell & Gillogly, for appellants.

C. H. Hendrickson, Davis & Welch, F. S. Berry and *J. E. Brittain, contra.*

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

PER CURIAM.

This is an action in equity brought to remove a cloud from certain property described in the petition and to quiet title thereto in plaintiff. The district court for Wayne county found for plaintiff and defendants have appealed.

We have carefully examined the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

HARRY REGO V. STATE OF NEBRASKA.

FILED OCTOBER 17, 1930. No. 27419.

ERROR to the district court for Lancaster county: ELWOOD B. CHAPPELL, JUDGE. *Affirmed.*

W. M. Elmen, for plaintiff in error.

C. A. Sorensen, Attorney General, and *Homer L. Kyle, contra.*

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

PER CURIAM.

This is a proceeding in error brought to this court by Harry Rego for a review of the judgment of the district court for Lancaster county, wherein he was convicted of the crime of robbery under section 9557, Comp. St. 1922, as amended by chapter 71, Laws 1927.

We have carefully examined the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

CHARLES C. CLINTON V. STATE OF NEBRASKA.

FILED OCTOBER 24, 1930. No. 27526.

ERROR to the district court for Otoe county: JAMES T. BEGLEY, JUDGE. *Affirmed.*

Pitzer & Tyler and *Lloyd E. Peterson,* for plaintiff in error.

C. A. Sorensen, Attorney General, and *Homer L. Kyle, contra.*

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

PER CURIAM.

This is a proceeding in error brought to this court by Charles C. Clinton for a review of the judgment of the district court for Otoe county wherein he was convicted of bank robbery.

We have carefully examined the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

CLARENCE T. GLICK, APPELLEE, V. E. S. WOLFENBARGER ET AL., APPELLANTS.

FILED OCTOBER 24, 1930. No. 27406.

APPEAL from the district court for Lancaster county: ELWOOD B. CHAPPELL, JUDGE. *Affirmed.*

Chambers & Holland, for appellants.

Richard F. Stout, contra.

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

PER CURIAM.

Plaintiff brought this action in the district court for Lancaster county to recover damages for personal injuries alleged to have been sustained by reason of a collision between an automobile owned by defendant E. S. Wolfenbarger and a milk wagon driven by plaintiff. The jury returned a verdict for plaintiff in the sum of $5,500, of which $2,500 was remitted by order of the trial court. From a judgment entered for plaintiff for $3,000 defendants have appealed.

We have carefully examined the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

MARY POHL ET AL., APPELLANTS, V. FRANK URBANEK ET AL., APPELLEES.

FILED OCTOBER 24, 1930. No. 27411.

APPEAL from the district court for Butler county: LOVEL S. HASTINGS, JUDGE. *Affirmed.*

R. C. Roper and *J. C. Hranac,* for appellants.

Coufal & Shaw, contra.

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

PER CURIAM.

Plaintiffs brought this action in the district court for Butler county to partition certain property under the terms of the last will and testament of Mary Petr, deceased. The trial court found that the provisions of the will in controversy operated to devise all of the real estate to defendant Frank Urbanek; that each of the other children took a bequest of $5, and that all the rest of the personal property involved vested in defendant Frank Urbanek. Plaintiffs have appealed.

We have carefully examined the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

EDWARD M. VAN ACKEREN, APPELLEE, V. PARK G. DOBSON ET AL.: JOHN C. EHERNBERGER, APPELLANT.

FILED OCTOBER 31, 1930. No. 27422.

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

Charles E. Martin and *A. L. Tidd,* for appellant.

King & Haggart, contra.

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

PER CURIAM.

This action was commenced in the district court for Cass county to quiet title to certain real estate described in the petition. The trial court found in favor of plaintiff and defendant John C. Ehernberger has appealed.

We have carefully examined the record and conclude that our decision herein is controlled by the case of *Pinkham v. Pinkham,* 55 Neb. 729. The judgment of the district court is therefore

AFFIRMED.

STATE, EX REL. C. A. SORENSEN, ATTORNEY GENERAL, V. FARMERS & MECHANICS BANK OF HAVELOCK, APPELLANT: MICHAEL J. MORAN, INTERVENER, APPELLEE.

FILED OCTOBER 31, 1930. No. 27550.

APPEAL from the district court for Lancaster county: ELWOOD B. CHAPPELL, JUDGE. *Affirmed.*

C. M. Skiles, I. D. Beynon and *W. A. Crossland,* for appellant.

C. J. Campbell, contra.

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

PER CURIAM.

Michael J. Moran filed his petition of intervention in the receivership proceedings of defendant bank alleging a deposit in the bank of the sum of $2,904.17 in an account known as "M. J. Moran, Special," and asked that two promissory notes representing personal indebtedness and certain other notes upon which he was surety be offset against the deposit.

The district court for Lancaster county held that intervener was entitled to have said deposit offset in satisfaction of the personal notes, but that he was not entitled to an offset in payment of the notes upon which he was surety. The defendant bank has appealed.

We have carefully examined the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

E. F. SEEBERGER, APPELLEE, V. SCHOOL DISTRICT, APPELLANT.

FILED NOVEMBER 7, 1930. No. 27380.

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

E. H. Evans, for appellant.

Halligan, Beatty & Halligan and *M. C. Murphy, contra.*

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

PER CURIAM.

Plaintiff brought this action in the district court for Lincoln county as assignee of First National Bank, McDonald State Bank, and Union State Bank, all of North Platte, against defendant school district to recover certain taxes levied against the banks and their capital stock under the provisions of chapter 169, Laws 1927, known as the intangible tax law. The trial court found in favor of plaintiff and defendant has appealed.

We have carefully examined the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

GEORGE I. FRENCH, ADMINISTRATOR, APPELLEE, V. EUGENE E. BRIARD ET AL., APPELLANTS.

FILED NOVEMBER 7, 1930. No. 27391.

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

W. M. Cain and *Dolezal, Mapes & Johnson,* for appellants.

George W. Wertz, contra.

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

PER CURIAM.

Plaintiff, as administrator of the estate of Warren E. French, deceased, brought this action in the district court for Colfax county to require defendants to convey certain lands, for an accounting, and for $1,000 as alleged damages. It appears that the land in controversy had been conveyed, under power of attorney from Warren E. French, by defendant Lillie B. Briard, to her husband,

Eugene E. Briard, who later reconveyed the land to her.

The trial court entered a decree requiring defendants to convey to the heirs and entered a money judgment against defendants for $1,000. Defendants have appealed.

We have carefully examined the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

ROY C. WHITE V. STATE OF NEBRASKA.

FILED NOVEMBER 7, 1930. No. 27571.

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

George N. Gibbs and *Halligan, Beatty & Halligan,* for plaintiff in error.

C. A. Sorensen, Attorney General, L. Ross Newkirk and *F. L. Bollen, contra.*

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

PER CURIAM.

This is a proceeding in error brought to this court by Roy C. White for a review of the judgment of the district court for McPherson county wherein he was convicted upon a charge of possession of a still and mash.

We have carefully examined the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

ALBERT FREBURG V. STATE OF NEBRASKA.

FILED NOVEMBER 7, 1930. No. 27576.

ERROR to the district court for Phelps county: LEWIS H. BLACKLEDGE, JUDGE. *Affirmed.*

Max Marshall and *John A. Lawler,* for plaintiff in error.

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

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

PER CURIAM.

This is a proceeding in error brought to this court by Albert Freburg for a review of the judgment of the district court for Phelps county wherein he was convicted of bootlegging as defined in chapter 77, Laws 1929.

We have carefully examined the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

FRANCES KRECEK, APPELLANT, V. JOHN KRECEK, APPELLEE.

FILED NOVEMBER 14, 1930. No. 27299.

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

A. H. Bigelow, for appellant.

Bartos & Placek, contra.

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

PER CURIAM.

This is an action for divorce brought in the district court for Douglas county. The trial court denied a divorce and dismissed both plaintiff's petition and defendant's cross-petition. Plaintiff has appealed.

We have carefully examined the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

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

FILED NOVEMBER 14, 1930. No. 27354.

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

L. C. Paulson, Bernard McNeny, Stiner & Boslaugh, Edmund P. Nuss, Max V. Beghtol and *J. Lee Rankin,* for appellant.

C. P. Anderbery, contra.

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

PER CURIAM.

Plaintiff brought this action in the district court for Kearney county to recover damages for injuries alleged to have been sustained in a collision with defendant's automobile. A verdict was returned in favor of defendant and plaintiff has appealed.

We have carefully examined the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

VERNE LECHLITER V. STATE OF NEBRASKA.

FILED NOVEMBER 14, 1930. No. 27468.

ERROR to the district court for Nemaha county: JEFFERSON H. BROADY, JUDGE. *Affirmed.*

Ernest F. Armstrong and *C. F. Reavis,* for plaintiff in error.

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

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

PER CURIAM.

This is a proceeding in error brought to this court by Verne Lechliter for a review of the judgment of the district court for Nemaha county wherein he was convicted of the crime of rape.

We have carefully examined the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

NEBRASKA CENTRAL BUILDING & LOAN ASSOCIATION V. NETTIE SHUMWAY, APPELLANT: CLAUDE C. FLANSBURG, APPELLEE.

FILED NOVEMBER 14, 1930. No. 27523.

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

Morrow & Morrow, for appellant.

Claude C. Flansburg, pro se.

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

PER CURIAM.

This is an appeal by Nettie Shumway, defendant below, from a decree of the district court for Scotts Bluff county awarding appellee Claude C. Flansburg a lien upon certain real estate owned by defendant Shumway.

We have carefully examined the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

AL REEMS V. STATE OF NEBRASKA.

FILED NOVEMBER 14, 1930. No. 27564.

ERROR to the district court for Lancaster county: LINCOLN FROST, JUDGE. *Affirmed.*

John E. Lowe, for plaintiff in error.

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

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

PER CURIAM.

This is a proceeding in error brought to this court by Al Reems for a review of the judgment of the district court for Lancaster county wherein he was convicted of unlawful possession of intoxicating liquor.

We have carefully examined the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

JOHN HALSTEAD ET AL., APPELLANTS, V. EUGENE E. GROVES ET AL.: LOGAN COUNTY HIGH SCHOOL DISTRICT ET AL., APPELLEES.

FILED NOVEMBER 14, 1930. No. 27578.

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

Hoagland & Carr, H. E. Dress, Robert V. Hoagland and *D. A. Russell,* for appellants.

Beeler, Crosby & Baskins, Sullivan & Wilson and *W. E. Hill, contra.*

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

PER CURIAM.

Plaintiffs brought this action in the district court for Logan county to cancel and enjoin performance of a contract for the construction of a gymnasium for the Logan county high school. While the original suit was pending, the county seat of Logan county was moved from Gandy to Stapleton, and supplemental petitions were filed by which it was sought to permanently enjoin the construction of any gymnasium and also to enjoin the maintenance

of a county high school at any place other than the new county seat.

The trial court in its decree canceled the specific contract for the erection of a gymnasium and enjoined performance thereof, but refused to enjoin the expenditure of the proceeds of a bond levy for the erection of the gymnasium and also refused to enjoin the operation of a county high school at Gandy. Plaintiffs and interveners have appealed.

We have carefully examined the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

ALFRED WILLIAM STUMPFF V. STATE OF NEBRASKA.

FILED NOVEMBER 14, 1930. No. 27632.

ERROR to the district court for Merrick county: LOUIS LIGHTNER, JUDGE. *Affirmed.*

J. H. Grosvenor, for plaintiff in error.

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

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

PER CURIAM.

This is a proceeding in error brought to this court by Alfred William Stumpff for a review of the judgment of the district court for Merrick county wherein he was convicted upon a charge of unlawful possession of intoxicating liquor as a third offense.

We have carefully examined the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

STATE, EX REL. C. A. SORENSEN, ATTORNEY GENERAL, V. CITIZENS STATE BANK OF SUPERIOR, APPELLANT: FIRST NATIONAL BANK OF KANSAS CITY, INTERVENER, APPELLEE.

FILED NOVEMBER 21, 1930. No. 27396.

APPEAL from the district court for Nuckolls county: ROBERT M. PROUDFIT, JUDGE. *Affirmed.*

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

Ryland, Boys, Stinson, Mag & Thompson, Sloans, Keenan & Corbitt and *Leslie C. Thurman, contra.*

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

PER CURIAM.

This is an appeal by the receiver of the Citizens State Bank of Superior from a judgment of the district court for Nuckolls county allowing intervener a preference based on certain drafts issued by defendant bank representing funds collected by said bank.

We have carefully examined the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

ALVERNON L. LYTLE V. STATE OF NEBRASKA.

FILED NOVEMBER 21, 1930. No. 27582.

ERROR to the district court for Kearney county: LEWIS H. BLACKLEDGE, JUDGE. *Affirmed.*

Mockett & Finkelstein and *C. P. Anderbery,* for plaintiff in error.

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

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

PER CURIAM.

This is a proceeding in error brought to this court by Alvernon L. Lytle for a review of the judgment of the district court for Kearney county wherein he was convicted of bank robbery.

We have carefully examined the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

NEIL SHINLEY V. STATE OF NEBRASKA.

FILED NOVEMBER 21, 1930. No. 27595.

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

Perry, Van Pelt & Marti, K. F. Williams, L. A. Kiplinger and *J. P. O'Gara,* for plaintiff in error.

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

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

PER CURIAM.

This is a proceeding in error brought to this court by Neil Shinley for a review of the judgment of the district court for Frontier county wherein he was convicted upon a charge of unlawful transportation of intoxicating liquor.

We have carefully examined the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

WESTERN PUBLIC SERVICE COMPANY ET AL., APPELLANTS, V. CITY OF BROKEN BOW ET AL., APPELLEES.

FILED NOVEMBER 21, 1930. No. 27673.

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

Sullivan & Wilson and *Clarence A. Davis*, for appellants.

Perry, Van Pelt & Marti and *Allan F. Black, contra.*

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

PER CURIAM.

Plaintiffs brought this action in the district court for Custer county to contest an election at which was submitted the question of granting plaintiff company a franchise to produce, sell and distribute electric heat, light and power in the city of Broken Bow. The trial court found in favor of defendants and plaintiffs have appealed.

We have carefully examined the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

J. B. MELLOR, APPELLEE, V. H. H. HAFFNER, APPELLANT.

FILED DECEMBER 5, 1930. No. 27394.

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

J. J. Harrington and *L. C. Chapman*, for appellant.

M. F. Harrington, contra.

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

PER CURIAM.

Plaintiff brought this action in the district court for Holt county to recover a balance alleged to be due on a promissory note given by defendant. The trial court found in favor of plaintiff and defendant has appealed.

We have carefully examined the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

ROSE AND GOOD, JJ., DISSENT.

ALFRED W. MILLER ET AL., APPELLEES, V. ROSA JOHNS WHEELER, ADMINISTRATRIX, APPELLANT.

FILED DECEMBER 5, 1930. No. 27443.

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

Lewis Chapman and *D. R. Mounts,* for appellant.

J. J. Harrington and *Julius D. Cronin, contra.*

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

PER CURIAM.

This is an appeal by Rosa Johns Wheeler, administratrix of the estate of Willard A. Wheeler, deceased, from a decree of the district court for Holt county. The trial court found that the personal estate in controversy should be distributed, one-half to the widow and the remaining one-half to thirteen first cousins of the deceased in equal shares.

We have carefully examined the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

MARGARET BENN, APPELLEE, V. MARY BAKER ET AL.: MARY ELIZABETH RULE ET AL., APPELLEES: COUNTY OF DOUGLAS ET AL., APPELLANTS.

FILED DECEMBER 5, 1930. No. 27444.

APPEAL from the district court for Douglas county: FRANCIS M. DINEEN, JUDGE. *Affirmed.*

Henry J. Beal, W. W. Slabaugh, John F. Moriarty, Thomas J. O'Brien and *B. J. Boyle,* for appellants.

John D. Wear and *W. A. Ehlers, contra.*

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

PER CURIAM.

Plaintiff brought this action in the district court for

Douglas county to foreclose certain tax sale certificates, among them one alleged to cover certain property owned by defendants Mary Elizabeth Rule and William D. Rule. These defendants asserted by answer and cross-petition that the tax certificate was void by reason of the insufficiency and inaccuracy of the description of the property. The trial court held the tax certificate to be void, enjoined collection of the taxes, and rendered judgment for plaintiff and against the city of Omaha and county of Douglas for the amount paid, together with interest. Both the city and the county appeal.

We have carefully examined the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

EARL GARMAN ET AL., APPELLEES, V. HUDSON INSURANCE COMPANY, APPELLANT.

FILED DECEMBER 5, 1930. No. 27453.

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

Raymond & Fitzgerald and *Frank P. Johnson,* for appellant.

Morrow & Morrow, contra.

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

PER CURIAM.

Plaintiffs brought this action in the district court for Scotts Bluff county to recover on a policy of hail insurance covering growing sugar beets. From a judgment in favor of plaintiffs, defendant has appealed.

We have carefully examined the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

CONTINENTAL NATIONAL BANK, APPELLANT, V. LESTER L. KUNKEL ET AL.: CHARLES KLUGE, APPELLEE.

FILED DECEMBER 5, 1930. No. 27464.

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

Max V. Beghtol, Cordeal, Colfer & Russell, and *J. Lee Rankin,* for appellant.

E. E. Jackman and *Perry, Van Pelt & Marti, contra.*

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

PER CURIAM.

Plaintiff brought this action in the district court for Perkins county to recover on a written guaranty. The trial court sustained the demurrer of defendant Charles Kluge and plaintiff has appealed.

We have carefully examined the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

ALFRED W. MILLER ET AL., APPELLEES, V. ROSA JOHNS WHEELER, APPELLANT.

FILED DECEMBER 5, 1930. No. 27465.

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

Lewis Chapman, Rose, Wells, Martin & Lane and *D. R. Mounts,* for appellant.

J. J. Harrington, J. D. Cronin and *Homer I. Smith, contra.*

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

PER CURIAM.

Plaintiffs brought this action in the district court for Holt county seeking to set aside a deed from Willard A.

Wheeler to Rosa Johns Wheeler, and to quiet title in themselves to an undivided one-half interest in the property described therein. Rosa Johns Wheeler is made defendant both as an individual and as administratrix of the estate of Willard A. Wheeler deceased. The trial court found in favor of plaintiffs and the defendant has appealed.

We have carefully examined the record and conclude that our decision herein is controlled by the opinion of this court in *Pinkham v. Pinkham,* 55 Neb. 729. The judgment of the district court is therefore

AFFIRMED.

IRENE STEVENSON, APPELLANT, V. SCOTTS BLUFF COUNTY, APPELLEE.

FILED DECEMBER 5, 1930. No. 27679.

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

Raymond & Fitzgerald, for appellant.

Wright & Wright, contra.

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

PER CURIAM.

Plaintiff, as the widow of Melvin Stevenson, deceased, brought this action under the employers' liability law to recover compensation for the death of her husband. The district court for Scotts Bluff county dismissed the petition and denied the award. Plaintiff has appealed.

We have carefully examined the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

EARL BELL, APPELLANT, V. GEORGE CLOPINE ET AL., APPELLEES.

FILED DECEMBER 16, 1930. No. 27363.

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

George J. Marshall and *Max Marshall,* for appellant.

Leon Samuelson, C. P. Anderbery and *C. R. Stasenka, contra.*

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

PER CURIAM.

Plaintiff brought this action in the district court for Franklin county to recover damages alleged to have been sustained to his lands and crops during the years 1927 and 1928 by reason of the alleged wrongful diversion of the waters of Wortham creek by defendants. The jury returned a verdict for defendants and from judgment thereon plaintiff has appealed.

We have carefully examined the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

PORTER C. BAKER, APPELLEE, V. JAMES H. CASSELMAN ET AL., APPELLANTS.

FILED DECEMBER 16, 1930. No. 27437.

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

R. O. Canaday and *Allen G. Fisher,* for appellants.

Morrow & Morrow, contra.

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

PER CURIAM.

Plaintiff brought this action in the district court for Scotts Bluff county to recover for damages alleged to have been suffered by reason of the issuance of a temporary restraining order and injunction in an action wherein James H. Casselman was plaintiff and Porter C. Baker and one Wallace Beatty were defendants. Upon trial in the district court a verdict was returned in favor of plaintiff for the sum of $900, and from a judgment thereon defendants have appealed, and plaintiff has filed a cross-appeal.

We have carefully examined the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

WALLACE D. BEATTY, APPELLEE, V. JAMES H. CASSELMAN ET AL., APPELLANTS.

FILED DECEMBER 16, 1930. No. 27448.

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

R. O. Canaday and *Allen G. Fisher,* for appellants.

Raymond & Fitzgerald, contra.

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

PER CURIAM.

Plaintiff brought this action in the district court for Scotts Bluff county to recover damages alleged to have been suffered as a result of being enjoined from removing sand and gravel from the premises of defendant James H. Casselman. Defendant C. F. Andrews was surety on temporary restraining order and temporary injunction bonds in the injunction action. Defendants have appealed from a judgment in favor of plaintiff in the sum of $1,977 and plaintiff has perfected a cross-appeal.

We have carefully examined the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

FRED J. DANKERS, EXECUTOR, APPELLEE, V. GUS GERLING ET AL., APPELLANTS.

FILED DECEMBER 16, 1930. NOS. 27490, 27545.

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

Willis E. Reed, John J. Hess and *W. T. Thompson,* for appellants.

James Nichols, Moyer & Moyer, R. J. Shurtleff, Charles H. Kelsey, McElfresh & Walker and *Fred M. Deutsch, contra.*

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

PER CURIAM.

These two appeals grow out of the same foreclosure action. Case No. 27490 is an appeal from an order of the district court for Madison county setting aside an order of confirmation of sale because of the inability of the purchaser to perform his bid. Case No. 27545 is an appeal from the confirmation of the new sale ordered.

We have carefully examined the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

ALBERT W. SCHNEIDER, APPELLEE, V. E. A. HARMS ET AL., APPELLANTS.

FILED DECEMBER 16, 1930. NO. 27499.

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

I. C. Travis, B. S. Baker and *Battelle, Travis & Strehlow,* for appellants.

Eugene N. Blazer and *Will H. Thompson & Son, contra.*

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

PER CURIAM.

Plaintiff brought this action in the district court for Douglas county to recover money alleged to have been loaned to defendants for the purchase of a theatre to be managed by plaintiff. Defendants have appealed from a judgment in favor of plaintiff in the sum of $8,500 and interest from March 7, 1927.

We have carefully examined the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

ALBERT LEE, APPELLEE, V. F. H. KOENIG, SHERIFF: THOMAS W. SHEPARD, TRUSTEE, APPELLANT.

FILED DECEMBER 16, 1930. No. 27503.

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

F. J. Reed and *Morrow & Morrow,* for appellant.

Mothersead & York, contra.

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

PER CURIAM.

This is an action in replevin brought against F. H. Koenig, as sheriff, Thomas W. Shepard, trustee of A. Victor Bryan, bankrupt, intervened as a defendant. From a judgment in favor of plaintiff, defendant Shepard has appealed.

We have carefully examined the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

FARMERS GRAIN COMPANY OF FOLEY, APPELLEE, V. PAULUS BARKER: SCOULAR-BISHOP GRAIN COMPANY, APPELLANT.

FILED DECEMBER 19, 1930. No. 27479.

APPEAL from the district court for Butler county: LOVEL S. HASTINGS, JUDGE. *Affirmed.*

Charles E. Matson, J. C. Hranac and *P. E. Reeder,* for appellant.

Coufal & Shaw, contra.

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

PER CURIAM.

Plaintiff brought this action in the district court for Butler county to recover a balance alleged to be due it from defendant Scoular-Bishop Grain Company on shipments of grain, and also to recover the amount of two checks issued by defendant Paulus Barker to the defendant grain company for alleged unauthorized purposes.

The trial court found generally for plaintiff, and defendant Scoular-Bishop Grain Company has appealed.

We have carefully examined the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

ELLEN MACKENZIE, APPELLEE, V. ROBERT E. MARBLE, APPELLANT.

FILED DECEMBER 19, 1930. No. 27494.

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

Gaines, McGilton, Van Orsdel & Gaines and *Rosewater, Mecham, Burton, Hasselquist & Chew,* for appellant.

John A. McKenzie, Benjamin S. Baker and *Ralph T. Wilson, contra.*

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

PER CURIAM.

Plaintiff brought this action in the district court for Douglas county to recover damages for alleged malpractice of defendant in his treatment of plaintiff while she was a patient under his professional care. This case depended on disputed facts and was peculiarly one to be decided by a jury. The jury returned a verdict for plaintiff in the sum of $25,000, and from a judgment entered thereon defendant has appealed.

We have carefully examined the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

VERNA A. CRIDER, APPELLANT, V. SCHOOL DISTRICT OF THE CITY OF LINCOLN, APPELLEE: LEONARD W. REYNOLDS, INTERVENER, APPELLANT.

FILED DECEMBER 19, 1930. No. 27495.

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

Peterson & Devoe and *Charles E. Matson,* for appellants.

R. O. Williams, contra.

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

PER CURIAM.

Plaintiff brought this action in the district court for Lancaster county to recover taxes paid on shares of capital stock in the Federal Trust Company, a Nebraska corporation, which were collected for the years 1925 and 1926 by defendant under an unconstitutional statute. Leonard W. Reynolds intervened as a stockholder and as assignee of the other stockholders, exclusive of plaintiff, seeking to recover taxes for the same years paid by the

corporation on outstanding stock. Upon motion of the defendant the trial court dismissed the petition of plaintiff and the petition of intervention. Plaintiff and the intervener have appealed.

We have carefully examined the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

NEBRASKA CHILDREN'S HOME SOCIETY ET AL., APPELLANTS, V. WILLIAM SEIP, APPELLEE.

FILED DECEMBER 19, 1930. No. 27501.

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

R. M. Switzler, M. B. Foster, C. J. Campbell and *G. E. Hager,* for appellants.

F. M. Deutsch and *O. B. Clark, contra.*

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

PER CURIAM.

This is an action to probate an instrument offered as the will of Adam Seip, a resident of Madison county at the time of his death. William Seip contested, as heir at law and next of kin, on the grounds of lack of testamentary capacity and because of the undue influence of certain institutions named as beneficiaries.

The jury found for contestants, and from judgment entered on the verdict the proponents have appealed.

We have carefully examined the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

DAY, J., DISSENTS.

ED HOLMBERG ET AL., APPELLANTS, V. BOARD OF SUPERVISORS ET AL., APPELLEES.

FILED DECEMBER 19, 1930. No. 27670.

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

George J. Marshall, for appellants.

Stiner & Boslaugh, Edmund Nuss and *Leon Samuelson, contra.*

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

PER CURIAM.

Plaintiffs brought this action in the district court for Franklin county to enjoin performance of a contract to build and repair bridges. A temporary restraining order was issued which upon hearing was dissolved and an injunction denied. Plaintiffs have appealed.

We have carefully examined the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

BURT COUNTY V. STATE BOARD OF EQUALIZATION AND ASSESSMENT.

FILED DECEMBER 19, 1930. No. 27706.

ERROR from State Board of Equalization and Assessment. *Affirmed.*

John P. Breen and *Ralph M. Anderson,* for plaintiff in error.

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

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

PER CURIAM.

This is a proceeding in error brought to this court to review an order of the state board of equalization and assessment increasing the taxable value of land in Burt county.

We have carefully examined the record and find the same to be free from prejudicial error. The order appealed from is therefore

AFFIRMED.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1931.

VAN E. PETERSON, RECEIVER, APPELLEE, V. CHARLES A. LONG ET AL.: GEORGE H. BIRCHARD, APPELLANT.

FILED FEBRUARY 6, 1931. No. 27486.

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

Sanden, Anderson, Laughlin & Gradwohl and *Frank A. Anderson,* for appellant.

Perry, Van Pelt & Marti, contra.

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

PER CURIAM.

Plaintiff brought this action in the district court for Phelps county to recover against defendants their statutory double liability as stockholders in the Holdrege State Bank. Defendant Birchard has appealed from a decree in favor of plaintiff.

We have carefully examined the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

ANNA WOSLAGER, APPELLANT, V. UNION NATIONAL BANK, APPELLEE.

FILED FEBRUARY 6, 1931. No. 27538.

APPEAL from the district court for Dodge county: FRED A. WRIGHT, JUDGE. *Affirmed.*

J. C. Cook and *Dolezal, Mapes & Johnson,* for appellant.

Courtright, Sidner, Lee & Gunderson, contra.

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

PER CURIAM.

Plaintiff appeals from a judgment upon an instructed verdict for the defendant. A series of cases were brought against the defendant bank upon similar allegations.

The first of these cases to appear in this court was *Myers v. Union Nat. Bank,* 115 Neb. 49, where all of the facts are fully set out in an extended opinion by Judge George A. Day and the law applicable thereto is announced.

It is admitted that the issues and evidence in this case are substantially the same except as to the testimony of one witness relied upon to establish fraud. We are of the opinion that there is no substantial difference in the two cases.

The verdict was instructed by Judge Welch in the *Myers* case, and after hearing all the evidence in this case Judge Wright also instructed a verdict for the defendant bank. We are convinced that no other verdict than one for the appellee could have been sustained, and the judgment is hereby

AFFIRMED.

FARM INVESTMENT COMPANY, APPELLEE, V. JOHN BRENNAN ET AL., APPELLANTS.

FILED FEBRUARY 11, 1931. No. 27509.

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

Allen G. Fisher and *Charles A. Fisher,* for appellants.

G. F. H. Babcock and *T. B. Dysart, contra.*

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

PER CURIAM.

Plaintiff brought this action in the district court for Dawes county to foreclose a tax sale certificate. The trial court found for plaintiff and defendants have appealed.

We have carefully examined the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

GOOD, J., not participating.

DRAINAGE DISTRICT NO. 2 OF DAKOTA COUNTY, APPELLEE, V. MILTON J. FORESHOE, APPELLANT.

FILED FEBRUARY 11, 1931. No. 27547.

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

George W. Leamer, for appellant.

Wymer Dressler, William P. Warner and *Sidney T. Frum, contra.*

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

PER CURIAM.

Drainage District Number 2 of Dakota county filed its petition in the district court for Dakota county asking that its charter be extended for fifteen years. Over the objections of Milton J. Foreshoe and others the trial court granted the extension asked. Foreshoe has appealed.

We have carefully examined the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

ROSS JENNINGS V. STATE OF NEBRASKA.

FILED FEBRUARY 11, 1931. No. 27638.

ERROR to the district court for Johnson county: JEFFERSON H. BROADY, JUDGE. *Affirmed.*

Ernest F. Armstrong, for plaintiff in error.

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

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

PER CURIAM.

This is a proceeding in error brought to this court by Ross Jennings for a review of the judgment of the district court for Johnson county wherein he was convicted of the crime of rape.

We have carefully examined the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

ANDREW NELSON ET AL., APPELLANTS, V. BENGTA HAKANSSON ET AL., APPELLEES.

FILED FEBRUARY 20, 1931. No. 27566.

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

John P. Breen, C. A. Kingsbury and *J. S. Holland,* for appellants.

A. C. R. Swenson, W. D. McCarthy and *William Ritchie, Jr., contra.*

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

PER CURIAM.

Pher Olson, a bachelor, 77 years of age, died intestate on December 22, 1928, at his home on his 200-acre farm in Dixon county. Andrew Nelson is one of his nephews and Hannah is the wife of Andrew. They appeal from a decree against them in a suit in equity in which they sought a judgment for specific performance of an alleged oral contract by Pher Olson, claimed to have been made and accepted in August and September, 1926, to devise the farm to them in consideration of their making a home for him

and caring for him the rest of his life. The defendants are other nephews and nieces interested in the estate. Some of them live here and some in Sweden.

The agreement is alleged to have been made while plaintiffs were on occasional visits to Olson, who was in a hospital at Walthill from some time in July, 1926, until September 7, 1926, at which time plaintiffs took him to a farm on which they were then living. It is alleged that later they removed to the 200-acre farm involved in this suit and continued to reside there until Olson's death, in conformity with the oral agreement on the part of Olson to execute a written will and to give plaintiffs the farm.

The trial court found that the plaintiffs have failed to establish by clear and satisfactory evidence the alleged oral contract, that the conduct of plaintiffs up to the time of filing the petition was inconsistent with and contradictory of their claim of ownership of the land and of any contract on their part in relation to it, that plaintiffs in no way acted in reliance upon any such contract as they allege, that even if such a contract had been made it would have been unenforceable under the statute of frauds, and that the acts and services relied on by plaintiffs as part performance were not sufficient to take this case out of the operation of the statute, and that the services were wholly referable to the relationship between the parties and to the financial aid given the plaintiffs by Olson and were more than compensated by their uncle. The final decree dismissed the petition and gave judgment for defendants.

Upon consideration of the record and evidence, we are of the opinion that the findings and judgment were right. The judgment of the district court is therefore

AFFIRMED.

BEN R. ALLEN V. STATE OF NEBRASKA.

FILED FEBRUARY 20, 1931. No. 27755.

ERROR to the district court for Otoe county: JAMES T. BEGLEY, JUDGE. *Affirmed.*

Andrew P. Moran, for plaintiff in error.

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

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

PER CURIAM.

Plaintiff in error, hereinafter called defendant, brings this cause to this court to review the record of his conviction of a violation of the state liquor laws.

The errors assigned and discussed in the brief relate to the sufficiency of the evidence to sustain the verdict and to the giving and refusing of instructions to the jury.

We have read all the evidence and, while there is a substantial conflict, there is ample evidence tending to establish defendant's guilt. The record presented a question for the jury to determine. Their verdict is conclusive on the question of fact.

Defendant complains of the court's refusal to give a cautionary instruction relative to the weighing of evidence of detectives and informers. The only witnesses to whom the requested instruction could apply were the sheriff, his deputy, and the chief of police, all sworn officers. Under the rule announced in *Flanagan v. State,* 117 Neb. 531, and followed and reaffirmed in *Trimble v. State,* 118 Neb. 267, and *Nelson v. State,* 118 Neb. 812, the court committed no error in refusing the requested instruction. Such an instruction is not applicable to public officials who are acting in their official capacity.

Complaint is made because the court failed to give certain other instructions which were fully covered by the instructions given by the court. No error is apparent in refusing any of the requested instructions.

Complaint is made of certain instructions given by the court, but when the charge, as a whole, is taken and considered it fairly states the law applicable to the issues and the evidence.

We find no error in the record. Judgment

AFFIRMED.

EMMA HAGGERTY, APPELLEE, V. CLEMENT E. TARPENNING, APPELLANT.

FILED MARCH 13, 1931. No. 27588.

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

Halleck F. Rose, C. F. Galloway and *Peterson & Devoe,* for appellant.

H. A. Bryant and *J. C. Cook, contra.*

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

PER CURIAM.

This is an action for $25,000 damages, and the petition charged the defendant with making an assault and striking the plaintiff upon her head with a chair.

The trial lasted several days, and the bill of exceptions, which is more than 350 pages long, discloses that some 30 witnesses testified in the case. The instructions appear to be in the usual form, and the jury returned a verdict for $1,500, for which amount a judgment was duly entered.

Strenuous objections are made in the brief of the defendant to the definitions of assault and battery and their presentation to the jury. The defendant denied that any battery occurred, but the jury have passed upon that question of fact.

We have examined the record and are satisfied there is no reversible error in the instructions of which the defendant complains.

The judgment of the district court is therefore

AFFIRMED.

FRANK W. THOMAS ET AL., APPELLEES, V. FEDERAL FINANCE COMPANY ET AL., APPELLANTS.

FILED MARCH 20, 1931. No. 27113.

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

Drake & Drake, for appellants.

York & York, contra.

Heard before GOSS, C. J., ROSE, DEAN, GOOD and DAY, JJ., and JAMES and WRIGHT, District Judges.

PER CURIAM.

This is an action to recover damages for false representations. From a judgment by the district court for Dawson county in favor of plaintiff, defendants have appealed.

We have carefully examined the record and find it to be free from prejudicial error. The judgment of the district court is therefore

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17. In a prosecution for making false entries in bank books, evidence *held* insufficient to establish criminal intent. *Spearman v. State* 799

Bills and Notes.
1. When proof of maturity of a note is an essential part of plaintiff's case, a general denial raises the issue of immaturity. *People's State Bank v. Smith* 29
2. Facts on which accelerated maturity of a debt is claimed should arise after the obligation is incurred. *People's State Bank v. Smith* 29
3. An indorsee taking a note with such knowledge of a defective title as amounts to bad faith takes with notice. *Deerk v. Babcock* 261
4. In a suit to cancel notes on the ground of fraud, indorsee bank *held* to have sustained burden of proving it acquired notes as holder in due course. *Deerk v. Babcock* 261
5. Proof that a receipt had been detached, after delivery, from another instrument is not evidence of alteration placing the burden on the holder to explain circumstances of detachment. *Strang State Bank v. Union Lumber Co.* 384
6. One claiming ownership of a note by indorsement has the burden of proving the genuineness of the indorsement. *Strang State Bank v. Union Lumber Co.* 384

Colleges and Universities.
The board of regents of the state university *held* entitled to relief in equity, where the state auditor certified appropriation for the university as reduced by the governor's veto after increased items passed the legislature by a three-fifths vote. *Elmen v. State Board of Equalization and Assessment* 141

Commerce.
1. A brakeman injured while working on a train operating between states *held* engaged in interstate commerce, though at the time of injury he was handling intrastate freight. *Lindley v. Wabash R. Co.* 195
2. Plaintiff *held* engaged in interstate commerce. *Lindley v. Wabash R. Co.* 195
3. Motor vehicle registration statute and statute requiring payment of a graduated fee for certificate *held* not to

violate the commerce clause of the federal Constitution. *Peterson v. Department of Public Works* 517

Constitutional Law. SEE STATUTES.

1. Courts will not annul a legislative act, unless it clearly contravenes the fundamental law, or is against public policy. *Weaver v. Koehn* 114
2. Legislative functions may not be delegated to private persons. *Rowe v. Ray* 118
3. Proviso of law relating to organization of new school districts *held* unconstitutional as attempting to delegate legislative functions to private persons. *Rowe v. Ray* 118
4. The Constitution is a restriction of legislative power and a grant to other departments of state government. *Elmen v. State Board of Equalization and Assessment* 141
5. Special provisions of a Constitution should be given effect in case of conflict with general provisions. *Elmen v. State Board of Equalization and Assessment* 141
6. Courts can enforce only limitations which the Constitution imposes with respect to legislative action. *Elmen v. State Board of Equalization and Assessment* 141
7. The terms of constitutional provisions are to be interpreted in their most natural and obvious meaning, and courts may not supply what they deem unwise omissions nor add words which make substantial change. *Elmen v. State Board of Equalization and Assessment* 141
8. Legislative construction of constitutional provisions is entitled to great weight, especially when adhered to for a considerable period and concurred in by the executive department. *Elmen v. State Board of Equalization and Assessment* 141
9. The governor in submitting the financial budget to the legislature and in acting on appropriation bills submitted for his approval is engaged in the performance of legislative duties within the constitutional provision limiting the powers of the departments of government. *Elmen v. State Board of Equalization and Assessment* 141
10. A statute conferring quasi-judicial powers on an administrative board is not violative of due process, where it provides for notice of hearing and appeal to the courts. *Dawson County Irrigation Co. v. McMullen* 245
11. Section 8428, Comp. St. 1922, empowering the department of public works to cancel water appropriation after notice, where water has not been put to beneficial use, *held* not void as giving the department judicial powers. *Dawson County Irrigation Co. v. McMullen* 245

12. The constitutionality of a statute will not be passed on where disposition of the case does not require it. *Lane v. State* 302
13. The statute relating to service on the secretary of state in actions against nonresident automobile owners, *held* valid, except as to 90-day continuance. *Herzoff v. Hommel* 475
14. A resident elector and taxpayer may question the constitutionality of a statute which would detach territory from his school district. *Ruwe v. School District* 668
15. Due process of law requires notice and opportunity to be heard, where exercise of judicial power would impose financial burdens on property owners. *Ruwe v. School District* 668
16. The legislature may confer on public boards power to determine the facts authorizing change in boundaries of school districts. *Ruwe v. School District* 668
17. A statute granting power to change boundaries of school districts without notice to property owners and opportunity to be heard is unconstitutional. *Ruwe v. School District* 668
18. City ordinance requiring Sunday closing of places of business operated for selling or exchanging motor vehicles *held* not discriminatory. *Stewart Motor Co. v. City of Omaha* 776

Contempt.

1. Conviction for contempt can only be reviewed by proceedings in error. *Gentle v. Pantel Realty Co* 630
2. Inducing witnesses to testify falsely in an action thereafter pending *held* to constitute contempt. *State v. Havel* 832

Continuance.

A continuance should be granted where defendant, through unforeseen calamity, becomes unable to attend or assist in the trial. *Juckniess v. Howard* 213

Contracts.

1. An ambiguity in a written contract prepared by one of the parties should ordinarily be resolved in favor of the party who did not prepare it. *People's State Bank v. Smith* 29
2. A written contract should be construed as a whole and as interpreted by the parties. *Petersen v. City of Omaha* 219
3. A contract will be treated as abandoned by mutual con-

sent, where the parties perform acts inconsistent therewith. *Baker v. School District* 513
4. Contract of employment of teacher *held* abandoned by mutual consent. *Baker v. School District* 513

Corporations.

A court of equity will not permit mere corporate forms to serve as a cloak for the perpetration of a fraud. *National Mortgage Loan Co. v. Hurst* 37

Costs.

1. The court, in determining the value of attorney's services, will consider the nature of the litigation, the amount involved, the result, length of time spent, care exhibited, and character and standing of the attorney. *Allen v. Tallon* 611
2. The amount of attorney's fees is a question of fact. *Allen v. Tallon* 611
3. Attorney's fees may be taxed at a term subsequent to the judgment term, and are subject to exceptions and review as other costs. *Allen v. Tallon* 611
4. Attorney's fees may be taxed as costs on judgment against an insurance company, though recovery was obtained on a counterclaim. *Allen v. Tallon* 611
5. Attorney's fees may be taxed in the supreme court on recovery on a claim of $300 or less for wages. *Dobney v. Chicago & N. W. R. Co.* 824

Counties and County Officers. SEE OFFICERS.

1. The statute authorizing a fee of 25 cents to the county treasurer for each motor vehicle operator's license *held* not in conflict with the statute requiring the treasurer to credit all fees to the county general fund. *Mehrens v. Bauman* 110
2. Creation of a county precinct *held* legal. *Lewis v. Eyerly* 343
3. One alleging fraud in procuring signatures to a petition for a special election to bond a precinct must prove that the signatures procured by fraud were necessary to authorize the election. *Lewis v. Eyerly* 343
4. Ballot for cancelation of bonds and for issuance of new bonds *held* legal. *Lewis v. Eyerly* 343
5. Precinct special election on issuance of bridge bonds *held* valid. *Lewis v. Eyerly* 343

Courts.

1. The right of appeal from the county court to the district court applies to final orders in administration of estates. *In re Estate of Golden* 226

2. The county court may apply equitable principles to matters within its exclusive probate jurisdiction. *In re Estate of Frerichs* 462

Criminal Law.

1. Overruling objection to proceeding with trial after adjournment of 19 days, occasioned by accidental injury of defendant, is not erroneous. *Hunter v. State* 58
2. A sentence for less than the minimum term prescribed by statute is not void, and the trial court, after it has been partially served, is without power to vacate it and impose a greater penalty. *Hickman v. Fenton* 66
3. A sentence setting commencement of imprisonment for a second offense prior to completion of a prior sentence, under which the convict was paroled, is merely erroneous. *Mercer v. Fenton* 191
4. Fixing sentence for second offense concurrent with prior sentence *held* not to nullify prior sentence. *Mercer v. Fenton* 191
5. In Nebraska all public offenses are statutory; and no person can be punished for any act or omission not made penal by the plain import of written law. *Lane v. State* 302
6. Criminal laws are strictly construed and a penalty must be imposed by clear words. *Lane v. State* 302
7. Remarks of counsel *held* highly improper. *Childs v. State* 310
8. It is the jury's province to pass upon the entire case and determine the weight of evidence. *Childs v. State* 310
9. The supreme court will not interfere with a conviction based on conflicting evidence, unless, as a matter of law, it is insufficient. *Matters v. State* 404
10. A motion for a new trial for misconduct of the jury and bailiff is addressed to the sound discretion of the trial court, and its ruling thereon will not be disturbed unless abuse of discretion is shown. *Matters v. State* 404
11. Exclusion of cumulative evidence, though competent, is not ground for reversal, unless prejudicial. *Matters v. State* 404
12. Jurors summoned by the sheriff after filing of affidavit of prejudice against him are disqualified, and refusal to quash the panel is ground for reversal. *Trobough v. State* 453
13. The court on request must instruct on defendant's theory of the case if there is some evidence to support it, especially where the state relies wholly on circumstantial evidence. *Trobough v. State* 453

14. Refusal of a cautionary instruction on circumstantial evidence *held* error. *Trobough v. State* 453
15. The time for retrial is addressed to the court's discretion. *Wilson v. State* 468
16. A verdict supported by evidence will not be disturbed. *Wilson v. State* 468
17. The trial judge has discretion to permit the prosecuting attorney to indorse names of additional witnesses on the information before trial. *Wilson v. State* 468
18. The degree of mental derangement which will exempt from punishment for crime must be such that accused was unable at the time of the crime to distinguish between right and wrong. *Wilson v. State* 468
19. Delay of ten years before defendant was taken into custody after affirmance of conviction *held* not to invalidate the sentence. *Volker v. McDonald* 508
20. The "term of imprisonment" does not begin until defendant is taken into custody on the mittimus or incarcerated under the sentence. *Volker v. McDonald* 508
21. Expiration of time without imprisonment does not constitute an execution of sentence of imprisonment. *Volker v. McDonald* 508
22. In a prosecution for embezzlement, an expert accountant may testify as to the result of his examination of account books which have been identified and are subject to inspection. *Hogoboom v. State* 525
23. A copy of a writing is admissible in evidence where the original has been lost or is in possession of the adverse party who refuses to produce it. *Hogoboom v. State* 525
24. Statutes of limitation may be availed of under the general issue in criminal procedure and are liberally construed in favor of accused. *Hogoboom v. State* 525
25. Though one cannot be convicted of felony solely on his voluntary admissions, yet if they are supported by strong circumstantial evidence they may sustain conviction. *Limmerick v. State* 558
26. In a prosecution for grand larceny of a second-hand airplane propeller, *held* error to permit a witness to testify as to its value "if in good condition," in absence of evidence showing such condition. *Hiles v. State* 580
27. In a prosecution for grand larceny, a witness is incompetent to testify as to the value of the property stolen, unless shown to have knowledge of the property and its value. *Hiles v. State* 580
28. Accused is entitled to a reasonable time to prepare for trial. *Cooper v. State* 598

29. Denial of a continuance is not reversible error unless the court abused its discretion. *Cooper v. State* 598
30. The court should instruct as to doubt arising from lack of evidence, unless that right of accused is fairly protected by the instructions as a whole. *Cooper v. State* 598
31. The prosecuting attorney and assisting counsel must conduct the trial in a manner fair to the rights of accused. *Cooper v. State* 598
32. Argument of special counsel *held* so prejudicial as to require a reversal. *Cooper v. State* 598
33. Judges and prosecutors must so conduct criminal trials that accused may have a fair and impartial trial. *Cooper v. State* 598
34. The rules as to the information, conduct of the case, and punishment applying to a principal apply to an aider, abettor, or procurer. *Neiden v. State* 619
35. One who steals personal property and sells it to another may be considered an accomplice of the buyer. *Neiden v. State* 619
36. Refusal to give a cautionary instruction as to testimony of accomplices where warranted by the evidence is reversible error. *Neiden v. State* 619
37. In a prosecution for attempting to procure abortion, testimony of similar acts committed about the same time is admissible only to prove intent. *Rice v. State* 641
38. The trial court must direct the reporter to prepare a bill of exceptions at the county's expense where an affidavit of poverty is supported by sufficient evidence. *Rice v. State* 641
39. Sterilization law *held* valid. *In re Clayton* 680
40. Where there is no bill of exceptions, instructions proper under any admissible evidence will not be held erroneous. *State v. Kastle* 758
41. In absence of a bill of exceptions, an instruction cannot be considered proper if it states the law erroneously when applied to facts shown by the instruction. *State v. Kastle* 758
42. Sentence pronounced on one already serving a sentence does not begin to run until expiration of the first sentence, unless otherwise provided. *Brott v. Fenton* 792
43. On exceptions to rulings in a criminal case, the supreme court can only determine the law of the case. *State v. Havel* 832

Customs.

One relying on a special custom must allege and prove it, and that the person sought to be bound contracted

with reference thereto. *State, ex rel. Sorensen, v. Nebraska State Bank* 539

Damages.

Physical injuries proximately caused by fright induced by one who owes a legal duty to one injured creates liability for damages. *Netusil v. Novak* 751

Death.

1. In an action for wrongful death, submission to jury of loss of companionship as an element of damage *held* error. *Dow v. Legg* 271
2. The measure of damage for the benefit of parents for wrongful death of a child is the present worth in money of contributions of which the parents were deprived. *Spomer v. Allied Electric & Fixture Co* 399

Deeds.

A deed will not be annulled for fraud and coercion, where the evidence fairly discloses that the grantor understood the transaction, and the deed was voluntarily executed. *Blazier v. Alloway* 71

Divorce.

To justify a divorce for extreme cruelty, petitioner must prove unjustifiable conduct seriously impairing his health or endangering his life or destroying the legitimate objects of matrimony. *Schmidt v. Schmidt* 596

Drains.

1. A drainage district is liable for damages caused by negligent construction of its works. *Compton v. Elkhorn Valley Drainage District* 94
2. It is actionable negligence for a drainage district to collect surface water from another watershed and conduct it to land of one of its members without making reasonable provision to avoid damage to his land and crops. *Compton v. Elkhorn Valley Drainage District* 94
3. The damages for which a drainage district is liable for flooding crops are those caused by the volume of water negligently allowed to inundate the crops. *Compton v. Elkhorn Valley Drainage District* 94

Elections.

1. The statutory requirement that the written application of a candidate be filed at least forty days before a primary election is mandatory. *State, ex rel. Smith, v. Marsh* 287
   State, ex rel. Wood, v. Marsh 296

2. The time for filing a candidate's application for a primary cannot be extended by custom. *State, ex rel. Smith, v. Marsh* 287
State, ex rel. Wood, v. Marsh 296
3. Where a protest is filed, the secretary of state may exclude from the primary ballot the name of an applicant fraudulently filed to deceive voters desiring to vote for a *bona fide* candidate for the same office having a similar name. *State, ex rel. Johnson, v. Marsh* 297
4. Proceeding to require a county election commissioner to file an acceptance of nomination and place a name on the ballot is a special statutory proceeding. *State, ex rel. Meissner, v. McHugh* 356
5. The special statutory proceeding to compel acceptance of a nomination is a "civil action." *State, ex rel. Meissner, v. McHugh* 356
6. Proceedings to compel acceptance of a nomination must be brought in the county where the cause of action arose. *State, ex rel. Meissner, v. McHugh* 356

Embezzlement.
1. The words "private person," in the statute relating to embezzlement, are used to distinguish a natural person from an artificial person. *Matters v. State* 404
2. The value of the property constitutes an essential element of an information charging embezzlement, and conviction for embezzlement cannot be sustained where its value is not found by the jury. *Hogoboom v. State* 525
3. Where the information alleged embezzlement over a series of years, and where the information and verdict failed to show the amount embezzled within the statutory period of limitations, the conviction must be reversed. *Hogoboom v. State* 525
4. Where an assistant cashier retained a position as assistant to the receiver while the bank was being conducted by the guaranty fund commission, he was in a fiduciary relationship with the bank, as regards a charge of embezzlement. *Morton v. State* 575
5. Evidence *held to* sustain conviction for embezzlement. *Morton v. State* 575
6. The common-law rule giving an executor title and right to dispose of personalty of the deceased does not prevent prosecution of an executor for embezzlement. *Pilger v. State* 584
7. An executor is amenable to the embezzlement statute applicable to "any individual or company or association." *Pilger v. State* 584

8. Evidence *held* to sustain conviction of an executor for embezzlement of personalty of an estate. *Pilger v. State* 584

Eminent Domain.

1. Compensation for land taken by eminent domain is measured by its market value at time of taking; and evidence of its peculiar value to the owner is inadmissible. *Wiles v. Department of Public Works* 689
2. A landowner is not entitled to damages to the remainder of a large tract not taken for a highway, where the damages are of the same character as suffered by landowners in the vicinity. *Wiles v. Department of Public Works* 689

Equity.

1. Equity seeks the substantial rights and applies the remedy so as to relieve those having the controlling equities. *National Mortgage Loan Co. v. Hurst* 37
2. Whether laches constitutes a defense to a suit in equity depends on the facts of each case. *Tombrink v. Sarpy County* 160
3. Unreasonable delay, independent of statute of limitations, may bar relief in equity if prejudicial to adverse party. *Tombrink v. Sarpy County* 160
4. Equity will in one suit settle diverse rights and obligations of parties successively liable for the same debt and will make that party liable who is ultimately liable at law. *Finzer v. Peter* 389

Estoppel. SEE INSURANCE, 6.

Public policy forbids application to the state of the doctrine of estoppel growing out of the conduct and representations of officers. *Volker v. McDonald* 508

Evidence. SEE MASTER AND SERVANT, 1-3. WITNESSES.

1. Statutes of a sister state, in absence of pleading and proof to the contrary, are presumed to be the same as those of Nebraska. *Franks v. Horrigan* 1
2. Laws of another state are presumed to be the same as those of Nebraska, in absence of pleading and proof to the contrary. *People's State Bank v. Smith* 29
3. In an action on a note between the immediate parties thereto, parol evidence is admissible to prove the purpose for which the note was given. *People's State Bank v. Smith* 29
4. A witness is not incompetent to estimate the speed of an automobile solely because it is approaching him. *Gerish v. Hinchey* 51

5. An experienced volunteer fireman is competent to testify as to the effect on a fire of the use of fire apparatus. *Luedeke v. Chicago & N. W. R. Co.* 124
6. Courts take judicial notice of proceedings of the constitutional convention, and of the journals of the house and senate. *Elmen v. State Board of Equalization and Assessment* 141
7. Evidence that parties charged with fraudulent disposition of property were engaged in similar fraudulent transactions is admissible to show fraudulent intent. *Shepard v. Hamaker* 166
8. Where the circumstances surrounding a transfer of property are suspicious, failure of the parties to produce available, explanatory, or rebutting evidence is a badge of fraud. *Shepard v. Hamaker* 166
9. The Nebraska statute fixing the right of a member of a fraternal benefit association to change the beneficiary is conclusively presumed to be a part of insurance contracts made in another state, where the foreign laws are not pleaded and proved. *Kernan v. Modern Woodmen of America* 333
10. Hearsay evidence is inadmissible to prove knowledge of one's friends and acquaintances as to whether he knew how to drive an automobile. *Toliver v. Rostin* 363
11. A municipal court may take notice of a city ordinance, but proof of its existence is ordinarily required in courts of general jurisdiction. *Spomer v. Allied Electric & Fixture Co.* 399
12. Parol evidence is admissible to show contract was executed subsequent to date appearing on instrument. *Farmers State Bank v. Bank of Plymouth* 663
13. Where a contract for sale of a bank's assets was executed and delivered two days after its date, parol evidence is admissible to prove that certain assets were to be withdrawn before the contract became effective. *Farmers State Bank v. Bank of Plymouth* 663
14. Declaration of a claimant, while in possession of deceased's securities shortly before death, that he claimed the securities as a gift, is admissible to show the intent attending possession, but not to prove the origin of his title. *Yardum v. Evans* 699

Execution.

On expiration of the period of a spendthrift trust, trust property is subject to execution against the beneficiaries. *Miles v. Miles* 436

Executors and Administrators.

1. An administrator is not personally liable for estate funds lost because of a depository's failure, unless he was negligent in selecting the depository. *Bank of Crab Orchard v. Myers* 84
2. Permission to file a claim against an estate after expiration of the time limit is essential to allowance of a belated claim. *In re Estate of Golden* 226
3. An order permitting filing of a belated claim against an estate may be reviewed in the district court on appeal from a final order allowing the claim. *In re Estate of Golden* 226
4. An appeal from a final judgment allowing a belated claim against an estate authorizes a trial *de novo* in the district court, including the issue raised by application to file the claim. *In re Estate of Golden* 226
5. Claims against an estate are forever barred, unless presented within the time allowed, or unless permission is granted to file belated claims. *In re Estate of Golden* 226
6. The statute of nonclaim is generally more rigorously applied than the general statute of limitations. *In re Estate of Golden* 226
7. Good cause must be shown to give the county court jurisdiction to file a belated claim against an estate. *In re Estate of Golden* 226
8. Good cause for granting permission to file a belated claim against an estate is analogous to that required for granting a new trial by a court of equity. *In re Estate of Golden* 226
   In re Estate of Golden 232
9. A contingent claim against an estate is one wherein liability depends on a future event, which may or may not happen. *In re Estate of Golden* 233
10. A note though secured by a mortgage is an absolute claim against an estate. *In re Estate of Golden* 233
11. The probate jurisdiction of the county court ceases when an executor, who is also testamentary trustee, makes final settlement. *In re Estate of Frerichs* 462
12. Where the person named executor predeceases testatrix, the county court must commit administration to competent persons to whom the property will revert when the estate is administered. *In re Estate of Peach* 571
13. Administration of an estate should remain in the hands of those having a direct interest therein. *In re Estate of Peach* 571
14. An executor or administrator is entitled to possession of personalty of the deceased until delivered to the dis-

tributees by order of the county court. *Dobney v. Chicago & N. W. R. Co.* ... 824
15. Widow's allowance is not assets of the estate. *Dobney v. Chicago & N. W. R. Co.* ... 824
16. An executor or administrator, as against an employer, is entitled to possession of wages due a deceased employee, and payment thereof for burial expenses was no defense to a suit therefor. *Dobney v. Chicago & N. W. R. Co.* ... 824

Fraud.

1. The party alleging fraud must prove it by clear and satisfactory evidence. *Kernan v. Modern Woodmen of America* ... 333
2. Generally, a false promise constituting fraud must be of an existing fact or a fact alleged to exist, and cannot consist of a mere promise to be performed in the future; but, if the intention not to perform be shown to have existed at the time, the promise is fraudulent. *Federal Finance Co. v. Cass* ... 834
3. Existence of evil intent at the time a promise to be performed in the future was made may be inferred from failure to comply with the promise. *Federal Finance Co. v. Cass* ... 834

Fraudulent Conveyances.

1. Evidence *held* to sustain finding that conveyances by debtor were made without consideration and in fraud of creditors. *Shepard v. Hamaker* ... 166
2. A purchaser not complying with the bulk sales law is a trustee for the seller's creditors and liable as garnishee. *Damicus v. Kelly* ... 588

Garnishment.

An heir's distributive share in the administrator's hands is not subject to garnishment under district court process. *American State Bank of Springfield v. Phelps* ... 370

Gifts.

1. To create a gift *causa mortis* a clear and intelligent intent to make a present gift must be shown. *Yardum v. Evans* ... 699
2. Under a gift *causa mortis*, the donee takes title as of the moment of the gift, subject to defeasance while the donor lives. *Yardum v. Evans* ... 699
3. Possession by one claiming to be donee of personalty of deceased donor raises no presumption of ownership in claimant. *Yardum v. Evans* ... 699

Guaranty.

1. A general guaranty of payment is enforceable only by creditors extending credit on the faith of it. *Farmers State Bank of York v. Brock* 551
2. A general guaranty need not name obligees, but may be accepted and acted upon by any one having knowledge of it. *Farmers State Bank of York v. Brock* 551
3. An agreement among guarantors that there should be no liability until others signed the guaranty is not binding on creditors without notice. *Farmers State Bank of York v. Brock* 551
4. Interest of a bank officer in keeping the bank open *held* a valid consideration for guaranty of bills receivable. *Doran v. Farmers State Bank* 655

Habeas Corpus.

1. Habeas corpus is not the proper procedure to secure review of errors in a criminal case. *Darling v. Fenton* 829
2. Errors subsequent to conviction are reviewable by proceedings in error but not by habeas corpus. *Darling v. Fenton* 829

Highways.

1. Delay of nearly four years in bringing suit to cancel special paving assessments *held* to bar relief, where plaintiffs petitioned for the pavement and made no objection to issuance of bonds or to making the improvement or levying the assessments. *Tombrink v. Sarpy County* 160
2. One causing an obstruction to be placed in a highway must use ordinary care to prevent injury to others. *Simonsen v. Thorin* 684
3. Placing and leaving an obstruction in a highway in a dangerous situation constitutes negligence. *Simonsen v. Thorin* 684
4. One who places an obstruction in a highway must remove it or use ordinary care to warn traffic of danger. *Simonsen v. Thorin* 684
5. A petition to open a highway on a section line is not essential. *Zyntek v. Board of County Commissioners* 779
6. A petition to vacate a highway is not demurrable, if it complies with the statutory form. *Zyntek v. Board of County Commissioners* 779
7. A public highway by prescription may be established by continuous adverse use thereof by the public for ten years. *Lancaster County, ex rel. Rosewell, v. Graham* 785

Homestead.

1. The selection of the homestead is left to the owner or rightful claimant. *Connor v. McDonald* 503
2. The homestead can only be selected from separate property of the wife with her consent. *Connor v. McDonald* 503
3. An undivided interest in realty, accompanied by exclusive occupancy by the owner and his family as a home, will support a homestead exemption. *Connor v. McDonald* 503
4. Judgment *held* not a lien on realty, where a former mortgage and the homestead exemption exceeded the value of the husband's undivided interest in the premises. *Connor v. McDonald* 503
5. The extent of a homestead is determined by the claimant's interest in the land, and in determining the homestead interest valid liens are deducted from the value of the land, and not from the homestead exemption. *Connor v. McDonald* 503
6. A purchaser of a homestead takes it free from liens. *Connor v. McDonald* 503

Homicide.

1. A purpose to kill and malice are material elements of murder in the second degree. *Childs v. State* 310
2. Evidence *held* insufficient to sustain conviction of murder in the second degree. *Childs v. State* 310
3. Evidence *held* to sustain conviction for first degree murder. *Wilson v. State* 468

Husband and Wife.

1. Requiring remittitur of $3,000 from verdict of $9,000 for alienation of affections *held* not error under the evidence. *Ebmeier v. Ebmeier* 13
2. In an action for alienation of affections, malice may be inferred from repeated wrongful acts. *Ebmeier v. Ebmeier* 13
3. In a suit for alienation of affections, the burden is on plaintiff to establish malice. *Williamson v. Williamson* 40
4. The law presumes that the father and mother, in advising their child, acted in good faith, as regards liability for alienation of affections. *Williamson v. Williamson* 40
5. In Iowa a married woman may contract the same as if single. *People's State Bank v. Smith* 29
6. In Iowa extension of time on husband's debt is a sufficient consideration for the wife's signing a note for its payment, where it was intended the wife should become personally liable. *People's State Bank v. Smith* 29

7. A married woman joining her husband in executing a note and mortgage for his preexisting debt, under an agreement that the sole purpose is to bind her interest in the mortgaged premises, *held* not personally liable on the note. *People's State Bank v. Smith* 29

Indictment and Information.

1. An information for embezzlement by an agent in the language of the statute sufficiently charges agency. *Matters v. State* 404
2. Where different felonies of the same character and grade are charged in different counts of an information, it is discretionary with the trial court whether to require election. *Matters v. State* 404
3. The court, in its discretion, may permit the county attorney to amend the information before trial, if the amendment does not change the nature of the offense. *Wilson v. State* 468
4. An information charging embezzlement during a series of years *held* good as to amounts embezzled within the period of the statute of limitations. *Hogoboom v. State* 525
5. An information in the language of the statute is generally sufficient. *Pandolfo v. State* 616
6. An information need not negative exceptions of a statute which are not descriptive of the offense. *Pandolfo v. State* 616

Injunction.

1. The board of education of a school district may sue to enjoin the county superintendent from forming a new school district. *Rowe v. Ray* 118
2. An administrative board possessing quasi-judicial functions will not be enjoined from conducting a hearing authorized by statute simply because it may make erroneous orders. *Dawson County Irrigation Co. v. McMullen* 245
3. Injunction is a proper remedy to prevent school district officers from taxing lands in another district. *Schafersman v. School District* 673

Insane Persons.

1. Sterilization of males may be accomplished by vasectomy. *In re Clayton* 680
2. It is the duty of the examining board to diligently inquire into cases of proposed sterilization as a prerequisite to release from a state institution for feebleminded. *In re Clayton* 680

3. It is within the state's police power to provide for sterilization of feeble-minded persons as a prerequisite to release from a state institution. *In re Clayton* 680

Insurance.

1. A husk elevator, used in connection with a canning factory, *held* within tornado policy covering "frame husking sheds." *Norfolk Packing Co. v. American Ins. Co.* 19
2. Insurer's denial of liability for loss on grounds other than failure of insured to give notice or to furnish proof of loss renders notice of loss unnecessary. *Norfolk Packing Co. v. American Ins. Co.* 19
3. Where an automobile occasionally used by a corporation was loaned to a third party, such third party did not thereby become an "assured" or an "additional assured" under a liability policy issued to the corporation. *Wigington v. Ocean Accident & Guarantee Corporation* 162
4. A person injured by a third party while operating an automobile of a salesman's wife on private business cannot recover against a company which insured the automobile for a corporation employing the salesman. *Wigington v. Ocean Accident & Guarantee Corporation* 162
5. Where an automobile liability policy covering a corporation's automobiles included an automobile occasionally used in its business, *held* the policy covered the latter automobile only when used in the corporation's business. *Wigington v. Ocean Accident & Guarantee Corporation* 162
6. Insurance company *held* not estopped to deny liability on a judgment against a person operating an automobile by reason of having defended assured and the third party in an action for injuries. *Wigington v. Ocean Accident & Guarantee Corporation* 162
7. The fact that the original beneficiary under a fraternal benefit certificate pays the dues does not deprive the member of the right to change the beneficiary. *Kernan v. Modern Woodmen of America* 333
8. Failure to examine policy will not defeat reformation after loss. *Davis v. Highway Motor Underwriters* 734
9. Public policy *held* not to forbid recovery on automobile accident policy for an accident caused by the actionable negligence of a minor, while violating the law. *Davis v. Highway Motor Underwriters* 734

Interpleader.

Proceeding *held* within statute governing interpleader. *Citizens Nat. Bank of Wisner v. McNamara* 252

Intoxicating Liquors.

Information *held* fatally defective in not reciting that defendant did not have a permit authorizing manufacture of liquor. *Paige v. State* 732

Judgment.

1. Insurer's right to prorate loss *held* adjudicated. *Norfolk Packing Co. v. American Ins. Co* 19
2. The duly authenticated judgment of a court of another state having jurisdiction is conclusive on the courts of this state. *State, ex rel. Sorensen, v. Nemaha County Bank* 59
3. The trial court has power to vacate, set aside, amend or correct its judgments or orders at the same term, and on its own motion. *Netusil v. Novak* 751
4. A district court can vacate or modify its own judgments after the term for mistake, neglect, or omission of the clerk. *Crete Mills v. Stevens* 794
5. A party deprived of his rights through official mistake, neglect, or omission will be put by the court in the same position as if the official's fault had not been committed. *Crete Mills v. Stevens* 794
6. It is the duty of the clerk to enter judgment in conformity to a general verdict, unless otherwise ordered. *Crete Mills v. Stevens* 794

Jury.

1. On filing affidavit of prejudice against the sheriff, he *ipso facto* was disqualified from serving process in the case. *Trobough v. State* 453
2. Sheriff's disqualification by filing affidavit of prejudice, *held* not to extend to drawing the jury panel. *Trobough v. State* 453

Larceny.

Evidence *held* insufficient to sustain conviction for stealing chickens. *Harmer v. State* 374

Licenses.

Cosmetologist *held* not a "barber" within the barber act. *Lane v. State* 302

Limitation of Actions.

1. A cause of action against a drainage district for damage to crops arises when the damage occurs. *Compton v. Elkhorn Valley Drainage District* 94
2. Generally, changes in the form of action or in relief sought, where the facts remain substantially the same, are not changes in the cause of action. *Finzer v. Peter* 389

Malicious Prosecution.

1. In an action for malicious prosecution, the question is whether those charging plaintiff with an offense had probable cause to believe him guilty. *Kersenbrock v. Security State Bank* 561
2. Whether facts proved amount to probable cause is a question of law in an action for malicious prosecution. *Kersenbrock v. Security State Bank* 561
3. Elements of probable cause stated. *Kersenbrock v. Security State Bank* 561
4. In malicious prosecution, where undisputed evidence shows probable cause, the court should direct a verdict for defendant. *Kersenbrock v. Security State Bank* 561
5. Facts proved *held* to show probable cause as a matter of law. *Kersenbrock v. Security State Bank* 561

Marriage.

Evidence *held* insufficient to sustain finding that marriage contract was induced by duress. *O'Reilly v. O'Reilly* 720

Master and Servant.

1. To recover for injury under the federal employers' liability act, plaintiff must prove that the instrument causing injury was at the time engaged in interstate commerce. *Lindley v. Wabash R. Co.* 195
2. In an employee's action for injuries due to defects in depot platform, admission of evidence of subsequent repairs *held* prejudicial error. *Lindley v. Wabash R. Co.* 195
3. While evidence of subsequent repairs to an alleged defective instrumentality causing injury is incompetent to prove negligence, if defendant on cross-examination brings out the fact of subsequent repairs plaintiff may on redirect show the reason for the repairs. *Lindley v. Wabash R. Co.* 204
4. Acceptance of a lump sum settlement by an employee will bar the widow's claim for additional award after his death. *Lincoln Packing Co. v. Coe* 299
5. The time for perfecting an appeal from an order overruling a motion for a new trial in a compensation proceeding commences to run at the time of overruling the motion. *Lincoln Packing Co. v. Coe* 299
6. Prior to amendment, section 3060, Comp. St. 1922, conferred sole jurisdiction on the district court for Lancaster county over appeals from the compensation commissioner in actions under the employers' liability law in which the state or the department of public works was a party. *Eidenmiller v. State* 430

7. Assumption of risk is a bar to an action under the federal employers' liability act. *Campbell v. Chicago, R. I. & P. R. Co.* ... 499
8. An employee assumes risks normally and necessarily incident to the occupation, whether aware of them or not. *Campbell v. Chicago, R. I. & P. R. Co.* ... 499
9. Where employee's knowledge of danger was equal to that of employer, he was not entitled to warning as a matter of law. *Campbell v. Chicago, R. I. & P. R. Co.* ... 499
10. An employee assumes risks not ordinarily incident to his employment, provided he appreciates the danger, or the risks are so plainly observable that he must be presumed to know them. *Campbell v. Chicago, R. I. & P. R. Co.* ... 499
11. Dependents of an injured employee are not necessary parties in interest in an action for compensation brought by him during his lifetime, and his settlement of the action with prejudice is binding on his dependents. *Bliss v. Woods* ... 790
12. One buying and shipping poultry in carload lots is engaged in a "business," within the compensation law. *Claus v. DeVere* ... 812
13. One employed as caretaker of a carload of poultry *held* an "employee," and not an "independent contractor," within the compensation law. *Claus v. DeVere* ... 812
14. The Nebraska compensation law applies to a caretaker of poultry transported from one state to another, and is not violative of the commerce provision of the federal Constitution. *Claus v. DeVere* ... 812
15. An injured employee cannot recover for compensation for his wife's services as a nurse in their home. *Claus v. DeVere* ... 812
16. Where a reasonable controversy exists as to liability, the employer is not liable for the statutory penalty for waiting time while the cause is pending in the courts. *Claus v. DeVere* ... 812

Mechanics' Liens.

1. Unintentional misapplication of a payment to another account will not invalidate a mechanic's lien; but credit will be allowed for the payment so misapplied. *Platner Lumber Co. v. Theodore* ... 804
2. Inclusion in a materialman's lien of an item not furnished for the particular building invalidates the lien only to the extent of such item, in absence of fraud. *Platner Lumber Co. v. Theodore* ... 804

Mortgages.

1. After a mortgagee forecloses and enters satisfaction of his mortgage, he cannot in another action recover taxes paid. *Criswell v. McKnight* 317
2. The rule that extension granted to grantee assuming mortgage debt releases former grantees and mortgagor not consenting thereto *held* not applicable in an action against grantees by mortgagor required to pay the debt. *Finzer v. Peter* 389
3. Grantor's rights against grantee under assumption agreement are based on contract of sale, and loss of mortgagee's rights against grantee assuming mortgage debt does not affect grantor's rights unless the mortgagee has bestowed such benefit on the grantor as to make enforcement of latter's right against grantee inequitable. *Finzer v. Peter* 389
4. The fact that the mortgagee extended time of payment of mortgage to last grantee without consent of mortgagor and other grantees successively assuming the mortgage is no defense to mortgagor's action against grantees. *Finzer v. Peter* 389
5. As between grantor and grantee assuming the mortgage debt, the latter becomes the principal debtor and the former surety; and in a suit by mortgagor against successive grantees assuming the mortgage, successive grantees are liable in inverse order of alienation. *Finzer v. Peter* 389
6. Equity has jurisdiction of a suit for reimbursement by mortgagor against successive grantees assuming the mortgage debt. *Finzer v. Peter* 389
7. An application for a deficiency judgment against the mortgagor is a continuation of the foreclosure suit, and does not require an order of court for its prosecution. *Scottsbluff Nat. Bank v. Pfeifer* 445
8. Deed given as security *held* to be a mortgage. *Doran v. Farmers State Bank* 655
9. Provision in a mortgage for acceleration of maturity of the mortgage debt in case taxes become delinquent *held* enforceable. *Matthews v. Guenther* 742
10. Evidence in foreclosure suit *held* to establish breach of condition of mortgage relative to payment of taxes by mortgagor. *Matthews v. Guenther* 742
11. Payment of delinquent taxes after commencement of suit to foreclose does not deprive mortgagee of right given by exercise of option to foreclose. *Matthews v. Guenther* 742

Municipal Corporations.

1. Powers conferred on municipal boards by legislative charter will not be extended beyond the plain import of the language used. *Garver v. City of Humboldt* 132
2. Statutes empowering municipal boards to perform certain functions will be strictly construed. *Garver v. City of Humboldt* 132
3. City councils *held* without authority under ch. 42, Laws 1927, to improve any street unless the street at the time actually connects with the state highway system. *Garver v. City of Humboldt* 132
4. A city council cannot by ordinance extend its powers beyond limits prescribed in its charter. *Garver v. City of Humboldt* 132
5. Neither resolution of necessity nor establishment of grade are jurisdictional prerequisites to letting of paving contract. *Burrows v. Keebaugh* 136
6. Notice of special meetings of council need not be given to member out of state and physically unable to be present. *Burrows v. Keebaugh* 136
7. Remonstrants may withdraw their names at any time before a petition is submitted to the board or council or afterwards before it is acted upon. *Burrows v. Keebaugh* 136
8. Contractors for a municipal improvement are not generally entitled to interest on money withheld as indemnity. *Petersen v. City of Omaha* 219
9. Contract for construction of a sewer construed with reference to extra compensation for sheeting. *Petersen v. City of Omaha* 219
10. A city must pay interest on money due on a municipal improvement, where the delay is unreasonable and the amount due is definitely ascertainable. *Petersen v. City of Omaha* 219
11. An ordinance relating to public health, safety, and general welfare will not be held invalid, unless it is arbitrary, unreasonable, or discriminatory. *State, ex rel. Andruss, v. Mayor* 413
12. It is the duty of a city to grant a license for a gasoline filling station where an applicant complies with the provisions of an ordinance adopted under a statute. *State, ex rel. Andruss, v. Mayor* 413
13. A city exercises delegated powers by ordinance. *State, ex rel. Andruss, v. Mayor* 413
14. Mandamus *held* to be the proper remedy to compel a city council to issue a license for a gasoline filling station. *State, ex rel. Andruss, v. Mayor* 413

15. Matters of strictly municipal concern to cities which have adopted a home rule charter are not subject to state legislation; but state legislation is not excluded on subjects pertaining to state affairs. *Carlberg v. Metcalfe* 481
16. Whether a law relates to municipal or state affairs depends on the contents of the act. *Carlberg v. Metcalfe* 481
17. Education is a matter of state concern. *Carlberg v. Metcalfe* 481
18. Schools are matters of state, and not of municipal concern. *Carlberg v. Metcalfe* 481
19. The establishment and maintenance of a municipal university is a matter for state legislation. *Carlberg v. Metcalfe* 481
20. A city in accepting the privilege conferred on it by a statute to establish a municipal university acts as a political subdivision of the state. *Carlberg v. Metcalfe* 481
21. Equity will not perpetually enjoin construction or operation of a sewer system if so changed as not to create a nuisance. *Stuhr v. City of Grand Island* 491
22. The statute requiring that ordinances be read on three different days applies to ordinances of a general or permanent nature, and not to resolutions or motions. *Hevelone v. City of Beatrice* 648
23. Enactment of a reasonable zoning ordinance is a valid exercise of police power. *City of Lincoln v. Logan-Jones* 827
24. A Greek letter fraternity house is not a "residence" within a city zoning ordinance establishing a residential district. *City of Lincoln v. Logan-Jones* 827

Negligence.

1. In an action for injury from an automobile collision, evidence *held* not to disclose contributory negligence of plaintiff, and to require a finding that defendant was guilty of actionable negligence proximately causing the injury. *Stiefler v. Miller* 11
2. An instruction placing the burden of proof on the wrong party and misstating the law as to contributory negligence is erroneous. *Gerish v. Hinchey* 51
3. An instruction that a party is not guilty of contributory negligence, if the jury find certain facts, is erroneous where the ultimate facts are not correctly stated. *Toliver v. Rostin* 363
4. Recovery for wrongful death of a minor should be diminished in proportion to the extent of contributory negligence, according to statutory rule. *Spomer v. Allied Electric & Fixture Co* 399

5. An automobilist should have his car under such reasonable control as will enable him to avoid collision with other vehicles operated with due care. *Spomer v. Allied Electric & Fixture Co* 399
6. "Reasonable control" of motor vehicles is such control as will enable drivers to avoid collision with other vehicles operated without negligence and with pedestrians exercising due care. *Spomer v. Allied Electric & Fixture Co* 399
7. Complete control of motor vehicles, such as will prevent collision by anticipation of negligent or illegal disregard of traffic regulations, in absence of warning or knowledge, is not required in Nebraska. *Spomer v. Allied Electric & Fixture Co* 399

New Trial.

1. A new trial will not be granted for newly discovered evidence unless it would probably change the result. *Simonsen v. Thorin* 684
2. A new trial will not be granted where newly discovered evidence would merely discredit a witness' testimony as to a matter unrelated to liability. *Simonsen v. Thorin* 684

Nuisance.

In granting an injunction against a nuisance, equity will not go beyond the necessities of the particular case. *Stuhr v. City of Grand Island* 491

Officers.

1. The duties of a county treasurer pertaining to licensing operators of motor vehicles are foreign to his regular duties. *Mehrens v. Bauman* 110
2. The statute authorizing payment of 25 cents to the county treasurer for each motor vehicle operator's license *held* not void as an increase of salary. *Mehrens v. Bauman* 110

Parent and Child.

1. Earnings of an unemancipated minor belong to his parents, but at common law a son is not legally bound to support them after he becomes of age. *Spomer v. Allied Electric & Fixture Co* 399
2. The statutory obligation of an adult child to support parents cannot be enforced in an action against a third person. *Spomer v. Allied Electric & Fixture Co* 399

Partition.

An heir or devisee cannot sue for distribution or partition until the debts of the estate have been paid or provided for, unless he give bond. *Markle v. Markle* 412

Partnership.

1. The existence of a partnership is for the jury where the evidence is contradictory. *Blue Valley State Bank v. Milburn* 421
2. The presumption is that a contract signed by one person is individual, and the person alleging it must prove that it was a partnership transaction. *Blue Valley State Bank v. Milburn* 421
3. Plaintiff seeking to hold defendant as a partner to a contract by reason of defendant having held himself out as such must show that he relied on such holding out in making the contract. *Blue Valley State Bank v. Milburn* 421

Payment.

A debtor may designate application of a payment to a particular debt and the creditor must make such application. *Platner Lumber Co. v. Theodore* 804

Pleading.

1. Plaintiff must recover on the cause of action stated in his petition; new causes of action may not be introduced by reply. *Livanis v. Northport Irrigation District* 314
2. Petition and reply *held* not to state a cause of action against defendant for damages from seepage and negligence. *Livanis v. Northport Irrigation District* 314
3. A demurrer to the petition is not a proper part of an answer. *Damicus v. Kelly* 588
   City of Schuyler v. Verba 729
4. As against a demurrer *ore tenus* after commencement of trial, allegations of a petition will be liberally construed. *City of Schuyler v. Verba* 729
5. Legal conclusions are not admitted by demurrer. *Dobney v. Chicago & N. W. R. Co.* 824

Process.

Statute providing that, on filing of affidavit of prejudice against the sheriff, the county clerk shall execute process, *held* mandatory. *Trobough v. State* 453

Railroads.

1. The use of the right of way of a railroad company is within its control, except as incidental to its functions as a common carrier, in which the public has an inter-

est. *Luedeke v. Chicago & N. W. R. Co.* 124
2. A railroad company may grant the privilege of constructing a building on its right of way by contract exempting it from damage resulting from its negligence associated therewith. *Luedeke v. Chicago & N. W. R. Co.* 124
3. A provision in a lease exempting a railroad company from liability for damages from installation of an unloading device on its right of way does not relieve it from liability for damages on account of negligence in unreasonably blocking a crossing. *Luedeke v. Chicago & N. W. R. Co.* 124
4. A railroad company is liable for damages directly resulting from its negligence in blocking a street crossing for an unreasonable time. *Luedeke v. Chicago & N. W. R. Co.* 124

Religious Societies.

1. Courts will not interfere with internal affairs of religious organizations except for protection of civil or property rights. *Deloisted v. Hilson* 788
2. Courts will not review acts of a religious organization with reference to its internal affairs for the purpose of ascertaining whether they conform with discipline and usages of the organization. *Deloisted v. Hilson* 788
3. Individual members of a voluntary unincorporated religious association have no severable right in property of the association; membership merely giving the right to use it. *Deloisted v. Hilson* 788

Schools and School Districts.

Evidence *held* to show a school district to be a consolidated district, required to furnish transportation of pupils. *State, ex rel. Brown, v. School District* 189

Set-off and Counterclaim.

1. "Set-off" implies demands between the same persons in the same capacity. *Bank of Crab Orchard v. Myers* 84
2. A claim of defendant, to be a "set-off," must be one on which he could, at the commencement of suit, have maintained an action against plaintiff. *Bank of Crab Orchard v. Myers* 84
3. An administrator taking an assignment from the estate of a claim for moneys deposited and lost through insolvency of a bank cannot set off the claim against his personal liability to the bank, where the bank sued before the claim was assigned. *Bank of Crab Orchard v. Myers* 84

4. Only claims maturing prior to commencement of a suit are available as a set-off. *Armstrong v. Marr* 182

States.

1. Where a claimant accepts a legislative appropriation in payment of his claim against the state, his claim for any balance will be barred. *Peterson, Shirley & Gunther v. State* 281
2. Where a claimant, by authority of a senate resolution, sues the state on a *quantum meruit* for work, he has the burden of proving his cause of action. *Peterson, Shirley & Gunther v. State* 281
3. Neither the state nor its direct agency may be sued in any court on which the legislature has not conferred jurisdiction over such suit. *Eidenmiller v. State* 430
4. The constitutional immunity of the state or its agency from suit is not waived by the attorney general's appearance, answering to the merits, and participation in the trial. *Eidenmiller v. State* 430
5. The state's immunity from suit cannot be waived by the voluntary appearance of the attorney general. *McNeel v. State* 674
6. A claimant may appeal to the district court from disallowance of a contract claim by the state auditor. *McNeel v. State* 674
7. An action against the state for a tort cannot be maintained without permission of the legislature. *McNeel v. State* 674
8. Where statute provides an exclusive remedy against the state and the forum, one branch of the legislature alone cannot extend jurisdiction to another forum. *McNeel v. State* 674
9. The Constitution *held* not to confer on a single branch of the legislature power to extend jurisdiction to sue the state. *McNeel v. State* 674

Statutes.

1. The legislature may classify counties for the purpose of legislation, where the classification has a substantial quality or attribute rendering legislation appropriate or necessary. *State, ex rel. Cone, v. Bauman* 77
2. The law authorizing counties having a population of 150,000 to use gas tax to retire county highway construction bonds *held* unconstitutional. *State, ex rel. Cone, v. Bauman* 77
3. An act will not be held invalid as being broader than its title where the title fairly expresses the general subject-matter. *Mehrens v. Bauman* 110

Westbrook v. State 625

4. The provision in the claims' appropriation act for reimbursing depositors in banks, *held* not clearly expressed in the title. *Weaver v. Koehn* 114
5. Legislative appropriations in excess of recommendations in the governor's budget, made by three-fifths vote of each house of the legislature, are not subject to veto by the governor. *Elmen v. State Board of Equalization and Assessment* 141
6. An appropriation bill containing items in excess of amounts recommended in the governor's budget *held* legally adopted by a three-fifths vote of each house of the legislature, without a separate three-fifths vote on each separate item increased. *Elmen v. State Board of Equalization and Assessment* 141
7. Generally, courts will refuse to construe statutes where construction is not necessarily involved in the case. *Dawson County Irrigation Co. v. McMullen* 245
8. The Constitution should be liberally construed to uphold a germane provision in a legislative act, though not specifically expressed in the title. *Pandolfo v. State* 616
9. Securities law *held* not unconstitutional by reason of the fact that the burden of proof as to exemptions was not specifically stated in the title. *Pandolfo v. State* 616
10. Reason and legislative intent control the strict letter of a statute to prevent palpable injustice or absurdity. *Hevelone v. City of Beatrice* 648

Stipulations.

1. A stipulation for modification of an injunction should be construed as an entirety. *Gentle v. Pantel Realty Co.* 630
2. A stipulation must be read according to the parties' intention, notwithstanding clerical errors and omissions. *Gentle v. Pantel Realty Co.* 630

Subrogation.

Subrogation will not be allowed where there is no mistake of fact and no superior equities. *Criswell v. McKnight* 317

Taxation.

1. The taxing power vested in the legislature is unlimited except as prescribed by the Constitution. *Elmen v. State Board of Equalization and Assessment* 141
2. A corporation which owns and operates a hydroelectric power plant and sells electric energy at its generator *held* subject to a franchise tax. *Northern Nebraska Power Co. v. Holt County* 724

3. The right to appropriate public waters for generating electric energy is taxable as a franchise. *Northern Nebraska Power Co. v. Holt County* ... 724
4. The right of eminent domain conferred on utility companies is a franchise right which may be taxed. *Northern Nebraska Power Co. v. Holt County* ... 724
5. The right given to utility companies to erect poles and wires along state highways is a taxable franchise right. *Northern Nebraska Power Co. v. Holt County* ... 724
6. A franchise is subject to taxation, though there is no present exercise of existing franchise rights. *Northern Nebraska Power Co. v. Holt County* ... 724
7. Where a taxpayer makes no return and an assessing board makes an original assessment at the time and place fixed by statute, personal notice to the taxpayer is not necessary. *Northern Nebraska Power Co. v. Holt County* ... 724

Tender.

What constitutes a tender, stated. *Linch v. Nebraska Buick Automobile Co.* ... 819

Trial. SEE APPEAL AND ERROR. CRIMINAL LAW.

1. One desiring an instruction to guide the jury in weighing certain features of evidence must make request therefor at conclusion of evidence, and submit in writing the instruction desired. *In re Estate of Strelow* ... 235
2. The giving of an oral instruction, without a waiver that it be in writing, is reversible error. *Dow v. Legg* ... 271
3. Whether persons riding in an automobile are engaged in a common enterprise is a question for the jury. *Toliver v. Rostin* ... 363
4. The giving of conflicting instructions is error. *Toliver v. Rostin* ... 363
5. It is the duty of the court to instruct on the issues presented by the pleadings and evidence, without request. *Blue Valley State Bank v. Milburn* ... 421
6. An instruction which submits to the jury questions not within the issues is erroneous. *Linch v. Nebraska Buick Automobile Co.* ... 819

Trusts.

1. A trustee cannot set up a claim of title in himself to trust property. *Miles v. Miles* ... 436
2. A court of equity has jurisdiction to enjoin a trustee from misappropriation of trust funds at the suit of a beneficiary. *In re Estate of Frerichs* ... 462

3. Where the will does not require a bond, the county court cannot demand a bond from a testamentary trustee, unless probability of loss or other equitable ground is shown. *In re Estate of Frerichs* 462

Usury.

1. When a commission added to interest aggregates more than the lawful rate of interest, a note is tainted with usury. *Detweiler v. Forman* 780
2. A renewal of a usurious note is also usurious. *Detweiler v. Forman* 780
3. Only the actual amount of the loan, less payments of principal and interest, can be recovered on a usurious loan. *Detweiler v. Forman* 780
4. The defense of usury is available to a mortgagor if he is liable for deficiency judgment, though he has parted with title. *Platner Lumber Co. v. Theodore* 804
5. In a foreclosure suit, the mortgagee cannot defeat the defense of usury by offering to waive deficiency judgment. *Platner Lumber Co. v. Theodore* 804

Vendor and Purchaser.

Vendor *held* liable for damages on account of incumbrance, where property was represented to be unincumbered. *Newberg v. Chicago, B. & Q. R. Co* 171

Venue.

1. In an action *in personam*, a summons cannot lawfully be sent to another county, unless there is a joint demand against resident and nonresident defendants. *Peters v. Pothast* 208
2. Where a jurisdictional defect does not appear on the face of the record, defendant may challenge it in his answer. *Peters v. Pothast* 208
3. To authorize summons to another county in an action *in personam*, the resident and nonresident defendants must be jointly liable. *Peters v. Pothast* 208

Waters.

1. Whether a defendant water company was negligent in lowering mains *held* a question for the jury. *Phelps v. Metropolitan Utilities District* 337
2. No natural servitude exists in favor of higher land as to surface waters. *Muhleisen v. Krueger* 380
3. Special elections in cities of the first class having more than 5,000 and less than 25,000 inhabitants may be called by resolution. *Hevelone v. City of Beatrice* 648
4. Notice of special waterwork's election and publication thereof *held* sufficient. *Hevelone v. City of Beatrice* 648

5. Record *held* to show substantial compliance with statutory requirement of majority vote on waterworks. *Hevelone v. City of Beatrice* 648
6. Procedure and action taken in contracting for private corporation's construction and maintenance of city waterworks approved. *Hevelone v. City of Beatrice* 648
7. Statutes governing organization and management of irrigation districts are mandatory, and should be strictly construed. *Elliott v. Calamus Irrigation District* 714
8. An irrigation district is a public corporation, and the powers of its officers and directors are limited by the statute under which it is created. *Elliott v. Calamus Irrigation District* 714
9. Warrants issued by officers of an irrigation district prior to a levy and at a time when no fund exists against which a levy may be made are void. *Elliott v. Calamus Irrigation District* 714
10. In absence of a levy, officers of an irrigation district are without statutory authority to issue warrants. *Elliott v. Calamus Irrigation District* 714
11. Officers of an irrigation district are charged with notice of their statutory powers and limitations thereon. *Elliott v. Calamus Irrigation District* 714

Wills.

1. Testator's mental capacity is a question for the jury where the evidence is conflicting. *In re Estate of Strelow* 235
2. The question of undue influence over testator may be submitted to the jury, where reasonable minds might conclude that the will was not his voluntary act. *In re Estate of Strelow* 242

Witnesses. SEE EVIDENCE.

1. Communications between attorney and client are privileged. *Matters v. State* 404
2. A witness may be cross-examined to test the credibility and accuracy of his evidence as to reputation of accused. *Morton v. State* 575
3. One claiming personalty of deceased as donee is incompetent to testify to the date when the property was delivered. *Yardum v. Evans* 699
4. A witness without present recollection may testify to facts contained in a record if he had knowledge of the facts when recorded and can vouch for its accuracy. *Linch v. Nebraska Buick Automobile Co.* 819