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# WAYNE COUNTY, APPELLEE, V. J. J. STEELE, APPELLANT.

FILED JUNE 19, 1931. No. 27704.

1. **Statutes:** AMENDMENTS. A test of the validity of amendments is whether their provisions are "germane" to the provisions of statute sought to be amended.
2. ———: ———. An amendatory provision is germane to a law sought to be amended when it is "alike," "closely allied," "pertaining to," or "related to" the same.
3. ———: AUTOMOBILE REGISTRATION LAW. Section 2, chapter 158, Laws 1925, as part of an act entitled, "An act to amend sections * * * 8337 * * * Compiled Statutes of Nebraska for 1922, * * * providing that the county treasurer as agent for the department of public works in each county shall retain as fees for his office five cents (5¢) for each original motor vehicle registration," etc., examined and approved as being properly within the title quoted, and germane to the provisions amended thereby.
4. ———: PENAL STATUTES. "A liability which is created by statute to follow as a consequence of the doing or omission of some act, and the extent of which is not measured or limited by the damage caused by the act or omission, is in the nature of a penalty and the statute penal in its character." *Kleckner v. Turk*, 45 Neb. 176.
5. ———: TITLE. "The title to a legislative act is a part thereof, and must clearly express the subject of legislation." *State v. Burlington & M. R. R. Co.*, 60 Neb. 741.
6. ———: ILLEGAL PROVISIONS. Any provision in a legislative bill which is not clearly expressed in the title thereof cannot be enacted into law.

APPEAL from the district court for Wayne county: DE WITT C. CHASE, JUDGE. *Affirmed as to first cause of action, and reversed and dismissed as to second cause of action.*

*William C. Dorsey, Montgomery, Hall, Young & Johnsen* and *Harry E. Siman*, for appellant.

*C. H. Hendrickson* and *H. D. Addison, contra.*

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

EBERLY, J.

In this case Wayne county seeks to recover from the defendant Steele, county treasurer of Wayne county, in an action at law upon two causes of action, viz.: On the first the sum of $660 for automobile license and registration fees earned and received between July 1, 1925, and July 1, 1928, inclusive, but retained by defendant and not accounted for by him; and upon the second cause of action the sum of $3,920 unlawfully paid by defendant as county treasurer, out of public funds in his possession, to Grace Steele, his sister, employed by him in the office of the county treasurer of Wayne county as a clerk and helper during the years 1925 to 1928, inclusive, all alleged to be in violation of sections 84-811 and 84-812, Comp. St. 1929. In the district court there was judgment on the pleadings for the plaintiff in the sum of $767.63 upon the first cause of action; and for the sum of $850.35 on the second cause of action. Defendant appeals. Plaintiff prosecutes a cross-appeal as to denial in part by the district court of its second cause of action.

As to the first cause of action, the controlling statutory provisions are sections 39-1405 and 60-325, Comp. St. 1929. The literal terms contained in these provisions plainly require the affirmance of the judgment of the district court upon the first cause of action. However, appellant insists that section 39-1405, which in its present form finds its source in chapter 158, Laws 1925, approved March 28, 1925, is invalid as having been passed in contravention of section 14, art. III of the Constitution.

Prior to the adoption of the amendment of 1925 by the legislature of that year, the matter under consideration was regulated by the following statutory provisions: Section 8379, Comp. St. 1922, which provided: "The following fee shall be paid upon the registration of each motor vehicle, in accordance with the provisions of this act," and thereafter sets forth the specific amount assessed against each class of vehicles. Section 8380, Comp. St. 1922, pro-

vided: "All registration fees provided for in this article shall be paid to the county treasurer of the county in which the applicant for registration resides, said fees shall be placed in a fund to be known as the highway fund and such treasurer shall dispose thereof as may be provided by law." Section 8337, Comp. St. 1922, provided: "The county treasurer shall transmit to the state treasurer three and one-half (3½%) per cent. of all of the highway fund collected by him, said three and one-half (3½%) per cent. shall be credited to the general fund and when appropriated shall be used by the department of public works to pay for the cost of administration of the motor vehicle law and the supervision of the maintenance of state highways: Provided, however, that when any of the clerical work that is being done by the department of public works in the administration of the motor vehicle law is transferred to the county treasurer's office of any county in the state, the department is hereby empowered to pay the county treasurer's office of such county an amount of money equal to the reduction of the expenses in said department by such transfer, provided, further, that any such money so paid shall be credited to the general fund of such county." Section 8389, Comp. St. 1922, provided: "The department of public works shall designate and appoint the treasurers of the various counties to be agents of the said department in such counties, for the purpose of registering motor vehicles, and for the granting of licenses to applicants, subject to the requirements of this article, and in accordance with such rules and regulations as shall be imposed by the department of public works."

It will thus be seen that the only sections providing for the disposition and remittance of the "highway fund" after the same has been collected, are sections 8337 and 8380, Comp. St. 1922. Section 8337 also provided, under conditions specified, for the payment to the county treasurer's office of certain compensation for work done and

services rendered by that governmental agency in the administration of the motor vehicle law, which was to be credited to the general fund of the county.

Chapter 158, Laws 1925, the amendatory act attacked by the appellant as unconstitutional, carried as its title, not only the usual provisions, viz., "An act to amend sections * * * 8337 * * * Compiled Statutes of Nebraska for 1922, relating to state highways," but, also, there was added thereto, "providing that the county treasurer as agent for the department of public works in each county shall retain as fees for his office five cents (5¢) for each original motor vehicle registration;" and there appears in the body of this act section 2, whereby section 8337 is amended to read as follows: "The various county treasurers shall act as agents for the department of public works in the collection of all automobile registration fees. While acting as such agents, the county treasurers shall retain from the funds collected for automobile registration five cents (5¢) for each original motor vehicle registration. Said five cents (5¢) shall be accounted for as other fees passing through their hands. After five cents (5¢) per original motor vehicle registration is deducted, the county treasurers shall transmit to the state treasurer two and one-half per cent. (2½%) of all such funds collected by them."

It must be conceded that "whatever might have been originally made a part of a law may at any time be ingrafted upon it by legislation professing to be amendatory." *Richards v. State,* 65 Neb. 808. The test of the propriety of the substance of amendments is whether they are germane to the provisions sought to be amended. "Germane" is defined by Webster's New International Dictionary as "Near akin; closely allied; appropriate; relevant." By Corpus Juris, as "Alike; closely allied; pertaining to; related to." 28 C. J. 614. The latter definition has been, in part at least, approved by this court. *State v. Majors,* 85 Neb. 375, 379. The effect of the amend-

ment to section 8337 here under consideration is, first, to make express what had been theretofore implied therein, viz., that "county treasurers shall act as agents for the department of public works in the collection of all automobile registration fees;" second, instead of a conditional payment to the office of county treasurers as compensation for services rendered, to be credited to the general fund, there was substituted a payment certain to the county treasurer as compensation for work thus performed, which should "be accounted for as other fees passing through their hands;" third, the percentage to be remitted to the state treasurer of the collections thus made was slightly reduced. Every change thus effected was plainly "closely allied to," "pertaining to," or "related to" the specific provisions contained in section 8337 prior to the amendment. The amendment thus adopted, therefore, must be considered as germane to that to which it applies, and properly covered by the title of the act involved in this cause of action.

Nor is the situation in any manner affected by the provisions of section 8389, Comp. St. 1922. On March 28, 1925, when chapter 158, Laws 1925, was approved, this section was wholly unaffected by the amendment heretofore considered by us, and remained unmodified. On April 2, 1925, chapter 159, Laws 1925, was approved, by which such section 8389 was amended, and as thus amended now appears as section 60-325, Comp. St. 1929. Manifestly a subsequent amendment to an independent act may not determine the constitutionality of a like independent act previously passed and approved. However, this section bears internal evidence that it was passed with due consideration of the amendment made by chapter 158, Laws 1925, as section 8389 as amended provides: "The treasurers of the various counties * * * as provided in section 8337, Compiled Statutes of Nebraska for 1922, as amended (39-1405), shall receive five cents (5¢) for each original registration as such agent." The statute control-

ling is valid as amended, and the judgment of the district court on the first cause of action is correct.

The judgment entered in the district court on the second cause of action was based solely on sections 5074 and 5075, Comp. St. 1922. These provisions now appear as sections 84-811 and 84-812, Comp. St. 1929. The defendant challenges the validity of this legislation on a number of grounds, of which we find it necessary to discuss but two: (1) The insufficiency of the title of chapter 227, Laws 1919, the original enactment; and (2) the penal nature of the part thereof authorizing recovery against the officer making the payment to the person ineligible to appointment.

This chapter was originally introduced as House Roll 260. It carried the identical title which formed the title of chapter 227, Laws 1919, viz.: "A bill for an act declaring it unlawful to appoint to lucrative public office or position any person bearing certain relationship to the appointing officer and making such appointments null and void."

The following constituted the body of this bill at the time it was first presented for the consideration of the legislature, viz.: "Section 1. That it shall hereafter be unlawful to appoint, by virtue of authority conferred by the Constitution or the laws of this state, to any lucrative public office or position any person bearing the relationship to the officer charged with making the appointment individually or in conjunction with other officers (or to his wife) that would entitle such person under the laws of this state to take by inheritance from said appointing officer (or his wife) in the event of intestate death; and each and every such appointment shall be null and void." It will be noted that, by the terms of the bill as originally introduced, persons related by blood or marriage were disqualified for appointment only "when" in the event of intestate death of the appointer, the appointee would "take by inheritance" from the person making such appoint-

ment. In the instant case it may be noted that under the terms of House Roll 260, as originally introduced, had the defendant been the father of a living child born in lawful wedlock at the time of appointing his sister, the validity of such appointment could not be questioned.

The situation was also properly reflected in the title of House Roll 260 by the employment of the words, "any person bearing certain relationship to the appointing officer," as employed therein. As thus used the word "certain" expressed a restriction upon the scope of the language employed, limiting its application to "one or some among possible others" (Webster's New International Dictionary), or to "a particular portion" (11 C. J. 74), of the relatives by blood and marriage. So, also, the effect of this title was to limit the exclusionary features of the proposed law to "some among possible others," to "a particular portion," of the relatives by blood and marriage, to segregate such and render the same ineligible to appointment. But neither the title nor the body of House Roll 260 contained any reference to penalties or any provision authorizing the recovery of moneys paid in violation thereof. In this connection it will be seen that the title of House Roll 260 was not only apt and appropriate, but, considering the body of the bill, was substantially conterminous with the legislative provisions therein contained. In the course of legislative procedure incident to its enactment, all of the words of House Roll 260 appearing after the title and the words "section 1" were by amendment stricken out and the present provisions of chapter 227, Laws 1919, substituted therefor, and was adopted and approved. The title, however, was not amended.

In the body of the act as finally passed, the class of ineligible relatives was increased from the limited few, who under existing circumstances "in the event of intestate death" of the appointer would "take by inheritance" from him, to "any person related by blood or marriage to the person * * * making said appointment: Provided, this

provision shall not apply in cases where such person appointed receives compensation of less than $800 per year." And section 2, ch. 227, Laws 1919, also in substance further provided that such prohibited appointment shall be void, and no person thus illegally appointed shall be paid from public money, and that "any person or persons so paying the same or any part thereof * * * shall be liable for all moneys so paid." Giving the words employed their literal meaning, the provision just referred to in effect made county treasurers liable for all payments made to unlawful appointees, whether such ineligible persons were appointed by themselves or others, and irrespective of their knowledge, intent or possibilities of information of the actual situation of the person to whom such payments were made.

It also may be said that the briefs afford us no comprehensive definition for the phrase "related by blood or marriage," as used in this statute. Nor is the limitation of the scope of the term here employed in any manner indicated by the authorities which are cited by the parties, nor are we able to find any satisfactory source of information on this subject in the books. Even if the Adamic theory of creation be not involved in the identification of those who in the terms of this statute are "related by blood or marriage," still practical difficulties are presented when we are met with the contention that this statutory provision is void for indefiniteness. It is possible, however, that this question need not be determined in the instant case.

Section 2 of the act under consideration provides for recovery of public funds paid in violation of its terms under conditions where right of recovery did not previously exist. Giving full effect to the language employed in the literal sense of the terms used, county, city, village and state treasurers were made responsible for all payments made by them to all ineligible persons under this act, irrespective as to who may have made such appoint-

ments or the guilty knowledge, or intent, or good faith, of the officers making such payments of public funds. So, too, these exactions were authorized by the terms of the statute without reference to value of services which the illegal payments were made to compensate, and without reference to the fact that actual damage may or may not have been suffered by the state or political subdivision involved. The liability by the terms of the statute was imposed on the delinquents solely because of the acts done. "A liability which is created by statute to follow as a consequence of the doing or omission of some act, and the extent of which is not measured or limited by the damage caused by the act or omission, is in the nature of a penalty and the statute penal in its character." *Kleckner v. Turk*, 45 Neb. 176. See *Bourne v. Baer*, 107 Neb. 255. So, whether the proscribed payment is to be made, as in this case, to his own appointee, or whether made by a treasurer to an unlawful appointee of another, the recovery, if sustained, must be deemed a recovery by a penalty.

So far as the second cause of action is concerned, the situation here presented may be summarized as follows: The statute controlling the second cause of action we find in a legislative enactment whose inhibitions are by its title limited to "one or some among possible others," or "a particular portion," of those related by blood or marriage to the appointee, but in the body of which, however, notwithstanding the limitations expressed in the title, these inhibitions are imposed on all who "are related by blood or marriage to the appointer," and they are rendered ineligible to appointment; also, wherein the title is wholly silent as to penalties and in no manner indicates their presence in the enactment, yet in the body thereof a penalty is expressly provided.

This court is committed to the view that "The title to a legislative act is a part thereof, and must clearly express the subject of legislation." *State v. Burlington & M. R. R. Co.*, 60 Neb. 741. See *State v. Tibbets*, 52 Neb.

228. It is quite apparent, therefore, that chapter 227, Laws 1919, approved April 9, 1919, was passed in contravention of section 14, art. III of the Constitution, which, among other requirements, provides: "No bill shall contain more than one subject, and the same shall be clearly expressed in the title."

The title of the act here controlling is plainly not comprehensive enough to authorize the penalty provisions of section 2 thereof, on which this second cause of action is based. We have repeatedly announced the rule: "Any provision in a legislative bill which is not clearly expressed in the title cannot be enacted into law." *Union P. R. Co. v. Sprague,* 69 Neb. 48. See *Ives v. Norris,* 13 Neb. 252; *Ex parte Thomason,* 16 Neb. 238; *Haverly v. State,* 63 Neb. 83. This appears applicable to the instant case, and we hold the provisions of section 84-812, Comp. St. 1929, void as enacted in contravention of section 14, art. III of the Nebraska Constitution.

It follows that the judgment of the trial court on the first cause of action is in all things correct, and is affirmed; but that the trial court erred in its finding and judgment against the defendant on the second cause of action. The judgment entered against the defendant on the second cause of action is therefore reversed and the cause of action dismissed.

AFFIRMED AS TO FIRST CAUSE OF ACTION, AND REVERSED AND DISMISSED AS TO SECOND CAUSE OF ACTION.

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ROSE R. PALTANI, APPELLEE, V. SENTINEL LIFE INSURANCE COMPANY, APPELLANT.

FILED JUNE 19, 1931. No. 27914.

Insurance: ACCIDENT POLICY: "AUTOMOBILE TRUCK." A touring car, from which the body has been removed and a cabin placed on the front with a small box for holding tools, and back of

which is attached a hoisting device for lifting automobiles for the purpose of repairing and towing them along the highway, is not an automobile truck within the meaning of a provision of an accident insurance policy excluding liability for an accidental injury received while riding in or on any automobile truck.

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

*Dressler & Neely,* for appellant.

*S. L. Winters* and *John T. Marcell, contra.*

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

DAY, J.

This is an action by the beneficiary to recover under the terms of an insurance policy for accidental death of the insured. The insurance company appeals from a judgment.

The insured was instantly killed, while riding in or upon an automobile, by being struck, run down or over by another automobile. The policy upon which this action is brought insures against losses and disabilities which result, exclusively of all other causes, from accidental bodily injuries sustained by the insured, which are sustained while operating, driving, riding in or on, demonstrating, adjusting or cranking an automobile, or in consequence of being struck, run down or run over, or caused by the burning or explosion of an automobile. Under the insuring paragraph of the policy, this accident was covered because the bodily injury resulting in the death of the insured was sustained while riding in or on an automobile, and in consequence of being struck down or run over by an automobile. However, the policy in question is one of strictly limited liability. It is denominated by the company as a "Special Automobile Accident Policy." It is, of course, perfectly proper for the company to limit its

liability. The policy only calls for a premium payment of $5 a year, which necessitates such limitation on the part of the company. If the accident in this case in which the insured figured is one not covered by the policy, it must be because it is excluded by a subdivision E of paragraph 4 of additional provisions of the said policy which limits or excludes liability for certain accidents. Here it is: "This insurance does not cover * * * while driving or riding in or on any * * * automobile truck."

In *Coad v. London Assurance Corporation,* 119 Neb. 188, we held: "Where an insurance policy by its insuring clause clearly covers an article, and an exemption clause does not clearly exclude it, the policy, being strictly construed against the company preparing it, will be held to cover said article." The plaintiff relies upon this case to support its contention. We doubt that the cited case controls the case at bar. There seems to be no ambiguity in the controversial policy.

The appellant contends that the insured at the time of his injury was riding in or on an automobile truck, and was therefore not covered by the policy. Was the car in or on which the insured was riding an automobile truck within the terms of the policy? The decision of the court that the car in or on which the deceased was riding was not an automobile truck will determine that plaintiff is entitled to recover under the policy. This case was presented to the trial court and to this court as a case stated upon an agreed statement of facts, which, with reference to the car in question, is as follows: "It is further agreed that the car upon which Paltani was riding when he was struck by the automobile driven by Wood was a Twin Six (6) Cylinder Packard Car, equipped for a wrecking car; that it was originally a touring car, and the touring body had been taken off and a cabin body put on the front of it, and a box for holding tools, and back of the box was a hoisting device for lifting up machines for the purpose of repairing, and for the purpose of towing them along

the highway." The Oxford Dictionary defines a truck as "a wheeled vehicle for carrying heavy weights." The New Century Dictionary defines a truck as an automobile for transporting heavy loads. An automobile truck has also been defined as a "vehicle for conveyance of commercial purposes over ordinary roads and the average type of that kind of vehicle is especially designed both in its propelling mechanism and its body construction for that function." 42 C. J. 611. The foregoing work cites *American-La France Fire Engine Co. v. Riordan*, 6 Fed. (2d) 964, which case we will discuss later. The car in question does not come within the definition of an automobile truck. It was not built for carrying heavy loads and was not so used. It was equipped with tools for doing a certain work. It was suitable for and was used to carry passengers. The insured was a passenger at the time of the accident. We are of the opinion that the car in this case is not a truck within the authoritative definitions herein quoted. The appellant contends that section 60-301, Comp. St. 1929, contains a statutory definition of the word truck, which statutory definition became a part of the contract of insurance. They rely upon the rule stated in *American Surety Co. v. School District*, 117 Neb. 6: "Statutes, with reference to which contracts are made and entered into, become a part of such contracts." The definition given in the statute is: "Trucks shall include motor vehicles equipped or used to carry anything other than passengers." This section of the statute is a part of the article relating to motor vehicle registration and licenses and deals only with the regulation of motor vehicles upon the highway. This automobile was not equipped or used to carry anything other than passengers.

The views expressed herein find support in some cases. In *American-La France Fire Engine Co. v. Riordan*, 6 Fed. (2d) 964, the court held that a fire engine was not a motor truck within the meaning of the revenue act which avoided the use of the term motor vehicle which is ordina-

rily charged as a "catch all" phrase. In *Poncino v. Sierra Nevada Life & Casualty Co.*, 104 Cal. App. 671, it is stated that the manner in which a vehicle is used, as well as construction, are important factors in determining its character as passenger or freight vehicle under an accident policy. This case cites *Wilmarth v. Pacific Mutual Life Ins. Co.*, 168 Cal. 536, which held that the provision in the policy for double indemnity in case of injury to the insured while in a passenger elevator had reference, not only to the elevator's use exclusively for passengers, but to the elevator's customary use for conveying passengers, although also used for carrying freight. As stated, there was testimony that the car was sold as a passenger car and that it was primarily used to transport the insured from place to place in the course of his employment. A body was attached and insured at the same time used the car for other purposes incidental to the main purpose, but that did not necessarily alter its characer and it would still be a passenger car. The car was customarily used for the carriage of the driver, the carriage of other passengers being incidental.

In *Hemlock 6400 Tire Co. v. McLemore*, 151 Tenn. 99, a Ford roadster with wagon shape box substituted for tonneau as distinguished from type designated "truck" by factory, used chiefly for commercial purposes to carry tools and rider's articles, but no freight, was held not a truck within the statutes providing for registration of automobiles and fixing fees; intent being to distinguish heavy, slow moving freight vehicles causing heavy road wear, according to manufacturer's class, and a truck being a strong vehicle for transporting freight, merchandise or other heavy articles.

We are constrained to hold that a touring car, from which the body has been removed and a cabin placed on the front with a small box for holding tools, and back of which is attached a hoisting device for lifting automobiles for the purpose of repairing and towing them along

the highway, is not an automobile truck within the meaning of a provision of an accident insurance policy excluding liability for an accidental injury received while riding in or on any automobile truck.

The judgment of the district court is

AFFIRMED.

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CHARLES H. SHEETS ET AL., APPELLEES, V. CITY OF COZAD ET AL., APPELLANTS.

FILED JUNE 29, 1931. No. 27836.

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

*Ted R. Frogge,* for appellants.

*Frank M. Johnson* and *Cook & Cook, contra.*

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

PER CURIAM.

Plaintiffs, residents, taxpayers and owners of real estate situated within street improvement districts attempted to be created within the city of Cozad, brought this action on their own behalf and that of all other taxpayers against the defendants. The purpose of the suit was to enjoin the defendants from proceeding with the work of curbing, guttering, grading, graveling or otherwise improving the streets within certain purported street improvement districts under the authority of ordinance No. 143 and ordinance No. 148 of the city, and from receiving bids therefor under the provisions of a published notice, and from entering into any contract for such improvement or any part thereof.

The defendants severally demurred to the petition on the ground that it did not state facts sufficient to constitute a cause of action. The court overruled the demurrers. Defendants elected to stand on their demurrers and

appealed from judgments thereupon entered against them.

The petition alleges in substance that the defendants had been enjoined on August 4, 1930, by the district court in a previous action, from making these improvements under ordinance No. 143, creating this paving district, until they first complied with the provisions of the law governing the making of such public improvements, and that no appeal or other modification of that decree has been had; that the mayor and council held a meeting on August 7, 1930, and adjourned to meet at 8 p. m. on August 15, and duly entered the adjournment on the minutes; that on August 15, 1930, a large number of signers of the petitions for the improvement had signed withdrawals from such petitions so as to reduce the number of signers far below the 60 per cent. of resident abutting property owners required by the law; that the mayor and city council, being advised of the intent to file such withdrawals at the adjourned meeting on that day, for the sole purpose of preventing the withdrawals from becoming effective, convened at 2 p. m. of that day—an hour not usual or customary; that no emergency existed for such meeting and the public was not advised of it; that at such 2 o'clock meeting said officials approved certain plans, specifications and estimates of cost for the different improvement districts and ordered the clerk to advertise for bids for the construction of the improvements; that the mayor and council convened at 8 p. m. that day and the aforesaid withdrawals of names were filed, so that the petitions did not contain the requisite number to support the improvements; that on August 19, 1930, the mayor and council enacted ordinance No. 148 (which is set out in full), specifying in what manner the cost of the said improvements, created by ordinance No. 143, shall be paid; that said ordinance No. 148 is invalid for the reason that the title is broader than the body thereof, that the body of the ordinance contains no provision ordering said work, that it is ambiguous and contains no provisions as to the man-

ner of paying the cost of the work, and does not specify the kind or character of the improvement intended to be made; that before ordinance No. 148 was enacted the mayor and council, at the special meeting at 2 p. m., advertised for sealed proposals and now, under the purported authority of ordinances 143 and 148, and other proceedings, the mayor and city council purpose to proceed and cause such improvements to be made; that thereby warrants and bonds will be issued, taxes and special assessments will be illegally levied, and ultimately public funds raised by taxation will be illegally expended.

We have heard the oral argument, read the record and examined the briefs. While the petition is long, and probably ncessarily so, and contains some matter that might be otherwise attacked, yet on the sole test as to whether it states a cause of action we are of the opinion that the order of the district court in overruling the demurrer was right. The judgment is therefore

AFFIRMED.

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NICK PAPER, APPELLEE, V. J. L. GALBRETH, APPELLANT.

FILED JUNE 29, 1931. No. 27828.

1. **Parol Evidence: WRITTEN INSTRUMENTS: FRAUD.** The defense on the ground of fraud may be shown by parol, not to contradict or vary but to destroy the legal and binding effect of a written instrument.
2. ———: ———: ———. This exception to the general rule of evidence in relation to written instruments is not rendered inapplicable or ineffective by a provision in the instrument that "no other agreement, oral or written, expressed or implied, shall limit or qualify the terms of this contract."

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

*Bernard McNeny, J. S. Gilham* and *L. A. Sprague,* for appellant.

*Burkett, Wilson, Brown, Wilson & Van Kirk* and *H. A. Brubaker, contra.*

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

GOSS, C. J.

At the close of the evidence the court sustained the motion of the plaintiff to direct a verdict against the defendant, who has appealed.

This is an action by plaintiff to recover the balance alleged to be due on a written contract between the seller and purchaser of a $2,500 Biophone Reproducer. This balance of $1,162.50 and interest is claimed on certain payments described in the contract and evidenced by promissory notes executed by the purchaser to cover that portion of the total purchase price not paid in cash when the contract was made. The petition appropriately pleaded the contract and defaults of payment.

The defendant answered, charging the plaintiff with fraud in the inception of the contract, in this, that the plaintiff represented to the defendant that the reproducer was a good machine, in perfect order and, as such, was capable of doing the work of a good talking machine in a satisfactory manner; that defendant purchased the article in entire reliance upon said representations; that said statements were false and said article was not capable of doing the work of a good talking machine in a satisfactory manner and was worthless to the defendant; that when plaintiff made the said representations to defendant he knew they were false in the aforesaid respects; that when he discovered the falsity of the representations, but after he had paid $1,337.50 to plaintiff on the contract, defendant rescinded the contract and offered to return to plaintiff the article, but plaintiff refused to accept it; and that defendant has thus been damaged in the sum of $1,337.50, for which, with costs, he asks judgment.

Plaintiff replied, admitting the $1,337.50 paid, otherwise

denying the allegations of the answer, and pleaded as an estoppel that defendant used the reproducer from its delivery, about March 7, 1929, until he ceased to pay thereon, about October 28, 1929, without complaint of any kind.

The sale was made and the contract entered into on behalf of plaintiff by his salesman, E. A. Harms, between whom and defendant all dealings were had. The contract contained this clause: "It is further understood and agreed that no other agreement, oral or written, expressed or implied, shall limit or qualify the terms of this contract."

On the trial it was sought to prove by the defendant, as a witness, through questions and by offers of proof, the fraud in the contract as alleged in his answer. The defendant was asked: "What was said by Harms to you about this machine?" This was objected to as incompetent, irrelevant and immaterial, and as tending to modify a written contract, specifically containing the clause we have quoted in the preceding paragraph. Plaintiff's objection was sustained, as was a like objection by plaintiff to an offer to prove by defendant the elements of the fraud pleaded in the answer. In effect this precluded defendant from making any defense. Assignments of error necessary to review the rulings and judgment of the court were duly made.

That fraud in the inception of a contract is a defense to its enforcement needs no citation of authority. The material and necessary elements in such a case were duly pleaded. *Peterson v. Schaberg,* 116 Neb. 346, and cases cited. The attack of a written instrument for fraud is a well-recognized exception to the general rule prohibiting the introduction of parol evidence to alter or contradict the terms of a writing. 27 C. J. 52. "It is well established that, as fraud vitiates everything which it touches, parol evidence is always admissible to show, for the purpose of invalidating a written instrument, that its execution was procured by fraud, or that, by reason of fraud,

it does not express the true intention of the parties. The rule in this respect is not rendered inapplicable by the fact that the writing contains a recital to the effect that all agreements between the parties are contained therein, or a provision that no verbal agreements affecting its validity will be recognized." 22 C. J. 1215. See *Stroman v. Atlas Refining Corporation,* 112 Neb. 187; *Martin v. Harris, ante,* p. 372. "The defense of fraud and want of consideration may be shown by parol, not to contradict or vary, but to destroy the legal and binding effect of a written contract." *Minneapolis Threshing Machine Co. v. Otis,* 78 Neb. 233.

Plaintiff cites certain statutes and authorities to support his argument that the representations alleged were warranties, that the defendant retained the instrument an unreasonable time without intimating to plaintiff that he had rejected it (Comp. St. 1929, sec. 69-448), and that, as a matter of law, he is estopped from setting up fraud as a defense or for affirmative relief. The trial court evidently took this view in refusing to allow the defendant to testify in support of his pleading alleging his theory of fraud in the inception and procurement of the contract. The short way to have raised this question was by a demurrer to the answer, without waiting to complete the pleadings, impanel a jury and try the case. The defense was bottomed on fraud and deceit by means of false representations as to an existing fact. We are unable to agree that this could be decided against defendant without hearing what the evidence was in support of this issue. We are of the opinion that the court erred in sustaining the objection to the testimony of the defendant and in ordering the jury to return the verdict against the defendant.

The judgment is reversed and the cause remanded.

REVERSED.

DODGE AGRICULTURAL CREDIT ASSOCIATION, APPELLANT, V. LILY C. TIGHE ET AL., APPELLEES.

FILED JUNE 29, 1931. No. 27161.

1. Appeal: DISMISSAL: MOOT QUESTION. An appellate court may properly decline to express an opinion on a mere abstraction or to determine a moot case and may act on it own motion in dismissing an appeal involving only a question of that nature.
2. ———: MOOT QUESTION: COSTS. On appeal the mere matter of costs does not necessarily require a decision on the merits of a case which has become moot.

APPEAL from the district court for Burt county: HERBERT RHOADES, JUDGE. *Appeal dismissed.*

*George W. Wertz* and *H. R. Ellenberger*, for appellant.

*North & O'Reilly*, *W. M. Hopewell* and *Orville Chatt*, *contra.*

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

ROSE, J.

The Dodge Agricultural Credit Association, plaintiff, brought this suit to foreclose a mortgage on a tract of land in Burt county. Lily C. Tighe one of the defendants, interposed an answer and a cross-petition containing pleas that she was induced by false representations to purchase capital stock of plaintiff and that plaintiff was insolvent and was mismanaging its business and property and praying for the appointment of a receiver for plaintiff. A receiver was appointed and he took charge of the property and affairs of plaintiff under an order of the district court. From this order plaintiff appealed.

On appeal it is argued by plaintiff that the district court was without jurisdiction to appoint a receiver and that there was no ground for the appointment made. The record shows that plaintiff was subsequently adjudged a bankrupt in the United States court for the district of Nebraska and that the receiver appointed by the state

court was superseded by a duly appointed trustee in bankruptcy. The powers of the receiver under his appointment, therefore, were terminated. Consequently, a moot case only is presented for review. Rulings on the questions argued would not afford plaintiff any effectual relief. An appellate court may properly decline to express an opinion on a mere abstraction or to determine a moot case and may act on its own motion in dismissing an appeal involving only an inquiry of that nature. *McCarter v. Lavery*, 101 Neb. 748; 4 C. J. 575; *Heesch v. Snyder*, 85 Neb. 778; *Brown v. Buckley*, 86 Neb. 572; *Deines v. Schwind*, 89 Neb. 122; *Mills v. Green*, 159 U. S. 651.

On appeal the mere matter of costs does not necessarily require a decision on the merits of a case which has become moot. A law text states:

"Some cases hold that an appeal in a case which has become moot will not be retained merely for the purpose of determining the question of costs." 4 C. J. 577.

This view was taken in a former opinion. *State v. Trainor*, 91 Neb. 848.

APPEAL DISMISSED.

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STATE, EX REL. FRED J. SCHROEDER, APPELLEE, V. ARTHUR J. SWANSON ET AL., APPELLANTS.

FILED JUNE 29, 1931. No. 27894.

1. **County Attorneys:** TERM OF OFFICE. The official term of a county attorney is four years and until his successor is elected or appointed, and qualified.
2. ———: ———: VACANCY OF OFFICE. The death of an elected candidate for county attorney before the beginning of the regular term, without taking an oath and giving a bond, does not create a vacancy, where there is a duly qualified incumbent who qualifies anew and whose term of office does not expire until his successor is elected or appointed, and qualified, the period for which such incumbent holds over being part of the term for which he was elected.
3. **Mandamus.** County commissioners may be required by mandamus to approve a proper official bond tendered by the county

attorney for the purpose of qualifying him to hold over, where the candidate elected to succeed him died before the beginning of the regular term without qualifying for the office.

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

*Butler & James*, for appellants.

*Cordeal, Colfer & Russell* and *Fred J. Schroeder, contra.*

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

ROSE, J.

This is an application by Fred J. Schroeder, relator, for a peremptory writ of mandamus directing the county commissioners of Frontier county, respondents, to approve an official bond tendered by him for the purpose of qualifying him to hold over as county attorney. The writ was allowed and respondents appealed.

November 2, 1926, relator was elected county attorney of Frontier county for the term of four years and until his successor should be elected and qualified. In due time he qualified according to law for the term beginning January 6, 1927, and entered upon and performed the duties of his office. At the general election November 4, 1930, Floyd Hall was elected county attorney of Frontier county for the term beginning January 8, 1931, and received his certificate of election, but he died December 3, 1930, without having taken the oath of office or having executed the official bond required by statute. Relator, claiming the right to hold over during the term for which Hall had been elected executed and filed in the office of the county clerk January 12, 1931, an oath of office and an official bond and demanded the approval of the bond. January 7, 1931, respondents, assuming there was a vacancy in the office of county attorney, appointed John S. Van Auken to fill it, and he promptly executed and filed an oath of office and a sufficient official bond, which respondents ap-

proved, but they refused to approve the official bond tendered by relator, though it was sufficient as to form, amount and sureties, giving as the reason for their refusal that it contains the recital: "Fred J. Schroeder holds over for the term of four (4) years beginning January 8, 1931, and ending January 3, 1935, or until his successor is duly elected or appointed, and qualified." The writ allowed by the district court directed respondents to approve relator's bond. Was it their duty to do so?

The facts are stipulated to be as outlined in the foregoing statement. Beginning with the general election in 1928, the law provides for the election of a county attorney every four years. Comp. St. 1929, sec. 32-209. The following statutory provision applies to that officer:

"Every officer elected or appointed for a fixed term shall hold office until his successor is elected or appointed, and qualified." Comp. St. 1929, sec. 32-222.

The term of office of the county attorney is therefore four years and "until his successor is elected or appointed, and qualified." It is not limited to four years, if his successor is not elected or appointed, and qualified. The election and acceptance of a certificate of election do not make an elected candidate for county attorney an officer or qualify him as such. Qualification by taking an oath of office and executing an official bond is essential. The death of an elected candidate for county attorney who never entered upon the duties of the office or qualified therefor by taking an oath and giving a bond does not create a vacancy, where there is a duly qualified incumbent who qualifies anew and whose term of office does not expire "until his successor is elected or appointed, and qualified." In such a contingency the period for which the incumbent holds over is part of the term for which he was elected. The right of relator to hold over depended upon compliance with the following statutory terms:

"When it is ascertained that the incumbent of an office holds over by reason of the nonelection or nonappointment

of a successor, or of the neglect or refusal of the successor to qualify, he shall qualify anew within ten days from the time at which his successor, if elected, should have qualified." Comp. St. 1929, sec. 12-117.

Not having qualified, or entered upon the duties of the office, the death of Hall after he was elected and before the beginning of the regular term did not create a vacancy. Relator, within the time fixed by law, qualified anew for the purpose of holding over and thus prevented expiration of his term at the end of four years. There was therefore no vacancy for respondents to fill January 7, 1931, and it was their duty to approve the official bond tendered by relator. While respondents' appointee is not a party to this proceeding, and title to the office is not triable in mandamus, relator, in view of the stipulated facts and the controlling statutes, made a *prima facie* case for the allowance of the writ.

AFFIRMED.

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W. A. WELLS, APPELLEE, V. FARMERS STATE BANK OF OVERTON: CLARENCE G. BLISS, RECEIVER, APPELLANT: ARTHUR A. FOREMAN ET AL., APPELLEES.

FILED JUNE 29, 1931. No. 27747.

1. Courts: JURISDICTION: RECEIVERS. Where certain mortgaged property of an insolvent bank is already under the control and direction of the department of trade and commerce and a receiver has been appointed therefor, a court is without authority to appoint another receiver to manage such mortgaged property.
2. ———: ———: ———. In an action for the appointment of a receiver for certain mortgaged property on the ground that such property is in danger of being materially injured and is insufficient to discharge a mortgage debt, *held*, that the provisions of section 20-1081, Comp. St. 1929, pertaining thereto, are inapplicable where such property with all other assets of an insolvent bank were at the time in the hands of another receiver duly appointed to take charge of its affairs and such bank was then under the control and direction of the department of trade and commerce.

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

*C. M. Skiles, I. D. Beynon* and *Frank M. Johnson,* for appellant.

*James E. Bednar, Miller & Blackledge* and *Stewart & Stewart, contra.*

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

DEAN, J.

October 16, 1919, Arthur A. Foreman and Dora M. Foreman, his wife, executed their promissory note in the principal sum of $20,000, payable on demand to the order of W. A. Wells, the plaintiff herein, and, as security for the money so loaned, the Foremans made and executed their certain mortgage deed upon the following described property, namely, the east half of the northeast quarter, and the southeast quarter of section 35, township 9, range 20 west of the sixth principal meridian, in Dawson county. When the note was executed, Foreman was one of the principal stockholders of the Farmers State Bank of Overton and also its president. While the note was executed in the name of the Foremans, the transaction was, in fact, a loan to the bank for its convenience. Subsequent to the execution of the note, namely, on December 16, 1929, the bank was declared insolvent and was placed under the direction of the department of trade and commerce and Clarence G. Bliss, as secretary of the department, was appointed receiver of the bank.

Wells began this action against the Foremans and also Clarence G. Bliss, as receiver of the bank, in the district court for Dawson county, to recover the sum due on the $20,000 note, and, pending the sale of the land, Wells prayed that a receiver be appointed by the court to take charge of the mortgaged premises to prevent such property from being materially wasted. Thereupon, pursuant

to the prayer of Wells, the court appointed W. Rollin Smith as receiver of the property. Bliss, however, as receiver of the failed bank, has appealed on the ground that the court was without authority to make such appointment and that the mortgaged property is under the control of the department of trade and commerce.

In respect of the duties imposed on the department of trade and commerce, where a failed bank is involved, section 8-181, Comp. St. 1929, imposes the following provision:

"Such department may forthwith take possession of the property and business of such bank and shall thereafter conduct the affairs of said bank, and shall retain possession of all money, rights, credits, assets and property of every description belonging to such bank, as against any means or final process issued by any court against such bank or corporation whose property has been taken."

The plaintiff, however, relies on section 20-1081, Comp. St. 1929, which contains this provision:

"A receiver may be appointed * * * in an action for the foreclosure of a mortgage when the mortgaged property is in danger of being lost, removed or materially injured, or is probably insufficient to discharge the mortgage debt."

Under the provisions of section 8-181, above cited, the department of trade and commerce has under its jurisdiction all of the property of every description belonging to or connected with the insolvent bank in question. And where the receiver has been appointed by the court and the bank has been placed under the direction of the department of trade and commerce some months before the application of the plaintiff for a receiver, it appears to us that the court was without authority to appoint another person as a second receiver.

In *People v. Central City Bank,* 53 Barb. (N. Y.) 412, the court said:

"Where two receivers are appointed, of the same bank,

under distinct and independent proceedings, and by the terms of their respective appointments each has entire control of all the assets of the bank, they cannot with propriety both act; the title of the one is necessarily exclusive of that of the other, and the question of priority must be determined as a legal right."

And in *Worth v. Piedmont Bank*, 121 N. Car. 343, where proceedings for a receiver were begun in two different courts and a different receiver was appointed in each case, the court held that the priority as between the receivers was to be determined by the respective dates of their appointment. And while the present case is not the outgrowth of an action resulting from the appointment of two receivers for the same bank, two receivers, under the facts before us herein, will of necessity be connected with the disposition of the same property. In an action for the appointment of a receiver for certain mortgaged property on the ground that such property is in danger of being materially injured and is insufficient to discharge a mortgage debt, the provisions of section 20-1081, Comp. St. 1929, are inapplicable where such property with all other assets of an insolvent bank were then in the hands of another receiver duly appointed to take charge of its affairs.

It is suggested that there may be doubt as to whether Clarence G. Bliss, "as the statutory receiver of insolvent banks in Nebraska, can properly serve in the dual capacity of being also receiver in a mortgage foreclosure involving land to which he as receiver of such failed bank holds the title." But it is, of course, elementary that receivers are not appointed primarily for the benefit of officers and stockholders of a corporation but for the benefit of creditors as well. *State v. Des Moines Union Stock Yards Co.*, 197 Ia. 987. "The receiver stands indifferent, as between the parties, though appointed on the application of one of them, and must prudently preserve and protect the property intrusted to him as an officer of the court."

*First Nat. Bank v. White Ash Coal Co.*, 188 Ia. 1227.

In view of the facts before us, we conclude that the judgment herein must be and it hereby is reversed, with directions that a judgment be entered consistent with the views herein expressed.

REVERSED.

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W. A. WELLS, APPELLEE, V. FARMERS STATE BANK OF OVERTON: CLARENCE G. BLISS, RECEIVER, APPELLANT: ARTHUR A. FOREMAN ET AL., APPELLEES.

FILED JUNE 29, 1931. No. 27748.

For syllabus see *Wells v. Farmers State Bank*, *ante* p. 462, decided herewith.

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

*C. M. Skiles, I. D. Beynon* and *Frank M. Johnson*, for appellant.

*James E. Bednar* and *Miller & Blackledge, contra.*

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

DEAN, J.

This action is a companion case to that decided herewith, entitled *Wells v. Farmers State Bank*, *ante*, p. 462. The facts and the law applicable thereto are identical with the above case except for the description of certain property, namely, the northwest quarter of section 22, township 9, north, range 20 west of the sixth principal meridian, in Dawson county.

For the reasons set forth in the above entitled case, the judgment herein must be and it hereby is

REVERSED.

## THEODORE GRIESS V. STATE OF NEBRASKA.

FILED JUNE 29, 1931. No. 27805.

1. Criminal Law: INSTRUCTIONS: ADMONITION TO JURY. By way of further instructions, the trial court may properly admonish the jury as to the importance of agreeing upon a verdict; urge them to make every effort to harmonize their views, and may call their attention to the time and expense involved in the trial and the time and expense which a new trial would entail.
2. ———: PERMITTING JURY TO SEPARATE. Permitting jury in criminal cause to separate after verdict reached and before it is received by the court is, at most, a mere irregularity.
3. ———: IRREGULARITIES. A mere irregularity in criminal procedure, not prejudicial to substantial rights of accused, constitutes no ground for reversal.

ERROR to the district court for Clay county: LEWIS H. BLACKLEDGE, JUDGE. *Affirmed.*

*Waring & Waring* and *C. L. Stewart*, for plaintiff in error.

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

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

GOOD, J.

Theodore Griess, hereinafter called defendant, was convicted of the offense of embezzlement and sentenced to imprisonment in the state penitentiary for a term of not less than 20 months, nor more than 24 months. He presents the record of his conviction to this court for review.

This is the second appearance of this cause in this court. A former conviction of defendant was reversed. The opinion is reported in 117 Neb. 719.

It is charged that the court erred in giving certain instructions and in permitting the jury to separate after arriving at a verdict and before it was received by the court.

Defendant asserts that instruction No. 4, given by the court on its own motion, is prejudicially erroneous and is, in substance, similar to an instruction condemned in our former opinion. The contention is not well founded. In our former opinion an instruction was criticized because it was argumentative and withdrew from the jury's consideration material parts of the evidence, including the presumption of innocence. The instruction now under consideration is free from the vices for which the former one was condemned. It is neither argumentative, nor does it withdraw from the consideration of the jury any part of the evidence, or the presumption of innocence to which defendant is entitled.

It appears that at 3:20 p. m. of December 3, 1930, the case was submitted to the jury. At 9:45 a. m., on the following day, December 4, the jury not having reached a verdict, the court, upon its own motion, had them brought into court, and, in the presence of defendant and his counsel, gave an instruction which advised the jury that the case had been carefully tried at considerable expense to the litigants and was submitted to the jury for decision and verdict and not disagreement. It admonished each juror to listen to the arguments of the other jurors with a willingness to be convinced, and, if they differed in their views, such differences in opinion should cause them to examine the evidence more closely and reexamine the grounds of their opinions. It further informed the jury that the main thing to be kept in view was the truth as it appeared in the evidence, examined in the light of the instructions of the court; that the court did not require any juror, in order to reach an agreement, to surrender his honest convictions, based upon consideration of the evidence and the law; that no juror should agree to a verdict which he could not conscientiously approve, but urged upon them the advisability of agreement and the importance of being careful, in the consideration of the case, to avoid mere partisanship, and to give fair consideration to

the conclusions and opinions of fellow jurors. The jury again retired and did not reach a verdict until many hours thereafter. It is urged that this instruction was prejudicial to the defendant, and that it coerced the jury into reaching a verdict of guilty.

We are unable to agree with the contention. Somewhat similar instructions have been criticized by some courts, but, when the criticized instruction is examined, it appears that it went much further than the one in the instant case.

Defendant cites and relies on *People v. Sheldon,* 156 N. Y. 268. It is therein held that the court should never present a personal consideration to the jury which will bear upon their conclusions and that the failure of the jury to agree amounts, in effect, to a confession of incompetency on the part of the jury. No such inference may be drawn from the instruction complained of in this case.

Another case relied on by defendant is *State v. Bybee,* 17 Kan. 462, wherein it is said (p. 466): "Now while a court may properly call the attention of the jury to many matters which increase the desirability of agreement, such as the time already taken, the improbability of securing additional testimony, the general public benefit in a speedy close of a litigation, and, at least in cases where the matters at stake are of minor importance, the question of expense to the parties and the public, yet no juror should be influenced to a verdict by a fear of personal disgrace, or pecuniary injury. No juror should be induced to agree to a verdict by a fear that a failure to so agree would be regarded by the public as reflecting upon either his intelligence, or his integrity."

We find nothing in the instruction complained of that goes to the extent of the instruction in the Kansas case. We think the correct rule is stated in 16 C. J. 1091 in the following language: "Provided nothing is said to coerce an agreement, or to indicate what verdict should be rendered, or that may be considered as an appeal to the jury to decide the case in some way even at the expense of

honest convictions, the court may give the jury further instructions or advice calculated to assist them in coming to an agreement; may call their attention to the time taken in the trial and the great expense incurred therein, or which would be incurred by a retrial; may impress upon them the importance of the case and urge them strongly to come to some agreement; * * * and may direct them to retire for further consideration." In 16 C. J. 961, it is said: "The court properly may admonish the jury as to the propriety and importance of agreeing on a verdict, and may urge them to make every effort to harmonize their views and to agree on a verdict consistent with their consciences, care being taken not to suggest what verdict is proper, nor to give instructions having a tendency to coerce the jury into agreeing on a verdict, or into inviting them to disagree. So also the court may urge as reasons for agreeing on a verdict the time and expense involved in the trial, and the time and expense which a new trial will entail."

As we view the criticized instruction, it was not prejudicial to the defendant and was a proper admonition to the jury to perform their plain duty and reach an agreement from a consideration of all the evidence, if they could conscientiously so do. The giving of the instruction was proper and to be commended.

It appears that after this instruction was given the jury retired; at 1:45 in the afternoon of December 4 they were again called into court; informed that the court was about to recess until the forenoon of the 5th of December, and that, if before that time they arrived at a verdict, they should date and sign it and put it and the instructions of the court in an envelope, seal the same and deliver it into the personal possession of their foreman; that thereupon they would be allowed to separate until 10 o'clock, December 5, when they should return into court with their sealed verdict. It appears that some time before the appointed hour the jury did agree and followed the instruc-

tions of the court, sealing their verdict and the instructions, and placing them in the possession of their foreman, and that the jury returned into court at 10 o'clock, on December 5, when they were polled and the verdict received. It is urged that it was error to permit the jury to separate after reaching a verdict and before returning into court therewith.

The record does not disclose that defendant was in any manner prejudiced by the separation of the jury. There is no statute in this state requiring the jury to be kept together, in custody of an officer, after they have arrived at a verdict and until they return with it into court. At most it is a mere irregularity. It is a well-settled rule in this court that a mere irregularity in procedure in a criminal cause, which does not affect the substantial rights of the defendant, will not cause a reversal of the judgment.

The record appears to be free from prejudicial error. The judgment is

AFFIRMED.

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HARRY M. HIRSCHMAN, APPELLEE, V. THOMAS J. CASEY, APPELLANT.

FILED JULY 2, 1931. No. 27750.

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

*Malcolm Baldrige* and *Viggo Lyngby*, for appellant.

*Webb, Kelley & Lewis, contra.*

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

PER CURIAM.

The Blue Cab and Five and Ten Cent Cab Company was organized on or about January 29, 1923, with Harry

M. Hirschman, plaintiff, and Thomas J. Casey, defendant, as the sole directors and officers thereof. The plaintiff and the defendant each, at the time, owned 40 shares of stock in the company. On or about December 21, 1928, the defendant paid into the treasury $1,500, under a written agreement, and he received 15 shares of stock therefor in addition to the 40 shares already owned by him. As a part of the same transaction it was agreed that the plaintiff should have the option of purchasing 7½ of the 15 shares so issued to the defendant for the purpose of equalizing the shares of stock owned by each of the parties herein. The plaintiff alleges that on or about May 9, 1929, he elected to exercise the option of purchasing the 7½ shares of the 15 shares of stock issued to Casey, and that he duly tendered $750 in payment thereof, but that defendant refused to accept the offer and refused to sell and transfer to the plaintiff the 7½ shares of stock. The trial court held that the plaintiff is entitled to the specific performance of the contract in suit and the court also held that the 7½ shares of stock are not procurable in the open market. The defendant has appealed.

Under the terms of the agreement, the option to purchase the 7½ shares of stock was to expire one year from the date thereof. The contract, as noted above, is dated December 21, 1928, and the plaintiff's offer to purchase the stock was made on or about May 9, 1929, within the time specified in the contract. The defendant contends that the contract is without consideration, but we think there was sufficient consideration to validate the option agreement. It is provided therein that, in consideration of the defendant purchasing the 15 shares of stock, he was to have full power to conduct the business as president and general manager, until otherwise agreed. Nor do we find merit in the contention that the minds of the parties did not meet on the essential terms of the contract and the conditions outlined therein. The evidence fairly discloses that the terms were mutually agreed upon and un-

derstood by the parties thereto and the defendant therefore should comply with the terms of the agreement on his part to be performed.

The judgment is affirmed on condition that the plaintiff, within 30 days of this date, pay into this court for the use of the defendant the sum of $750, together with interest thereon at the rate of 7 per cent. from the date of the decree in the trial court.

AFFIRMED ON CONDITION.

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HORATIO B. SAUNDERS ET AL., APPELLEES, V. STATE SAVINGS & LOAN ASSOCIATION, APPELLANT.

FILED JULY 2, 1931. No. 27815.

1. **Building and Loan Associations.** Mutuality is the basic and essential principle of a savings and loan association.
2. ———: LIABILITIES OF MEMBERS. Members of a savings and loan association, whether borrowers or nonborrowers, must share alike in its earnings and bear alike its losses.
3. ———: INSOLVENCY: STATUS OF BORROWING MEMBERS. Upon liquidation of an insolvent savings and loan association, a borrowing member is not entitled to set off what he has paid against the loan he has received, but is required to repay what he has actually received, with interest thereon until paid.
4. ———: ———: DISTRIBUTION OF ASSETS. When the assets of an insolvent savings and loan association are reduced to money and its debts are paid, all members are entitled to a *pro rata* dividend upon their respective shares.

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

*Frank H. Woodland,* for appellant.

*King & Haggart, contra.*

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

GOSS, C. J.

This suit in equity involves a controversy between borrowing stockholders and a savings and loan association as to whether interest shall continue to run after its stated date of maturity on a note given by the borrowers. From a decree against it, the association appeals.

Horatio B. Saunders and Belle Saunders, his wife, were stockholders in State Savings & Loan Association. No formal or other certificate of stock than their pass book is shown by the evidence, but there is no dispute about the balance thereon May 25, 1929, which is the date of the note given by the borrowers. In its answer the defendant admits that on said date "the plaintiffs were the owners of stock in the defendant association of the face value of $4,592.47, represented by pass book No. 2062." Shares were $100 each. The above value had resulted as a new entry in the pass book as of January 1, 1929, by reason of a 5 per cent. annual dividend credited each six months on the balance six months earlier. On this pass book there had been no deposits for over five years and only one withdrawal, of $100, in that time.

April 9, 1929, Mrs. Saunders, for plaintiffs, wrote defendant they were desirous of withdrawing $2,000, asking how much "interest" they would lose if they took it May 25, and how much if they left it until July 1, 1929. In an undated letter, probably written the next day, the defendant wrote plaintiffs, inclosing a withdrawal notice to sign, explaining that amounts withdrawn between dividend dates do not draw dividends for that period, and that the best way to withdraw money from such an association is to give a 30 day notice on January 1 or July 1. The letter then continued:

"If the need is urgent, and a customer cannot wait until the next dividend paying date, we have what we call stock loans. These loans are made on pass book security. On your account, for instance, if you wished to withdraw $2,000 on May 25th you would send in your pass book as

security. We would send you a note and you would pay, on this amount, to August 1st, $21.66. We would pay you your full dividend July 1st, or $50 on this amount. Your dividend would be credited to your account, in full, July 1st. On August 1st we would charge off $2,021.66 and send you your pass book."

Under date of April 15, 1929, plaintiffs wrote defendant, stating they had to pay $2,000 at Eau Claire, Wisconsin, the first of June. While they might be able to sell some property in Polk, Nebraska, their home town, yet in case they cannot sell, they will have to get the money from defendant; so the letter requests a note be forwarded, dated May 25, 1929, to run until August 1, 1929. The letter, which was written by Mrs. Saunders, further says: "I will * * * just simply send you the note properly signed with my pass book on May 25th and then you send me the money retaining the pass book until the first of Aug. when you send me the book with the proper reduction and also my note."

Also, under same date, April 15, 1929, defendant wrote plaintiff, Mrs. Saunders: "In accordance with your request we are inclosing a stock loan note dated May 25th, and you may return it to us, together with your pass book, so that it will reach us on this date, and we will send you your check for $2,000. Please tell us just where you wish it sent."

On May 23, 1929, Mrs. Saunders wrote defendant, inclosing the pass book and the $2,000 note of plaintiffs, with a request that the money be sent to J. W. Morrill, 426 Summit Ave., Eau Claire, Wisconsin, so as to reach there not later than May 29. The note was for $2,000, dated May 25, 1929, due August 1, 1929, with interest at $10 per month and was signed by the plaintiffs. It contained this collateral assignment: "I hereby assign and transfer to said association my 25 shares of stock, represented by Certificate No. 2062 in said association, as collateral security for the payment of this note. In case of failure

to pay the same at maturity, I authorize said association, or its assigns, to withdraw and pay the amount on this note."

The defendant, on May 25, 1929, wrote Mrs. Saunders they were mailing a $2,000 check to Wisconsin as instructed, and further said: "We will hold your pass book together with your note in our files until further notice from you, or until August 1st—if we do not hear from you."

On May 28, 1929, the defendant's board of directors, on the recommendation of an examiner of the department of trade and commerce, ceased to accept deposits and, on May 31, placed the association in the hands of the department for liquidation. Comp. St. 1929, sec. 8-319. The evidence shows it was insolvent. On June 5, 1929, the stockholders determined upon voluntary liquidation under the statute and the association has ever since been in the hands of the board of directors as liquidating agents. Comp. St. 1929, sec. 8-323.

Payment on the $2,000 check had been stopped, but later either that check was paid or a new check for that amount was issued and paid. After August 1, 1929, plaintiffs demanded a return of the note and pass book, but it was refused. On August 20, 1929, defendant wrote the plaintiffs the reason for not returning the pass book was that the association was in process of liquidation and the board of directors had not yet given authority to charge the note against the account. Such authority was not given and this suit was begun March 22, 1930.

At the time of the introduction of the note in evidence at the trial, November 21, 1930, defendant had credited on the note three liquidation payments, attributable to the interests of plaintiffs in the association as shown by the pass book. These payments as to amounts, dates and application, are as follows: First payment, total $459.24, applied to pay interest to September 26, 1929, $40.33, to principal $418.91; second payment, $229.62, applied to pay

interest to January 15, 1930, $29.19, to principal $200.43; third payment, $459.24, applied to pay interest to June 20, 1930, $35.65, to principal $423.59. These liquidation payments or dividends represent a total of 25 per cent. There was evidence to the effect that, depending on the real estate market remaining as it is now for the next four or five years, voluntary liquidation may result in total payments of 80 per cent. of their principal to the stockholders.

Plaintiffs in their petition allege the facts substantially as we have stated them, plead that the defendant continues to charge interest on the note from its maturity, whereas, under the contract, as they interpret it, the note should have been charged off as paid on August 1, 1929, as an item of $2,021.66 against the total of the $4,592.47, leaving $2,570.81 on which liquidation payments should be and should have been computed and forthwith paid to plaintiffs instead of being applied on the note. They prayed for an accounting and for such a decree.

The defendant states in its brief: "There is no issue as to the facts in this case. The controversy grows out of the proper interpretation of the facts as well as the questions of law involved." In its view the plaintiffs chose the option to borrow on the security of their stock rather than to give the legal withdrawal notice; and that the defendant has, in the circumstances, no right to charge the indebtedness against the stock, but was required, under the law, to demand payment of the note, and, in default thereof, to apply the liquidating payments on the note, without abatement of interest until the note is fully paid.

The district court ordered that the note should not bear interest after August 1, 1929; that it should be held by defendant at $2,021.66, with plaintiffs' total stock at its face value of $4,592.47, until the total dividends calculated upon the latter sum should pay the note; that then the canceled note, together with the plaintiffs' pass book, should be returned to them, and any remaining dividends

should be the property of the plaintiffs and should be paid to them. This order was based upon the finding by the court that, at the time of going into voluntary liquidation, defendant was under a valid contract to use on August 1 so much of said stock as was necessary to discharge said note, and, by undertaking such liquidation, has postponed the payment of it but has not acquired any right to additional interest on the note.

The plaintiffs have cross-appealed, assigning that the district court erred in allowing defendant to hold the note until application of liquidating payments or dividends discharged it as it stood as of August 1, 1929, and in not ordering all liquidating payments on the $2,570.81 balance to be paid to plaintiffs. Defendant appealed because the court failed to enter judgment on its cross-petition for the amount due on the note.

The situation is new in this jurisdiction. The cause must be decided upon general principles relating to the dealings between the parties and to their rights and duties to other shareholders in the association. For that reason we have stated the facts rather fully.

The basic and essential principle of a savings and loan association is mutuality. 9 C. J. 921, and cases cited from many jurisdictions. *Anselme v. American Savings & Loan Ass'n,* 63 Neb. 525, and cases cited. We are aware that this opinion was superseded on rehearing (66 Neb. 520), but the inherent value of this particular rule, and of the cases cited on this point, remains. Members, whether borrowers or nonborrowers, have a mutual interest in its affairs, and, sharing alike in its earnings, must share alike in its losses. *Eversmann v. Schmitt,* 53 Ohio St. 174. It being the duty of each member to bear his share of losses, "therefore the borrowing member is not entitled to set off all that he has paid against the loan or advancement which he has received." *Knutson v. Northwestern Loan & Building Ass'n,* 67 Minn. 201. Upon insolvency "nothing remains but to wind it up in such manner as to

do equity to creditors and between the members themselves. A borrowing stockholder, in settling with an insolvent building association, should be required to repay what he actually received, with interest. He will then be entitled, after the debts of the corporation are paid, to a *pro rata* dividend with the nonborrowing stockholder for what he has paid upon his stock." *Strohen v. Franklin Saving Fund & Loan Ass'n,* 115 Pa. St. 273.

Analyzing the facts with the principles of law in mind, it seems clear that, when the parties had their correspondence in April and May, 1929, both were considering the association as if it would still be a going concern in August of that year. The information conveyed to plaintiffs by the association, in the letter of April 10, heretofore quoted, announced the conventional procedure to be followed if the stockholder desired to withdraw money and also the procedure to be followed if the stockholder desired to borrow money so as to avoid the entire loss of dividends for the period between January and July. The correspondence amounted rather to the statement of a practice than to the making of a contract. The association, or its officer or employee, could not guarantee in April that it would be a going concern in August. The plaintiffs were charged with notice of the law and knew or should have known that, whether they adopted the withdrawal method or the borrowing method, the final adjustment depended upon the association being a going concern, in the one instance, when their 30 day withdrawal notice matured, and in the other, when their note as borrowers matured. They waited from April until, as events proved, it would have been too late to give notice and to withdraw the desired portion of their money, and then adopted the other plan and borrowed it. We are of the opinion that no contract was made by the correspondence, or otherwise, binding the association to offset an equal amount of plaintiffs' stock against the note if the association should be insolvent and under statutory liquidation

when the note matured. When that event occurred, the association then had not the power of a going concern to follow the conventional method of permitting these borrowing stockholders to pay their note by an equal portion of the face value of their shares; and the duty of the liquidators to all stockholders, borrowers and nonborrowers alike, prevented them from doing so.

The borrowers secured $2,000 from the association. They agreed in their note to repay it with interest. The unfortunate insolvency of the association and its liquidation intervened to prevent the entire payment of the note out of their shares in the usual way so as to do away with further interest on the note. But the law prevents the cancelation of the interest without actual payment of the principal. The trial court was in error in ordering its cancelation and in refusing to enter a judgment in favor of the association for the balance due it as prayed for in the defendant's cross-petition. The trial court did not err in refusing to grant the prayer of the plaintiffs' petition assigned as error in their cross-appeal.

For the reasons stated, the judgment of the district court is reversed, with directions to take a further accounting, if necessary, to show additional liquidation dividends or payments on plaintiffs' shares, and to enter a judgment for defendant against plaintiffs for the unpaid balance on the note, if any, with interest; and to provide that any further dividends on their shares held as collateral to the note may be applied on such judgment until it is thus or otherwise paid.

REVERSED.

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BESS W. DUTCH ET AL., APPELLANTS, V. DOUGLAS B. WELPTON ET AL., TRUSTEES, APPELLEES.

FILED JULY 2, 1931. No. 27746.

1. **Judgment as Bar.** "A judgment acts as an absolute bar to a subsequent action based upon the same contentions, not only

as to every matter offered to sustain or defeat said contentions, but also as to any other admissible matter which might have been offered for that purpose." *School District D v. School District* No. 80, 112 Neb. 867.

2. TRUSTS: SUIT FOR ACCOUNTING: PARTIES. Where certain minors have a contingent interest in a decedent's estate then in process of administration, the executor of such estate is the proper person to maintain an action for an accounting.

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

*Beeler, Crosby & Baskins, C. J. Thurston* and *L. A. Devoe*, for appellants.

*Halligan, Beatty & Halligan* and *C. E. Herring, contra.*

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

DEAN, J.

This action was begun in the district court for Douglas county by Bess W. Dutch and Thomas I. Dutch, as next friends of Hester Mary Dutch, Ralph Dutch, and Betty Jane Dutch, minors, to require the defendants, Douglas B. Welpton and the Equitable Trust Company of Omaha, as trustees, to account for certain property of Hester Welpton, deceased, and the Welpton Investment Company of Ogalalla. The defendants filed a plea in bar wherein they allege that the matters pleaded in the petition were adjudicated in an action in the district court for Douglas county, and that an appeal is pending in this court in respect of the estate of Hester Welpton, deceased. The defendants also allege that the issues presented in the two actions are identical in character and that the plaintiffs should be precluded from now prosecuting the present action. The plaintiffs filed a demurrer to the plea in bar wherein they allege that the defendants failed to state facts sufficient to constitute a defense. The court construed the plea in bar as a demurrer. Thereupon the

plea in bar was sustained and the action was dismissed. The plaintiffs have appealed.

The record discloses that, on March 3, 1922, a written agreement was entered into by and between Hester Welpton and the Welpton Investment Company with Douglas B. Welpton and the Equitable Trust Company to permit the latter, as trustee, to convert the estate into certain securities to the end that obligations then outstanding against the Welpton Investment Company and Hester Welpton should be discharged. Pursuant to the terms of the agreement it was provided that the trusteeship should be continued until the obligations had been either fully discharged or the estate converted into securities, the income whereof was intended to take care of the payment of the obligations. The plaintiffs contend that the terms of the contract have been fully completed and that an accounting should be had in the premises.

Bess W. Dutch now contends that she is entitled to one-half of the property under the trust agreement, and she has contested the Hester Welpton will. Plaintiffs contend that, in the event they are unsuccessful in the will contest, they have a contingent interest in the remainder of the income of the Welpton estate.

The same question is involved here that was presented in the former action entitled *Dutch v. Welpton*, 120 Neb. 852, wherein Bess W. Dutch sought to compel the defendants to make an accounting. In the former action the trial court decreed that "the trust instrument executed by Hester Welpton, deceased, and the conveyances executed in carrying it into effect conveyed no present interest to said plaintiff but were intended as a security for then existing indebtedness of said deceased, she retained her equity of redemption in the property, and the provision for an accounting to plaintiff in the event of said Hester's death was an expression of testamentary intention for which no consideration was received, and which was superseded by the will made by her within a few weeks

thereafter." The court dismissed the action, and the judgment was affirmed by us. *Dutch v. Welpton,* 120 Neb. 852. The rule stated in *School District D v. School District* No. 80, 112 Neb. 867, is applicable. We there held:

"A judgment acts as an absolute bar to a subsequent action based upon the same contentions, not only as to every matter offered to sustain or defeat said contentions, but also as to any other admissible matter which might have been offered for that purpose."

In respect of the minors represented herein by Thomas I. Dutch, where such minors have a contingent interest in the estate of the decedent, now in the process of administration, the executor is the proper person to maintain an action for an accounting. And where an executor has not refused to compel an accounting by the trustees of the estate of a decedent, which is then in the course of probate proceedings, contingent heirs of such estate cannot maintain such an action. *Cox v. Yeazel,* 49 Neb. 343; *Prusa v. Everett,* 78 Neb. 250. In 2 Woerner, Law of Administration, sec. 322, this observation appears: "As a rule, only the executor or administrator can maintain actions on behalf of the estate or make distribution."

"The executor or administrator is the legal owner, for the time being, of the personal property of which decedent died possessed, and his title and authority extends so completely to all such property as to exclude for the time being creditors, legatees, and all others beneficially interested in the estate. The latter persons cannot follow such property specifically into the hands of others, much less dispose of it; but the executor or administrator is the only true representative thereof whom the law will regard." 23 C. J. 1172.

Finding no reversible error, the judgment is

AFFIRMED.

CLARENCE G. BLISS, RECEIVER, APPELLANT, V. WILLIAM F. MASON ET AL., APPELLEES.

FILED JULY 2, 1931. No. 27803.

1. **Banks and Banking**: DEPOSIT OF COUNTY FUNDS: PLEDGE OF ASSETS. It is not contrary to public policy in Nebraska for a state bank, designated as a depository of county funds, to pledge sufficient of its assets to reasonably secure repayment of county deposits in such depository bank.
2. ———: ———: ———. The specification in section 77-2506, Comp. St. 1929, of certain assets which a bank may pledge to secure repayment of deposits of public funds was not intended as a limitation on the pledging power of the bank, but for the greater security of the public funds.
3. ———: ———: ———: INDEMNITY OF SURETIES. A state bank, designated as a county depository, may lawfully pledge sufficient of its assets to protect from loss sureties on its depository bond to the county.
4. ——: ———: ———: ———. Section 77-2601, Comp. St. 1929, authorizes a state bank to contract for indemnity of sureties on a depository bond given by such bank to secure deposit of public funds.

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

*W. H. Line, Lamont L. Stephens* and *C. M. Skiles,* for appellant.

*W. A. Prince* and *R. H. Mathew, contra.*

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

GOOD, J.

This is an action for conversion of certain bonds. Defendants denied conversion. A trial to the court resulted in a judgment for defendants. Plaintiff has appealed.

The facts are not in dispute. Defendants signed, as sureties, a county depository bond for the Bank of Ashton, running to Sherman county. At the time this bond was executed it was agreed that the bank would indemnify the

sureties against loss by the deposit of bonds or other assets of the bank. Pursuant to this agreement, the bonds, alleged to have been converted, were pledged to protect defendants from loss by reason of their liability on the depository bond. Later the bank failed, and at the time the county had on deposit in the bank a considerable sum which the defendants caused to be repaid to the county. Thereafter the bonds in question were sold for their full value to reimburse defendants. From the sale defendants realized a sum slightly in excess of the amount paid to the county. The defendants offered to account for and pay over to the plaintiff such excess.

The vital question presented by the appeal is: May a state bank, duly designated as a depository of county funds, make a valid pledge of any of its assets to indemnify against loss sureties on a county depository bond?

Plaintiff contends that the pledge of securities to defendants to indemnify them against loss was an act *ultra vires*, unlawful, and against public policy; that, unless given authority specifically or by necessary implication, a bank may not pledge its assets to secure a deposit of public funds; that, when authority is given by statute to pledge specified assets, it may only pledge such as the statute authorizes, and that the pledge of another kind of assets is unlawful; and further contends that there is no Nebraska statute permitting a state bank to pledge its assets to secure county deposits, or to indemnify sureties on a depository bond.

Plaintiff cites and relies upon a number of decisions, made by the courts of other states, all of which we have examined. Several of them are based upon the construction of a particular statute of the state in which the decision was made, and such statutes are different from those in Nebraska, and are, therefore, not in point. A few of these authorities, however, support plaintiff's contention. The great majority of the courts, and, we think, the great weight of authority, holds to a contrary view, name-

ly, that a state bank, designated as a depository, may, in the absence of a statute prohibiting it, pledge its assets to secure the deposit of public funds. Among the cases so holding are: *Williams v. Hall*, 30 Ariz. 581; *Williams v. Earhart*, 34 Ariz. 565; *McFerson v. National Surety Co.*, 72 Colo. 482; *First American Bank & Trust Co. v. Town of Palm Beach*, 96 Fla. 247; *Richards v. Osceola Bank*, 79 Ia. 707; *Andrew v. Odebolt Savings Bank*, 203 Ia. 1335; *United States Fidelty & Guaranty Co. v. Village of Bassfield*, 148 Miss. 109; *Consolidated School District v. Citizens Savings Bank*, 223 Mo. App. 940; *Ainsworth v. Kruger*, 80 Mont. 468; *Page Trust Co. v. Rose*, 192 N. Car. 673; *Richmond County v. Page Trust Co.*, 195 N. Car. 545; *City of Portland v. State Bank of Portland*, 107 Or. 267; *Cameron v. Christy*, 286 Pa. St. 405; *Wylie v. Commercial & Farmers Bank*, 63 S. Car. 406; *Grigsby v. People's Bank*, 158 Tenn. 182; *Pixton v. Perry*, 72 Utah, 129.

We cannot agree with the contention of the plaintiff that the public policy of Nebraska forbids the pledging by a state bank of sufficient of its assets to secure deposits of public funds. It has long been the policy of this state, announced by the legislature, that the deposit of public funds in banks should be protected by a surety bond, a personal bond, or by the deposit of certain specified assets of the bank. Among the assets so specified are United States bonds, state bonds, county, municipal and school district bonds.

While the securities pledged in the instant case were, in part, United States bonds, there were other bonds issued by a private corporation and by a foreign government. Plaintiff contends that, so far as the latter bonds are concerned, it was not a lawful act to pledge them as security for a deposit of county funds. The contention is not persuasive. The statute fixing the character of bonds that may be deposited includes the choicest assets of a banking institution. It is difficult to perceive why

a bank could lawfully pledge such assets and could not pledge those less desirable. The reason for the statutory specification of pledgeable assets was for the greater protection of the public fund, and not as a limitation upon the power of the bank.

It is contended, however, that, since a personal depository bond was given, there is no authority for pledging any of the assets of the bank to the sureties on such bond. If it is lawful to pledge such assets directly to the county, by what reason can it be said that it is unlawful to pledge such assets to the sureties who furnish a personal bond? No reason, in the absence of a statute prohibiting it, is apparent.

Moreover, section 77-2601, Comp. St. 1929, provides: "In all cases in which public moneys, or other funds belonging to the state or to any county, school district, city or municipality thereof, have been deposited or loaned to any person or persons, corporations, bank, copartnership or other firm or association of persons, it shall be lawful for the officer or officers making such deposit or loan, or his or their successors in office, to maintain an action or actions for the recovery of such moneys deposited or loaned, and all contracts for the security or payment of any such moneys or public funds made shall be held to be good and lawful contracts binding on all parties thereto." This statute would seem to clearly make valid the contract whereby the Bank of Ashton pledged certain of its assets to the defendants to induce them to become sureties on the depository bond.

Other propositions are argued, but we deem it unnecessary to consider them, since the ones already discussed are sufficient to dispose of the appeal in the instant case. We do not wish it to be understood, however, that this court is deciding that a state bank may pledge its assets for the securing of any deposit other than of public funds.

The judgment of the district court is right and is

AFFIRMED.

PETER JENSEN, TRUSTEE, APPELLANT, V. A. BALLMER, APPELLEE.

FILED JULY 2, 1931. No. 27951.

1. Trusts: EXPRESS TRUST: CONVEYANCE OF PROPERTY OF BANK TO TRUSTEE. Where property is conveyed to a trustee, under an agreement between the depositors and the reorganizers of a state bank, as provided by section 8-181, Comp. St. 1929, for the purpose of liquidation and distribution to depositors and creditors, there is created an express trust.
2. ———: POWERS OF TRUSTEE. In such a case, the trustee is authorized to sell said assets, in the manner provided by the contract.
3. Conversion: EQUITABLE CONVERSION. Where the provisions of a contract executed under the provisions of section 8-181, Comp. St. 1929, between the depositors and the bank or reorganizers thereof, are of such a character as to amount to a positive direction to convert the real estate into money, an equitable conversion of the real estate into money is accomplished by the contract.

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

*Frank M. Johnson, John J. Ledwith* and *I. D. Beynon,* for appellant.

*Cook & Cook, contra.*

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

DAY, J.

This is an action brought by Peter Jensen, as trustee for the depositors of the Farmers State Bank of Cozad, for the purpose of enforcing specific performance of a contract between him as such trustee and Ballmer for the sale of certain real estate which is being held by the said Jensen in trust for the depositors of the bank. The trial court denied a decree of specific performance.

The defendant alleges in his answer that the plaintiff refused to furnish to the defendant a good and sufficient abstract of title in the real estate involved, as provided

by the terms of the contract. It is further alleged in the answer that the real estate was formerly owned by the Farmers State Bank of Cozad and that said bank was reorganized and reopened under the provisions of section 8-181, Comp. St. 1929; that the said real estate was a part of the slow and doubtful assets of the said bank which was purchased by the depositors and unsecured creditors of said bank by virtue of an agreement entered into by the depositors and unsecured creditors and the reorganizers of the bank, in consideration for which the depositors gave up 50 per cent. of their deposits.

The question is: Has the appellant tendered to the appellee a good and sufficient abstract of title showing good title of record to the premises and a good and sufficient warranty deed conveying the premises to appellee in fee simple, free from incumbrances, as provided by the contract? It is conceded that the Farmers State Bank had a good title of record to the premises involved at the time when the bank was taken over and closed by the department of trade and commerce. All objection to the title grows out of matters subsequent to the closing of said bank. After the bank was closed an effort was made to reorganize and reopen it under the provisions of section 8-181, Comp. St. 1929. In pursuance of this purpose, an agreement was signed by depositors representing 87 per cent. of the deposits, which contract was approved by the department of trade and commerce. It thereupon became binding under the statute upon all of the depositors, whether they had signed the same or not. The contract provided that the deposits should be reduced 50 per cent. and that the remaining 50 per cent. of the deposits should in effect purchase certain slow and doubtful assets of said bank, which were to be conveyed to the trustee, who should convert the same to cash and from said proceeds pay dividends to the various depositors.

The trust was created in this case by the agreement of the depositors and creditors to accept the slow and doubt-

ful assets of said bank in consideration of 50 per cent. of their deposits. It was agreed that these assets should be held and liquidated by a trustee for the benefit of the depositors. This bound those who signed the agreement, and since that number was equal to 87 per cent. of the deposits, it was by operation of law binding upon the remainder the same as though they had voluntarily entered into it. Section 8-181, Comp. St. 1929, under which the reorganization of this bank was accomplished, is as follows:

"If the secretary of the department of trade and commerce with a view of restoring the solvency of any bank of which the department has taken charge pursuant to law shall approve a reorganization plan entered into between depositors and unsecured creditors representing eighty-five per cent. or more of the total amount of deposits and unsecured claims of such bank on one hand and the bank or reorganizers thereof on the other, then and in such case all other depositors and unsecured creditors shall be held to be subject to such agreement to the same extent and with the same effect as if they had joined in the execution thereof, and their claims shall be treated in all respects as if they had joined in the execution of such articles of reorganization, in the event of restoration of such bank to solvency and the reopening of the same for business. Any county, city, village, town or school district, through its governing board, and the state, through the governor, may enter such agreement."

The agreement entered into by the depositors and the reorganizers of the bank, and approved by the secretary of the department of trade and commerce under the above quoted statute, provided that certain slow and doubtful assets of said bank should be, in consideration of 50 per cent. of deposits, "transferred, assigned and conveyed by said bank to a trustee selected and designated by the depositors, *to be held and liquidated by* said trustee, under the supervision and approval of the depositors' board of

control, for the benefit of the undersigned and other depositors and creditors participating in the aforesaid purchase and distributed to them in proportion to their respective interests." (Italics ours.) Where property is conveyed to a trustee, under an agreement between the depositors and the reorganizers of a state bank, as provided by section 8-181, Comp. St. 1929, for the purpose of liquidation and distribution to depositors and creditors, there is created an express trust. In such a case, the trustee is authorized to sell said assets, in the manner provided by the contract.

We think that the doctrine of equitable conversion is applicable to this case, since there was a conveyance to the trustee by agreement, with authority to sell and distribute the proceeds. In *State v. American Baptist Home Mission Society,* 96 W. Va. 447, it was said: "It will be noted that the deed from the Latin-American Improvement Association to Stump, trustee, directed that the land be sold immediately, and that the proceeds be applied as provided therein. There were no conditions imposed on the direction to sell. The duty of the trustee to sell was imperative; he was left with no discretion, and was not limited to any contingency. Where there is such a direction to the trustee to sell, the conveyance works a conversion of the property from real to personal, which takes place upon the execution of the deed"—citing, 3 Pomeroy, Equity Jurisprudence (4th ed.) secs. 1159-1162; 13 C. J. 854,857; 6 R. C. L. 1074. There is no limitation in this case upon the authority of the trustee to sell except the approval of the depositors' board of control. Construing the agreement, there is a positive direction to the trustee to sell, by and with the approval of the depositors' board of control, and when the real estate, which was a part of the slow and doubtful assets purchased by the depositors, was conveyed to the trustee, the conveyance effected a conversion of the property from realty to personalty. In the operation, the creditors did not acquire an undivided

equitable interest in any of the real estate so conveyed. The depositors in the said bank have an interest only in the proceeds of sale, and not in the land itself. *Rodisch v. Moore,* 266 Ill. 106. This doctrine of the law is well recognized in this state. It has been applied in this state in the case of wills, but is equally applicable here. *Chick v. Ives,* 2 Neb. (Unof.) 879, held: "Where the provisions of a will are of such character as to amount to a positive direction to convert the real estate into money or personalty, or where by a fair construction of the will such intention of the testator is clearly shown by implication, a court of equity will decree that an equitable conversion of the real estate of the testator into money, or personalty, took place at the time of his death." See, also, *Arlington State Bank v. Paulsen,* 57 Neb. 717. Applying this doctrine to the case at bar, we are of the opinion that, where the provisions of a contract executed under the provisions of section 8-181, Comp. St. 1929, between the depositors and the bank or reorganizers thereof, are of such character as to amount to a positive direction to convert the real estate into money, an equitable conversion of the real estate into money is accomplished by the contract. The trustee was authorized and directed to liquidate and convert into money and distribute according to the agreement in the office of the secretary of the department of trade and commerce. The only limitation was that his act be approved by the depositors' board of control. Such a committee was selected by the depositors in this case and approved the contract which is the subject of this controversy. The conveyance under the contract to the trustee did not invest any depositor or creditor with an undivided equitable interest in the real estate.

The appellee relies upon *Shonsey v. Clayton,* 107 Neb. 695, in which it was said that a title to be good and marketable must be free from reasonable doubt either in law or in fact. The appellee contends that the title in this case is not free from reasonable doubt, and that there-

fore, under the authority of said case, the contract ought not to be enforced. In the instant case, there is no reasonable doubt as to the sufficiency of the title, to bring it within the rule of the cited case.

From an examination of the record, we are of the opinion that, under the contract and agreement of the depositors and the conveyance by the bank to the trustee of the land, the said trustee had the right of conveyance, subject only to the approval of the depositors' committee; and that the trustee could convey a good and marketable title to the real estate. The judgment of the district court is reversed, with directions to enter a decree of specific performance.

REVERSED.

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COMMERCIAL SAVINGS & LOAN ASSOCIATION ET AL., APPELLANTS, V. PYRAMID REALTY COMPANY, CROSS-APPELLANT: CHARLES B. MCDONALD ET AL., APPELLEES.

FILED JULY 2, 1931. No. 27669.

1. **Constitutional Law: TAXATION: FORECLOSURE OF LIEN BY COUNTY.** Section 77-2039, Comp. St. 1929, giving counties right to foreclose lien for all delinquent taxes, examined, discussed and found to be constitutional.
2. **Statutes: CONSTITUTIONALITY.** The substituting of an entire new act, complete in itself, by amendment, when the contents are germane to the original act, is not a violation of section 14, art. III of the Constitution, which requires that the new act set out sections amended.
3. **Taxation: SALE FOR TAXES: REDEMPTION.** The provision for a two-year period reserved to the owner and persons interested in redemptions from sales of land for taxes, in section 3, art. VIII of the Constitution, is satisfied by an elapse of two years after sale before tax deed issue, or by a stay of two years after a judicial sale in foreclosure of tax lien under section 77-2039, Comp. St. 1929, before confirmation and the issuance of the sheriff's deed.
4. ———: ———: **NOTICE.** Personal notice required in sale of land for taxes, as provided in section 3, art. VIII of the Con-

stitution, applies in all cases where a tax deed is sought, but is not required in sales under tax foreclosures in section 77-2039, Comp. St. 1929.

5. ———: FORECLOSURE OF LIEN: REDEMPTION. The owner or person in interest is allowed to redeem from a foreclosure of tax lien by the county under section 77-2039, Comp. St. 1929, by paying full amount of taxes due, with 10 per cent. interest. He has no right in law or in equity to redeem by paying only the amount of the bid. He is required to pay the full taxes assessed against such real estate by section 4, art. VIII of the Constitution.

APPEAL from the district court for Douglas county: WILLIAM G. HASTINGS, JUDGE. *Affirmed in part, and reversed in part, and dismissed.*

*A. H. Murdock,* for appellants.

*Henry J. Beal, Dan J. Gross* and *H. C. Schoening,* for appellees.

*O'Sullivan & Southard* and *Arthur J. Whalen,* for Pyramid Realty Company.

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

PAINE, J.

This was an action in equity brought by the Commercial Savings & Loan Association and John McKiernan, plaintiffs and appellants, to redeem lot 10, block 3, Mahoney & Minnehan's First Addition to the city of Omaha, from a sale of the same pursuant to a special and independent action brought by the county for the foreclosure of the tax lien, not a tax certificate, held thereon by the county of Douglas in accordance with section 77-2039, Comp. St. 1929, and to enjoin the appellees, Charles B. McDonald, sheriff of Douglas county, Otto J. Bauman, county treasurer of Douglas county, Henry J. Beal, county attorney of Douglas county, and Robert Smith, clerk of the district court, from attempting to enforce the lien entered pur-

suant to a decree in the foreclosure proceedings brought by the county of Douglas foreclosing and selling said property for the taxes levied against it.

To the amended petition the Pyramid Realty Company demurred for the reason that said amended petition did not state facts sufficient to constitute a cause of action against said defendant, and the county of Douglas, for and on behalf of its officers named above, filed a demurrer upon the same ground.

The district judge overruled the demurrer of the Pyramid Realty Company, but sustained the joint demurrer filed for the Douglas county officers and dismissed the amended petition. Exceptions were duly entered to both rulings. The plaintiffs, as appellants, and also the Pyramid Realty Company, as defendant and cross-appellant, have each appealed.

The transcript consists only of the amended petition, the two demurrers filed thereto, the decree entered, the notice of appeal, the two supersedeas bonds, and the certificate of the clerk of the district court. However, three excellent briefs of 126 pages remove any doubt about the fact that the issues are sharply contested, and the county attorney of Douglas county, to impress the court with the gravity of the questions involved, sets out that 239 similar cases, involving more than 7,000 separate parcels of land, have been carried through by this method of foreclosure in the last four years, and that suits involving 600 parcels of land are now pending; that the amounts in money are large, for more than $400,000 in delinquent taxes have already been collected as a result of such actions in Douglas county alone, and more than a million dollars worth of real estate in that county will be affected by the decision in this case. For these reasons, all parties urge that a decision be rendered in this test case at an early date.

The amended petition states that John McKiernan is now occupying and has been the owner of the said lot

No. 10 since March 6, 1911, upon which date he and his wife gave a mortgage of $1,000 thereon to the said Commercial Savings & Loan Association, by which mortgage the owner agreed to pay all taxes; that payments were made by the borrower, leaving a balance of $674.13 due the said Commercial Savings & Loan Association on its loan.

The full amount of taxes, including paving, curbing and sewer assessments, with interest, due upon said lot to the county treasurer of Douglas county was $1,224.63, and neither the owner, who was primarily responsible, nor the said Commercial Savings & Loan Association as mortgagee, ever paid these delinquent taxes.

The board of county commissioners of Douglas county directed the county attorney to foreclose these long delinquent taxes. This action was prosecuted under the special form of tax foreclosure open only to counties when taxes are delinquent for more than three years after being offered for sale but not sold for want of bidders, as provided in section 77-2039, Comp. St. 1929.

As a result of such proceedings and in pursuance to the decree of foreclosure thereunder, said property was offered for sale upon June 4, 1929, and the highest bid was made thereon by the Pyramid Realty Company, cross-appellant herein, for the sum of $81. The sheriff made due return thereof, but said sale could not come up for confirmation before June 4, 1931, under said statute, which provides for a stay of two years from the date of the sale, during which time the owner of the fee or any person having a legal interest therein may redeem by paying, not the amount of the bid, but the full amount of taxes, interest and costs due the county.

Upon December 24, 1929, the plaintiff, Commercial Savings & Loan Association, tendered to the clerk of the district court the amount of said bid of $81 with costs and 10 per cent. interest, amounting in all to the sum of $115, which tender and offer were refused, and two days later

made the same tender to the said Pyramid Realty Company, which tender was also refused. Suit was brought in the district court and upon April 26, 1930, the amended petition was filed.

The plaintiffs allege that section 77-2039, Comp. St. 1929, is unconstitutional and void, and pray that an accounting be had and the tender of the $115 be accepted and the title to said lot 10 quieted and confirmed in said plaintiffs.

1. It is impossible to set out any considerable part of the claims made by the parties in their briefs, but we will very briefly set out a summary of the principal contentions.

In 1903 the legislature passed a general revenue act, known as chapter 73, Laws 1903. That entire act, covering some 90 pages, containing 242 sections, was a new and comprehensive measure dealing with all phases of assessment, levy, payment and collection of taxes, various methods of sale for delinquent taxes, tax certificates, tax deeds, and tax foreclosures. Section 231 of that act was later known as section 6559, Rev. St. 1913.

Appellees insist that they have been unable to find any decision involving a foreclosure under this section during the time it remained upon the statute books or thereafter. This section was repealed in 1919 by the enactment of chapter 59, Laws 1919, later known as section 6087, Comp. St. 1922, which act has now become section 77-2039, Comp. St. 1929. The appellants attack the constitutionality of this act for the reason that it did not contain the sections amended and repealed; that no bill can contain more than one subject, which must be clearly expressed in the title, and that by implication it amended several other sections of our statutes. They further charge that it also violates all of section 3, art. VIII of the Constitution, reading: "The right of redemption from all sales of real estate for the nonpayment of taxes or special assessments of any character whatever, shall exist in favor of owners and persons interested in such real estate, for a period of not less

than two years from such sales thereof: Provided, that occupants shall, in all cases, be served with personal notice before the time of redemption expires." And, lastly, that it also violates that part of the third section of our Bill of Rights, which declares that no person shall be deprived of his property without due process of law. Plaintiffs cite many Nebraska cases, some of which will be discussed in this opinion.

It has been held in this state that, if the entire purpose and aim of a certain law is invalid and void, such law is as though it had never been passed. *State v. Several Parcels of Land,* 78 Neb. 703. But we find many states have held that, if only a certain section or part of a section is void, such portion may be amended or a new section substituted, provided the purpose of the act is not outside its title.

In *State v. Insurance Co. of North America,* 71 Neb. 320, it is said: "Ordinarily, a statute repugnant in some of its features to some constitutional provision will yield only to the extent of the repugnancy and no further. Where the act eliminating the unconstitutional feature is complete in all respects, and capable of enforcement, it will be held valid and enforceable, except where the invalid portion was manifestly an inducement to the passage of the remainder."

In the opinion in *Lynch v. Murphy,* 119 Mo. 163, we find this language: "Another contention is that section 7, * * * being unconstitutional and void, it was not subject to amendment. This contention we also think untenable. There is a marked difference in regard to the amendment of an act which is void in its entirety and one that is only void in part, or when one section of an act is in conflict with the Constitution of the state and the remaining sections are in harmony therewith. When the entire act is void, there is nothing to amend, while it is otherwise when there is only one section, or a part of one section, sought to be amended, as in the case at bar. In the latter

case the amendment may be made to any part of the section, or by substituting an entire new section in lieu thereof, provided the act, when amended, does not embrace a purpose outside of its title, and inconsistent with the provisions remaining unrepealed."

Unless we are satisfied beyond a reasonable doubt that the law is unconstitutional, it is our duty to uphold it; and in this case there does not exist in our minds any such doubt.

Some of our courts have even gone so far as to say: "A statute so framed as to be wholly or in part unconstitutional, but having a title expressing a constitutional object may, by amendatory legislation, be rendered constitutional, without having recourse to an enactment independent throughout its provisions." *State v. Corker,* 67 N. J. Law, 596, 60 L. R. A. 564. To the same effect are *State v. Cincinnati,* 52 Ohio St. 419; *In re Groff,* 21 Neb. 647.

2. The first objection made to the present act by appellants is that the act does not contain a copy of the sections of the old act which is amended.

Section 6087, Comp. St. 1922, now section 77-2039, Comp. St. 1929, was an act complete in itself and did not amend any section of the statutes other than section 6559, Rev. St. 1913, which was contained therein and repealed. It, therefore, does not come within the inhibition of the constitutional provision that "No law shall be amended unless the new act contain the section or sections as amended, and the section or sections so amended shall be repealed." *Minier v. Burt County,* 95 Neb. 473; *State v. Moore,* 48 Neb. 870. This question is discussed in *State v. Moore, supra*: "It is only where an act of the legislature is incomplete in itself, but manifestly amendatory of some existing statute to which it does not refer, that it is within the inhibition of the constitutional provision that 'No law shall be amended unless the new act contain the section or sections as amended, and the section or sections so amended shall be repealed.' Const. art. III, sec. 14. If

the act is complete in itself it does not violate said provision."

This act, section 77-2039, Comp. St. 1929, provides the only complete, independent method for the foreclosure of delinquent tax liens by a county in case no administrative sale has been had prior thereto. Foreclosure of tax certificates purchased by counties or by individuals are conducted under sections 77-2041 to 77-2047, Comp St. 1929, and should not be confused in any way with the procedure now under discussion. This bill did not purport to be an amendment of former sections, but enacts entirely new legislation upon the same subject-matter. It is complete within itself and does not violate the provision of the Constitution requiring the sections amended to be set out. *State v. Cox,* 105 Neb. 75.

In regard to the necessity of obtaining personal service under section quoted above from our Constitution, it is our opinion that this section does not apply to judicial sales like the case at bar, but only to purchasers at administrative sales, and is only a condition precedent when a tax deed is being sought.

In *Van Etten v. Medland,* 53 Neb. 569, we find in the text of the opinion reference to the provision of our Constitution requiring personal service: "The foregoing provision has been frequently under consideration by this court, and it has been uniformly ruled that the redemption notice is essential only where a tax deed is sought, and that service of such notice is unnecessary to maintain an action to enforce a tax lien."

Those interested will find a most exhaustive article of 85 pages upon the subject of partial invalidity of statutes, discussed under 39 subject-headings and citing the authorities from each state, in Ann. Cas. 1916D, 9. This article states the general rule to be that a statute may be valid in one part and invalid in another, and if the invalid part is severable from the remainder the portion which is valid may stand.

The section of an act properly amended should be construed precisely as though it had been enacted in its amended form. *State v. Hevelone,* 92 Neb. 748. Ordinarily, courts will refuse to construe a statute when construction is not necessarily involved in the case. *Dawson County Irrigation Co. v. McMullen,* 120 Neb. 245; *Melton & Tanner v. State,* 160 Tenn. 273.

3, 4. The appellants insist that under section 3, art. VIII of the Constitution, they have a right of redemption for two years, with notice before that time expires. As their amended petition was filed before two years had expired after the sale conducted by the county, there was ample time for such notice to be given. The law itself provides for a stay of two years after sale. The two-year period reserved in our Constitution has been running while this case has been pending. It is clearly two years granted to appellants, that is, to the owner and mortgagee, after the judicial sale, and after confirmation there will not be an additional two years more. *Parsons v. Prudential Real Estate Co.,* 86 Neb. 271; *Selby v. Pueppka,* 73 Neb. 179.

The question of notice is not new in tax foreclosure cases appealed to this court. "To constitute due process of law it is not necessary that notice be given of each step in the process of taxation. It is sufficient if the taxpayer has an opportunity to appear, at some time, before a tribunal having jurisdiction, and there procure an adjustment of his liabilities." *State v. Several Parcels of Land,* 83 Neb. 13. See notes, L. R. A. 1916E, 1.

While the case of *City of Beatrice v. Wright,* 72 Neb. 689, was directed to another section of our law providing for an administrative sale by the county of property which had taxes delinquent for five years (Laws 1903, ch. 76), yet it is somewhat in point, for Chief Justice Holcomb states clearly: "The fact that no notice of sale is required other than that contained in the act itself does not render it void as taking property without due process of law."

5. This section 77-2039, Comp. St. 1929, is a necessary

law to force the payment of necessary taxes to run our government. It clearly provides that the tender made by an owner or mortgagee during the two years' stay given them after the sale at foreclosure must be a tender to the clerk of the district court of the total amount of taxes due thereon, with interest at 10 per cent., and a share of the costs. Such a provision is just and equitable, and if the plaintiff had paid that amount into court, the Pyramid Realty Company would not have received the $1,224.63, but would only have received its $81 with 10 per cent. interest; but, if no effort had been made to redeem during the two years by either plaintiff, then the bidder would have received a deed to the lot 10 and its title would have been freed from the burden of taxes. It is not equitable or just for the owner to expect to come into court and be allowed to redeem under the provisions of a different kind of foreclosure action, and by paying the amount bid to avoid payment of his just burden of taxes for all these years.

In the case of *State v. Several Parcels of Land*, 84 Neb. 719, in which the owner attempted to redeem from a sale under the so-called "Scavenger Act" by paying the amount of the bid with interest and costs, rather than by paying the full amount of taxes, interest and costs, the syllabus states: "An owner who seeks to redeem land from a public tax sale, which has been sold in pursuance of a decree obtained thereunder for delinquent taxes, must pay the full amount of the decree, with interest as provided by law, and all costs."

In this case the owner of this lot 10 failed to pay taxes for many years. He had mortgaged the property for $1,000, and while he made payments upon his mortgage to the Commercial Savings & Loan Association, neither he nor the mortgagee paid any taxes of any kind due upon this property during all these years until the taxes thereon amounted to $1,224.63, and his offer to pay but $115 to cancel all these taxes is not fair in equity. The county

commissioners ordered the county attorney of Douglas county to foreclose the lien of taxes on this lot for the reason, as stated in the argument, that when taxes are but one or two years in default they would usually be purchased at the public sale of delinquent taxes held upon the first Monday in November of each year, but when taxes are in default for many years, as these were, then no purchaser can be found; and this special foreclosure act, section 77-2039, Comp. St. 1929, was passed by the legislature for the express purpose of providing a simple method by which a county could bring a foreclosure in a form that would insure bidders at the sale, and after a stay of two years the sale will be confirmed and a sheriff's deed given to the purchaser. This court finds that the method pursued in this case by the officials of Douglas county was the proper method under the law for meeting the situation as it existed, and was the proper method provided by law for attempting the collection of the taxes due against this lot 10. The district judge was right in sustaining the demurrer filed by the Douglas county officers, and his action therein is approved.

In considering the demurrer filed by the Pyramid Realty Company, this court believes that under the law the district judge was wrong, and that this demurrer should also have been sustained, and as no amendment can be made by appellants to bring the allegations within the decision as herein announced, their amended petition should be dismissed and costs taxed to appellants. Affirmed in part, reversed in part, and action dismissed.

AFFIRMED IN PART, AND REVERSED IN PART, AND DISMISSED.

# SUSIE SAWYER, APPELLANT, V. MUTUAL BENEFIT HEALTH & ACCIDENT ASSOCIATION, APPELLEE.

FILED JULY 10, 1931. No. 27830.

1. Insurance: SUICIDE: PRESUMPTION. Presumption against self-destruction prevails where the evidence shows death was caused by violence and does not tend to prove suicide.
2. ———: ———: ———: REBUTTAL. The presumption against self-destruction is overcome where evidence has been introduced tending to show suicidal death.

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

*Raymond & Fitzgerald,* for appellant.

*Cleary, Horan & Skutt* and *Wright & Wright, contra.*

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

GOOD, J.

This is an action on an accident policy of insurance, to recover the amount of the certificate for the death of insured, alleged to have been caused by accidental means. Defendant admitted death of insured, but denied that it was caused by accidental means. At the close of the evidence in behalf of plaintiff, the court sustained a motion to direct a verdict for defendant. Plaintiff has appealed.

While there are several errors assigned, the only one that we need to consider is whether there was sufficient evidence to require the submission of the cause to the jury.

The record discloses the following facts: Insured was 43 years of age, married and living happily with his wife, with no domestic trouble, occupying a responsible and remunerative position, without business troubles or worries, and in fairly good health. Some time previous to his death, he had learned from a physician that he had a high blood pressure, at least higher than is usual for one of his age. Insured and his wife lived in a small town, and

he desired to consult his family physician, living in a town some 20 miles distant. On Sunday morning, the 26th of January, 1930, he and his wife had arranged to drive in insured's automobile to their former home, to consult the family physician with reference to his blood pressure.

It is shown that a year or two previous, while on a vacation trip in a new car and having considerable money with them, it was thought desirable to purchase a gun for their protection. Defendant purchased a pistol and placed it in the pocket on the right-hand side of the car. Whether the pocket was in the front door of the car, or under the cowl in front of the door, is not made clear. So far as disclosed, the pistol was always kept in the car. Insured was never known to have had it in the home or to have discharged it prior to his death.

On the morning in question, after breakfast, he went to the garage to pump up three of the tires which were flat. His wife remonstrated with him about doing this work alone, and asked him to wait until her son-in-law, who lived only half a block distant, should come over and assist him. However, insured went to work alone and pumped or partially pumped up one of the tires, returned to the house, and visited for a few moments with a friend who had called. After the friend's departure, the wife being about to take a bundle of clothing to her daughter's house, insured offered to carry it for her, but the wife said it was light and she could carry it. They went out together, past the garage; the husband entered the garage and the wife went on to her daughter's. In 10 minutes she came back and found insured dead on the floor of his garage, his body on the left-hand side of the car, his feet on the running board, near its junction with the front fender, and the body lying nearly, but not quite, parallel with the car. There was a bullet hole through his head. The bullet had entered back of the right ear and had emerged slightly to the front and above the left ear. The pistol was lying by his side, a few inches from his right

hand. There is no evidence that there were any powder burns about the wound. The flesh where the bullet entered was seared. The record is barren as to whether the left car door was open, or whether the glass in the car window was up or down, or whether any tools were in the pocket where the pistol was always kept, or in the car, or on the floor. The record does not disclose the caliber, make, or character of the gun. It was stated, however, on oral argument, that it was an automatic pistol. Shortly after the removal of the body, the car was pushed out of the garage and a shell, which would fit the pistol and which had been recently discharged, was found on the garage floor, either in front of or under the front part of the car. As stated, the trial court, on this showing of facts, directed a verdict for the defendant, on the theory that the proof was insufficient to establish death by accidental means.

Plaintiff relies upon the fact that death was caused by external, violent means, and on the presumption which obtains that one does not voluntarily take his own life, especially in the absence of any incentive or motive for so doing. It must be borne in mind that this action is based on an accident policy, where it is incumbent upon plaintiff to prove that death was caused by some accidental means. That it was caused by a bullet wound is clear, and, aided by the presumption that one does not voluntarily take his own life, a *prima facie* case has been made, unless the circumstances disclosed are such as to overcome the presumption.

In *Grosvenor v. Fidelity & Casualty Co.*, 102 Neb. 629, it was held: "The presumption against death by suicide is *prima facie* only and rebuttable. It prevails when the cause of death is unknown. It does not prevail as a presumption in the presence of facts bearing upon the question whether death is intentional or accidental.

"When evidence is adduced which is contrary to such presumption, or the presumption is met by conflicting pre-

sumptions, it disappears, although the fact upon which it rests may still remain, proper to be considered in arriving at a conclusion.

"The petition averred death from 'accidental carbolic acid or toxic poisoning.' This the answer denied and averred 'suicide by the intentional drinking of deadly poison, namely, by the drinking of carbolic acid.' The reply contained a denial and admission of death from 'drinkng a deadly poison, to wit, carbolic acid.' *Held,* that the burden was upon plaintiff to produce evidence showing that the death was accidental and not suicidal.

"The burden of proving a cause of action or defense is not sustained by evidence from which the jury can arrive at its conclusion only by mere guess or conjecture."

We are aware that some courts have held that the presumption against death by suicide amounts to evidence. It is a presumption which obtains because of the general rule that people desire the continuance of life and do not, ordinarily, take their own lives, at least without some motive or incentive. It must also be borne in mind that there are many suicides where the incentive or motive is wholly unknown, and what prompted such an act may be known only to the person doing it. The presumption may be overcome either by direct or circumstantial evidence. The question here is whether the circumstances produced on behalf of plaintiff are such as to overcome or remove the presumption.

At the oral argument it was suggested that insured might have been reaching from the left to the right side of the car for a tool to be used, and had taken hold of the gun, and that it might have accidentally exploded, but this is mere conjecture, and we think is refuted by the facts proved. If such had been the fact, no doubt the pistol would have dropped in the car and the exploded shell would have been found in and not outside the car. There was a space of but two or three feet between the left-hand side of the car and the wall of the garage. The bullet,

therefore, must have been fired at rather close range. It is probable that, had it been held any considerable distance from the head when discharged, there would have been no powder burns to the wound. The absence of such powder burns would indicate that the pistol was held either at a considerable distance from insured's head, or so close as to prevent any powder burns. As heretofore noted, the small space between the wall of the garage and the car would indicate that the pistol could not have been fired from any considerable distance. Therefore, in order to have no powder burns, it is probable that the gun was held against the insured's head. The fact that the wound where the bullet entered was seared indicates the presence of considerable heat. It seems improbable that the bullet, which would have entered the head in a small fraction of a second after it was discharged, could have been so hot as to sear the flesh. The inference is that the flesh was seared because of the heat generated by the explosion of the powder, and that the pistol was held practically against insured's head. The location of the wound, the facts detailed, and the further fact that no other person than insured was present, all indicate that he probably held the pistol against his head when it was discharged. Under such circumstances, accidental discharge of the pistol is not a reasonable deduction.

The facts and circumstances proved, we think, overcome the presumption that one does not voluntarily take his own life. In this view of the case, a verdict was properly directed for defendant. The judgment is

AFFIRMED.

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## CHARLES N. HINDS V. STATE OF NEBRASKA.

FILED JULY 10, 1931. No. 27772.

1. **Appeal: SUFFICIENCY OF EVIDENCE.** As to case designated, "Docket E, page 188," record examined and evidence therein set forth *held* to be ample to support the verdict and sentence.

2. ———: ———. As to case designated, "Docket E, page 202," record examined and information adjudged to be insufficient to charge, and evidence of the state insufficient to establish, a crime.

ERROR to the district court for Gage county: FREDERICK W. MESSMORE, JUDGE. *Affirmed in part, and in part reversed and dismissed.*

*Jack & Vette,* for plaintiff in error.

*C. A. Sorensen, Attorney General, George W. Ayres, F. S. Howell* and *H. F. Matoon, contra.*

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

EBERLY, J.

This proceeding in error involves a consolidation of two cases in the trial court. In the first, which will be designated for convenience as "Docket E, page 188," the defendant was charged in three counts as follows: In the first, with a violation of section 8-136, Comp. St. 1929, as an officer and director of the Hinds State Bank, by the issuance of bills payable in behalf of that institution in excess of the amount of capital stock and surplus of that bank; in the second count, the defendant, as an officer of that bank, was charged with making a false report, in that he made a report to the secretary of the department of trade and commerce on the 18th day of December, 1929, setting forth that the total amount of bills payable of said bank then outstanding was but $24,000, when in truth and in fact there were outstanding bills payable in the sum of $30,000; the third count embraced charges of false entries on the books of the bank with intent to deceive, etc.

In the second case, which was tried as a part of the consolidated case in the district court, and which will be distinguished as "Docket E, page 202," the defendant, as an officer of the Hinds State bank, is charged in two sep-

arate counts with borrowing money from said bank in violation of section 8-149, Comp. St. 1929. The trial resulted in a verdict of guilty as to all of the counts above referred to; motion for new trial was overruled; and the following sentence imposed: "Judgment of the court, in case E-188, on the first, second and third counts thereof, that defendant be sentenced to the penitentiary of the state of Nebraska from one to five years at hard labor, Sundays and holidays excepted, solitary confinement to be no part of this sentence. Judgment of the court, in case E-202, on the first and second counts thereof, that defendant be sentenced to the penitentiary of the state of Nebraska from one to five years at hard labor, Sundays and holidays excepted, solitary confinement to be no part of this sentence. That the sentences in both cases, on all five counts thereof, run concurrently."

We have carefully examined the record made in the trial court. In case "Docket E, page 188," we find no prejudicial error whatever. The evidence is practically without dispute that at the times set forth in the information the defendant was the managing, executive officer of the bank, and in practical charge of its affairs; that the paid-up capital of the Hinds State Bank was then $20,000; that it had no surplus; that there were outstanding bills payable in the sum of $29,000; that these instruments had all been issued personally by the defendant as an officer of the bank; that there was entered on the books of the bank a record of but $24,000 of the $29,000 of outstanding bills payable; that in one of the reports to the secretary of the department of trade and commerce, made as charged in the information, the defendant reported as outstanding but $25,000 in bills payable of said bank, when in truth and in fact $30,000 of its bills payable had been issued and were then unpaid.

We do not overlook the contention made by the defendant in the trial below that, as to one of the $5,000 bills payable forming a part of the $29,000, it was executed by

him through oversight or mistake, and that the book entries, and the report based thereon, were made by him in good faith, and believed at the time to be true. Conceding, for the purpose of this discussion only, that the defendant's contention on this point, if sustained, would be, so far as the second and third counts above referred to are concerned, a complete defense, it cannot be so considered in view of the record presented for review. The trial court submitted this question of mistake to the jury, under appropriate instructions, and this controlling question of fact was determined by the jury against the contention of the defendant. The evidence in the record is sufficient to support the jury's finding. It follows that the verdict and sentence imposed under the three counts of the information in "Docket E, page 188," must be, and are, sustained

In the second case, which is designated in the record as "Docket E, page 202," the defendant was convicted on two counts with violation of section 8-149, Comp. St. 1929, providing: "No officer * * * of any corporation transacting a banking business under this article shall be permitted to borrow any of the funds of the bank, directly or indirectly," under penalties therein prescribed. Defendant insists that the information in this respect, as an entirety, does not state facts sufficient to constitute a crime, and that the evidence in the record is wholly insufficient to establish a crime.

The entire transaction in respect to each of the three notes involved may be epitomized by the following excerpt from the information: "The said Charles N. Hinds, so being such officer and employee of said banking corporation, * * * then and there being, unlawfully and feloniously, directly and indirectly, did borrow and permit himself to borrow of the funds of said banking corporation the sum of $5,000, in that the said Charles N. Hinds gave his personal note and bills payable to the Beatrice National Bank, of Beatrice, Nebraska, * * * and for

which said note and bills payable the said Charles N. Hinds caused the said Beatrice National Bank to give credit in its books of account to said Hinds State Bank for the sum of $5,000, and that, as part of said transaction, and for the purpose of getting the benefit of said $5,000, as a loan to himself, the said Charles N. Hinds charged the Beatrice National Bank upon the books of the Hinds State Bank said sum of $5,000, and at said time credited himself on said books of said Hinds State Bank with the sum of $5,000."

A careful reading of the statute controlling convinces us that the defendant's contention must be sustained. The gist of this statutory offense is "the borrowing by a bank officer of the funds of the bank of which he is an officer." Webster's New International Dictionary, among other definitions of the word "borrow," gives the following: "To receive from another on a pledge or security given for its return or the return of an equivalent; to receive with the implied or expressed intention of returning the identical article or its equivalent in kind;—the opposite of lend. * * * To make one's self indebted for; to appropriate; to take, receive, or derive." See, also, *State v. School District* No. 4, 13 Neb. 82. Therefore, as quoted, the statutory language implies the following: (1) Lending by the bank involved to the borrowing official, either directly or indirectly. (2) On the part of the delinquent officer, it implies making himself indebted for; to appropriate; to take, receive or derive, funds of the bank lending to him, either directly or indirectly. (3) It involves the diminishment of the "funds of the loaning bank" to the extent of the loan made. It must, in other words, amount to a debtor and creditor transaction in which the delinquent officer is the ultimate debtor, and the bank involved the ultimate and real creditor. The situation as set forth in the information, as well as in the testimony embraced in the record, does not establish any of these necessary elements. There are but three parties involved in the instant

case—the Beatrice National Bank, the Hinds State Bank, and Charles N. Hinds, the defendant. The contract for the loans are wholly represented by the three promissory notes executed by the defendant payable to and accepted by the Beatrice National Bank of Beatrice, Nebraska. These contracts vested the Hinds State Bank with no rights, and imposed on it no liabilities. These notes were lawful contracts between the parties thereto. The fact that the defendant Hinds was an officer and director in the Hinds State Bank did not in any way interfere with his right in his own private behalf to negotiate these loans, nor to make a lawful deposit in the Hinds State Bank of the funds received as a result of the three notes. Whether his deposit thus made was within the protection of the guaranty law is not in any manner involved in the present situation. It must be admitted, aside and apart from this feature, that there is no statutory provision which inhibits what was actually done in this case.

At least after the loans had been secured and the execution of the necessary papers incident thereto accomplished, the defendant was entitled to receive from the Beatrice National Bank the consideration expressed in his contracts. Certainly at his election he could have demanded this money in cash, and could have physically transported it from Beatrice to Odell and physically deposited it in the Hinds State Bank at that place. But, as shown by the evidence in the record, as well as set forth in the statements of the information in this transaction, the defendant simply made use of the established methods of exchange, and of doing business in modern times. He deposited the consideration received for each of his three notes given to the Beatrice National Bank in that bank to the credit of the Hinds State Bank. The Hinds State Bank, notified of this, accepted the credits and in return credited the defendant as a depositor to the extent of the credits it received from the Beatrice National Bank, and the defendant received from the Hinds State Bank the pro-

ceeds of the loans thus made. When we analyze the result, it must be conceded: (1) That the defendant was at all times, and still is, the sole debtor to the Beatrice National Bank on each of the three notes held by it. (2) The Beatrice National Bank is the sole lender to the amount of the consideration of the notes to the defendant. (3) The Hinds State Bank is not in any manner liable on the indebtedness to the Beatrice National Bank, nor is the defendant in any manner liable to the Hinds State Bank, and the Hinds State Bank is liable to defendant only as a depository bank to the depositor to the extent of the deposit actually made. The loanable funds of the Beatrice National Bank have been actually decreased in the exact amount of the loans made to this defendant. The Hinds State Bank has its loanable funds intact, and wholly unaffected by the transactions. In other words, every dollar of funds and property possessed by the Hinds State Bank, at the inception of the transactions, it had after defendant Hinds had received from it all of the moneys deposited in the manner set forth. Therefore, it follows that, the Hinds State Bank not being the lending bank, not being a party to the loan contracts, and not having its loanable funds or its property in any manner diminished or affected by the transactions, such transactions cannot be said to fall within the purview of the criminal statute sought to be invoked in the present proceeding.

Furthermore, while in no way involved in the charges under consideration, the evidence does not sustain the conclusion that any of the notes referred to and embodied in this information were actually paid by the funds of the Hinds State Bank.

It therefore follows that the trial court erred in overruling the objections to the validity of the information, and in overruling the challenge of the defendant to the sufficiency of the evidence presented in this case. The verdict and sentence imposed by the district court under counts 1 and 2 of the information filed in case known as

"Docket E, page 202," are therefore set aside and annulled, and the proceeding as to these counts dismissed.

AFFIRMED IN PART, AND IN PART REVERSED AND DISMISSED.

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STATE, EX REL. O. S. SPILLMAN, ATTORNEY GENERAL, V. FIRST STATE BANK OF PAWNEE CITY, APPELLEE: D. W. OSBORN, GUARDIAN, APPELLANT.

FILED JULY 10, 1931. No. 27557.

Banks and Banking: INSOLVENCY: PRIORITIES. Where war risk insurance is paid by the United States to the guardian of an incompetent, the money belongs to the United States, and is subject to its control until it reaches the beneficiary designated according to law. In such a case the guardian is the agent for the government and his authority over the fund is limited and controlled by federal statutes alone.

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

*Dort & Witte* and *F. H. Wagener*, for appellant.

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

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

DAY, J.

This is an appeal from a judgment entered in the district court for Pawnee county finding that certain funds deposited in the First State Bank of Pawnee City by D. W. Osborn, guardian of Frank M. Tannyhill, an incompetent person, were not entitled to a priority over other claims against said bank. The First State Bank of Pawnee City was a state bank which was taken over by the guaranty fund commission on February 9, 1925, because of insolvency. The guaranty fund commission continued in possession thereof and operated it as a going bank until

November 17, 1927, when the bank was placed in the hands of a receiver appointed by the district court for said county. The claimant is the guardian of Frank M. Tannyhill, a mentally incompetent, who is a World War veteran, and by reason of mental and physical disability has been determined by the veterans' bureau of the United States government entitled to receive certain compensation and insurance payments from the United States. The guardian has received compensation and insurance for and on behalf of said Frank M. Tannyhill and deposited said funds in the First State Bank of Pawnee City. At the time the bank was placed in the hands of the receiver, there was on deposit in said bank to the account of the guardian the sum of $9.90 in a checking account and $8,972.57 in a savings account, all of which money, with the exception of $500, was derived from and paid by the United States government to the said guardian as compensation and insurance due the said Tannyhill. The guardian filed his claim with the receiver without claiming priority of said funds, and the court on March 7, 1928, allowed the claim as a prior lien on the assets of the bank and the guaranty fund of the state of Nebraska, of which there has been paid a 10 per cent. dividend. Subsequently, on the 29th of April, 1929, the guardian filed a petition in intervention, which was the beginning of this case, setting up the facts and asking that said funds be declared to be government funds and as such entitled to preference over claims of all other claimants and depositors by virtue of the federal statutes. The receiver answered, admitting the amount of the fund, but denied the same were government funds entitled to a priority, and denied that the bank, its officers, directors or stockholders voluntarily turned over the said bank to the department of trade and commerce and did not voluntarily commit the acts of bankruptcy, and further set out that such claim was *res judicata*.

The questions presented by the record in this case are as follows: First. Even if estoppel or *res judicata* does

not apply, and if the funds were admitted to be funds of the United States, do not the provisions of section 3466, U. S. Rev. St., give the United States a prior lien on the assets of the bank for the funds deposited by the guardian, as against the other depositors of the bank? Second. Were the funds in question, when deposited in the bank by the guardian, the funds of the United States, and therefore entitled to priority under section 3466, U. S. Rev. St.? Third. Was the allowance of the claim of the guardian as a claim against the guaranty fund as a prior claim against the assets to the bank *res judicata* by which the guardian is estopped from now claiming priority as against all other claims?

If this deposit was funds of the United States, the question of the priority of the lien created by section 3466, U. S. Rev. St., over the lien created by the state statute in favor of other depositors of the bank has recently been discussed and determined by this court. *State v. Thurston State Bank, ante,* p. 407. Following that decision, we find that, if the deposit is funds of the United States, a lien is created prior to that of the other depositors of the bank.

In another recent case we have discussed the nature of the funds arising from the payment of the United States under the war risk insurance acts. See *State v. Security Bank,* p. 521, *post.* This case presents a similar, though not an identical, proposition. The insured being an incompetent, the money was paid to his guardian. To carry out and accomplish its purpose, congress provided for the protection of such funds. Section 4783, U. S. Rev. St., provides for the punishment of every guardian having charge and custody of the pension of his ward, who embezzles the same. Section 450, 38 U. S. C. A., provides: "Where any payment under this chapter is to be made to a minor, other than a person in the military or naval forces of the United States, or to a person mentally incompetent, or under other legal disability adjudged by a court of competent jurisdiction, such payment may be

made to the person who is constituted guardian, curator, or conservator by the laws of the state or residence of claimant, or is otherwise legally vested with responsibility or care of the claimant or his estate * * * And provided further, that the director, in his discretion, may suspend such payments to any such guardian, curator, conservator, or other person who shall neglect or refuse, after reasonable notice, to render an account to the director from time to time showing the application of such payments for the benefit of such minor or incompetent beneficiary." The money is paid by the United States for the benefit of the disabled veteran or his beneficiary. The United States, for convenience, paid the money impressed with a trust provision to the guardian. Such guardian could not be required to accept the money; but, if he accepted it, he took it subject to all the provisions imposed by statute. For the further protection of the fund, it is provided by section 556, 38 U. S. C. A.: "Every guardian, curator, conservator, committee, or person legally vested with the responsibility or care of the claimant or his estate, having charge and custody in a fiduciary capacity of money paid, under the war risk insurance act * * * for the benefit of any minor or incompetent claimant, who shall embezzle the same in violation of his trust or fraudulently convert the same to his own use, shall be punished," etc. In *State v. Kilgore State Bank*, 112 Neb. 856, this court held that a deposit by the United States, through its proper agent, of individual Indian moneys in a state bank is entitled, upon failure of said bank, both to priority against the assets of the bank and to the protection of the state guaranty fund, under section 3466, U. S. Rev. St., by reason of being government funds. In the *Kilgore* case, the court states: "But the money was in fact deposited by the United States as a guardian of its wards, through its Indian agent or representative, and it would seem that the law is broad enough in its purpose to cover a case of this kind. This view finds support in the case of *United*

*States Fidelity & Guaranty Co. v. Bramwell,* 295 Fed. 331, which involved the deposit of a large amount of Indian funds in the Bank of Klamath Falls." See, also, *State v. Thurston State Bank, ante,* p. 407. The decision in these cases was based upon the fact that the one who deposited the money was in fact the agent of the United States. We are of the opinion that the guardian in this case is the instrumentality of the United States for the purpose of paying the proceeds of war risk insurance to the beneficiary. He is a mere trustee or depositary for the government. *Manning v. Spry,* 121 Ia. 191; *Tama County v. Kepler,* 187 Ia. 34. In the latter case, it is said: "It is the settled law of the United States and of this state that the guardian in such case 'is nothing more than an agent for the government, and that pension money in his hands is still under its control and management.'" In *Manning v. Spry, supra,* it was held: "That a guardian appointed under state authority, to whom pension money was paid, is nothing more than an agent for the government, and that money in his hands is still under its control and management. Indeed, guardians appointed under state laws are required to make report to the commissioners of pension of their acts and doings with reference to pension money received by them. In the *Hall* case *(United States v. Hall,* 98 U. S. 343) it is held that a guardian appointed under state authority is not bound to accept pension money, and that, if he does, he is amenable to the laws of congress. This being so, it is clear, we think, that the money has not passed into the hands of the pensioner, although paid to his guardian, and by him loaned out for safekeeping, and to secure some return therefrom. So long as the fund remains subject to the control and jurisdiction of the federal government, the state has no right to impair, direct, or control it. It is doubtful if a guardian could be punished by the state courts for mismanagement of pension money. He is amenable to the general government, and in handling pension money he acts as a government official

or agent, and not primarily for the court appointing him." Under a former pension law, it was said: "The plain purpose of all those stringent provisions of the pension laws which the district attorney has read in your hearing is to secure absolutely to the pensioner the bounty of the government. It cannot, on any pretext, be lawfully diverted, directly or indirectly, while in transit to his hands. It is not assets for the payment of debts, and can be in no way pledged or impounded for that purpose, and all dealings in that direction are null and void." *United States v. Ryckman,* 12 Fed. 46, 48. The money paid under the war risk insurance act partakes of the nature of a pension and of insurance. The exemption sections of the pension laws have been adopted in the enactment of the war risk insurance acts. The guardian is required to make similar reports to the veterans' bureau. In 21 R. C. L. 247, sec. 13, the rule is well stated: "Throughout the whole period since the Constitution was adopted it has been the policy of congress to enact such regulations as will secure to the beneficiaries of the pensions granted the exclusive use and benefit of the money appropriated and paid for that purpose. * * * This power of congress to enact such protective measures cannot well be questioned, for if it may grant pensions it is difficult to see why it may not pass laws to protect the fund appropriated for such a beneficiary of the government, certainly until it reaches his hands. And power to protect the fund from misappropriation, fraud and unauthorized conversion to the use of another, and to secure its safe and unimpaired transmission to the beneficiary, has been claimed and exercised through the whole period since congress, under the Constitution, commenced to grant pensions." The language adopted for the protection of the proceeds of the veterans' war risk insurance is substantially the same as that used for the protection of pensions. It was used with a knowledge of its definite meaning, acquired through judicial construction. Its purpose was to create insurance for the benefit of the

veteran and his dependents. It was the obligation of the government to pay it to those entitled by law to the benefits. Until the money is paid to the beneficiary, the obligation is not discharged. For convenience, in the case of an incompetent, the money is paid to the guardian. In such a case, the guardian is nothing more than an agent of the government and the money in his hands is under its control and management. So long as the fund is subject to the control of the federal government, the state has no right to control it. Where war risk insurance is paid by the United States to the guardian of an incompetent, the money belongs to the United States, and is subject to its control until it reaches the beneficiary designated according to law. In such a case, the guardian is the agent for the government and his authority over the fund is limited and controlled by federal statutes alone.

Except as to $500, which it is stipulated was not proceeds of war risk insurance, the deposit represented funds of the United States, and as such is entitled to priority over claims of other deposits. The judgment of the trial court is reversed and the cause is remanded, with direction to the trial court to enter judgment in accord with this opinion.

REVERSED.

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STATE, EX REL. C. A. SORENSEN, ATTORNEY GENERAL, V. SECURITY BANK OF CREIGHTON, APPELLANT: MAGGIE A. AGLER, ADMINISTRATRIX, APPELLEE.

FILED JULY 10, 1931. No. 27696.

1. **Insurance: WAR RISK INSURANCE: PAYABLE TO BENEFICIARIES.** After the designated beneficiary's death, war risk insurance is payable to the estate of the insured for distribution to persons then living within permitted class, as beneficiaries, and not as heirs at law.
2. **———: ———.** Money payable by the United States under the war risk insurance acts is money of the United States until it reaches the beneficiary of the fund.

APPEAL from the district court for Knox county: CHARLES H. STEWART, JUDGE. *Affirmed.*

*C. M. Skiles, W. A. Meserve* and *I. D. Beynon,* for appellant.

*F. H. Wagener* and *Richard Steele, contra.*

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

DAY, J.

This case arose out of the claim of one Maggie A. Agler, administratrix of the estate of Robert R. Gordon, deceased, a soldier in our army in the World War, against the receiver of the Security Bank of Creighton, on a certificate of deposit in her name, as administratrix, in said bank, which deposit represented the proceeds of war risk insurance. The administratrix claims that she stands in the place of the United States in relation thereto and has a first lien on all the assets of said bank superior to the other depositors. The district court so found, and the receiver appeals.

The Security Bank of Creighton was taken over by the department of trade and commerce on May 17, 1928, and operated by the guaranty fund commission as a going bank until June 4, 1929, on which date a receiver was appointed to liquidate. The administratrix filed her claim on a certificate of deposit which was classified and allowed as a deposit. The claimant filed a petition of intervention in said proceedings claiming that the said deposit was the proceeds of war risk insurance issued by the United States on the life of Robert R. Gordon, who died intestate on December 19, 1919, and claimed that said money was the property of the United States, and that she had a first lien on the assets of said bank under the provisions of section 3466, U. S. Rev. St. The receiver objected to the allowance of the claim because, first, the depositors' lien created by statute was a prior lien upon the assets of the bank, and,

second, the administratrix is not a governmental agency and the deposit was not money of the United States.

Relative to the first question, this court has decided in a recent case the time when the statutory lien of the depositors attaches to the assets of a state bank. In *State v. Thurston State Bank, ante,* p. 407, the material facts are substantially the same as in the instant case and control the question of priorities of liens. It is sufficient to state that under the rules of law therein stated, if the deposit involved is money of the United States, it is a lien upon the assets of the bank superior to the statutory lien in favor of general depositors.

There remains but one question for our determination. Was the deposit made by the administratrix in the Security Bank of Creighton, Nebraska, money of the United States within the comprehension of section 3466, U. S. Rev. St.? The claim of the administratrix is based on the provision of the above statute, which reads as follows: "Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed." In this case, it is not disputed that the officers of the bank at the time the deposit was received knew from what source it came and that such deposit was the proceeds of war risk insurance paid by the United States.

The purpose of the war risk insurance was to benefit the World War veteran and his dependents. Congress could adopt any method which seemed to it best suited to accomplish its purpose. The initial act of October 6,

1917, provided for insurance, "in order to give to every commissioned officer and enlisted man" greater protection for themselves and their dependents. 40 U. S. St. at Large, ch. 105, sec. 400, p. 409. This purpose is reaffirmed in the Act of June 7, 1924, 43 U. S. St. at Large, ch. 320, sec. 300, p. 624, and restated in the Act of March 4, 1925, 43 U. S. St. at Large, ch. 553, sec. 12, p. 1308. The purpose of the statutes providing for war risk insurance is important and helpful in determining the intention of congress as expressed by its legislative acts.

To study and ascertain the intent of congress, let us consider section 454, 38 U. S. C. A., which is as follows: "The compensation, *insurance,* and maintenance and support allowance payable under parts II, III, and IV, respectively, shall not be *assignable; shall not be subject to the claims of creditors of any person to whom an award is made under parts II, III, or IV; and shall be exempt from all taxation.*" (Italics ours.)

The insurance provided was not assignable. It was the intention of congress to protect the fund so that it would be directed to the benefit of the veteran and his dependents. This provision was clearly to protect him from himself as well as from others. To accomplish this purpose and to insure with certainty that the funds provided would go directly to the maintenance and support of the veteran and his dependents, it was also provided that it was not subject to the claims of creditors. In *Payne v. Jordan,* 152 Ga. 367, it was held that funds actually paid by the government to the beneficiary of an insurance policy and by her deposited in a bank are not subject to garnishment. To the same effect is *Perrydore v. Hester,* 215 Ala. 268. It was held that it should be exempt from all taxation. *Succession of Geier,* 155 La. 167, holds that the beneficiaries of deceased service men who receive insurance money under the war risk insurance act are not subject to a state inheritance tax. To the same effect is *In re Shaw's Estate,* 224 N. Y. Supp. 344; *In re Estate of Harris,* 179 Minn.

450; *Tax Commission of Ohio v. Rife,* 27 Ohio App. 516; *In re Cross' Estate,* 152 Wash. 459; *Manning v. Spry,* 121 Ia. 191; *Watkins v. Hall,* 107 W. Va. 202; *Wanzel's Estate,* 295 Pa. St. 419.

It is evident from these foregoing provisions that congress intended the money to go to the veteran and his dependents. It provided for every foreseen contingency to retain control of the money until it was placed in the hands of the beneficiary. To accomplish this beneficent purpose, it has surrounded the money with every safeguard to protect it. It has placed the funds upon a plane analogous to a trust impressed with certain specific conditions. It was intended to discharge in a measure the moral obligation of the United States to the veterans of the World War, not in the sense that it was a gratuity, for it was not, but it did give the soldier in the war an opportunity to contract with the United States for the benefit of himself and his dependents. The veteran could name the beneficiary within certain limits provided by law. The monthly payments would be made to such beneficiary. When, as in this case, the named beneficiary died, and no other beneficiary had been named by the insured, then the law provides that there shall be paid to the estate of the insured the present value of the remaining unpaid monthly instalments of the insurance so awarded to such person. 38 U. S. C. A. sec. 514. The commutated monthly payments had been paid to the administratrix in this case. The payment was made to her subject to all the conditions imposed by law upon the fund. It is not subject to taxation. It is not subject to the payment of debts. *In re Estate of Hallbom,* 179 Minn. 402; *In re Cross' Estate,* 152 Wash. 459; *Payne v. Jordan,* 152 Ga. 367.

Furthermore, it is provided by law that the insurance shall be payable only to a spouse, child, grandchild, parent, brother, sister, uncle, aunt, nephew, niece, brother-in-law or sister-in-law or to any or all of them. 38 U. S. C. A. sec. 511. This section of the statutes definitely limits the

persons to whom the money can be paid. This insurance was never provided for the benefit of creditors. It was specifically provided that creditors should not benefit from it. It was certainly not intended that the creditors of a third party, in this case the depositors in the Security Bank, should benefit from the fund.

But the receiver argues that the funds, when paid to the estate of the deceased veteran, become the assets of the estate. The argument in *In re Estate of Hallbom,* 179 Minn. 402, is so concise and sound that we quote and adopt it as follows: "Having in mind the repeatedly expressed and obvious purpose of the act, we are of the opinion that reason and principle require us to hold, as we do, that the payment of the funds to the estate of the insured is merely a matter of procedure, and the representative of the estate is to distribute it only to persons included 'within the permitted class.' The persons who would receive the money receive it as beneficiaries under the policy and not as heirs at law. *Cassarello v. United States,* 271 Fed. 486; *In re Cross' Estate,* 152 Wash. 459, 278 Pac. 414; *Wilson v. Sawyer,* 177 Ark. 492, 6 S. W. (2d) 825; *Perrydore v. Hester,* 215 Ala. 268, 110 So. 403, 405; *Tax Commission of Ohio v. Rife,* 119 Ohio St. 83, 162 N. E. 390; *Wanzel's Estate,* 295 Pa. 419, 145 A. 512; *Watkins v. Hall,* 107 W. Va. 202, 147 S. E. 876; *Payne v. Jordan,* 152 Ga. 367, 110 S. E. 4; Id. 36 Ga. App. 787, 138 S. E. 262; *Sutton's Ex'r v. Barr's Adm'r,* 219 Ky. 543, 293 S. W. 1075. There are cases to the contrary. *Whaley v. Jones,* 152 S. Car. 328, 149 S. E. 841, and cases therein cited; *Hugus v. United States,* 24 F. (2d) 247; *Estate of Greiner,* 195 Wis. 332, 218 N. W. 437; *Condon v. Mallan,* 58 App. D. C. 371, 30 F. (2d) 995; *Branch B. & T. Co. v. Brinkley,* 196 N. Car. 40, 144 S. E. 530; *National Union Bank v. McNeal,* 148 S. Car. 30, 145 S. E. 549."

We hold that, after the designated beneficiary's death, war risk insurance is payable to the estate of the insured for distribution to persons then living within permitted class, as beneficiaries, and not as heirs at law. The statute

provides it shall only be paid to the permitted class. The veteran himself could not have designated any other as beneficiary and congress did not intend that a failure to name a beneficiary would carry the fund to persons, whom the veteran himself was prevented by law from naming as beneficiaries. In other words, he will not be held to accomplish by neglect what he could not do by the exercise of thoughtful care. Such a rule would defeat the obvious and definitely expressed intention of congress.

For convenience, the money is paid to the administratrix, to be paid to the heirs within the permitted class of beneficiaries. A number of cases already cited liken the procedure to that followed in the case of damages recovered by an administrator in actions for wrongful death. In such a case, the money is not an asset of the estate. The administrator is a mere trustee to receive and pass on the funds to those entitled to them. Lastly, congress completed the control of the United States over this trust fund by providing that, in case the purpose of the trust failed, the money should revert to the United States. 38 U. S. C. A. sec. 512, provides: "That no payment shall be made to any estate which under the laws of the residence of the insured or the beneficiary, as the case may be, would escheat, but same shall escheat to the United States and be credited to the United States government life insurance fund."

To summarize, the administrator holds the money for a certain definite purpose only; if that purpose fails, it reverts to the United States. It is the money of the United States until it reaches the beneficiary, intended by the trust created. The congress of the United States created a channel through which this money is to reach the dependents of the veteran. It must not be diverted from that channel. It cannot be so diverted. As money of the United States, it is entitled to priority of payment by virtue of the statutes of the United States. The judgment of the trial court is

AFFIRMED.

# STATE, EX REL. O. S. SPILLMAN, ATTORNEY GENERAL, APPELLEE, V. DUNBAR STATE BANK: E. J. DEMPSTER, RECEIVER, APPELLEE: MONTO LOWREY ET AL., APPELLANTS.

FILED JULY 10, 1931. No. 27713.

1. **Estoppel**: DUPLICATE NOTES. The maker of a promissory note, who has voluntarily paid it to an agent in charge of liquidating a bank, is estopped to recover it later from a receiver in charge of said bank, after the maker discovers that by his own mistake and carelessness he had signed duplicate notes, covering the same indebtedness, upon the demand of the former bank officers.
2. **Banks and Banking**: DUPLICATE NOTES: RECOVERY FROM GUARANTY FUND. When the maker objects before paying a note, and states that a New York bank is demanding payment of a similar note, a mere expression of opinion by the agent in charge of liquidating said bank, that the note held in the New York bank might, upon careful examination, turn out to be a forgery is not such a positive statement of existing facts as will allow a recovery thereof from the depostors' funds of said failed bank.
3. ———: ———: ———. When the maker of a genuine note pays off a duplicate thereof, which he has signed for the same amount, after a personal examination thereof, to an agent in charge of a bank being operated by the guaranty fund commission, the duplication not being known to said agent, the laches and carelessness of the maker thereof in failing to detect the duplication at the time of signing the second note charges him with the loss, rather than to cast it upon the depositors' funds of the failed bank now in receivership.

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

*Edwin Moran*, for appellants.

*C. M. Skiles* and *Albert S. Johnston, contra.*

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

PAINE, J.

In the case pending in the district court for Otoe county over the receivership of the Dunbar State Bank, Monto Lowrey and Della M. Lowrey, his wife, were given leave to intervene, and filed an amended petition of intervention on February 10, 1930, in which they ask to recover from the receiver of said bank the sum of $2,652.16, which they had paid to John M. Eiser, special agent of the guaranty fund commission, who was in charge of said bank on January 26, 1928, being the principal of a note for $2,500 and the interest thereon of $152.16, which note was dated March 15, 1927; and they ask to have their claim when allowed offset against a note of $2,388.81, which is secured by a real estate mortgage which was given to the receiver of said bank on March 17, 1928, and that they be paid the difference of $281.67 in cash. The district court found against the interveners and dismissed their action.

A large number of notes had been given by the interveners to the Dunbar State Bank; some of these had been sold and transferred to other banks. Upon March 8, 1927, the Chase National Bank returned a note of the interveners of $2,500 to the Dunbar State Bank, and on March 11, 1927, as shown by a photostat copy of the letter attached to the New York deposition, its president mailed back interveners' note for $2,500, dated March 1, 1927, payable September 1, 1927, at 7 per cent. interest, to replace the note maturing for the same amount. No other note was given by the appellants on the same day, and the former note returned from New York was surrendered to the makers.

The said Dunbar State Bank went into the hands of the guaranty fund commission on the 4th day of April, 1927, and Thomas Murray, its president, absconded March 14, 1927, and was not apprehended for many months, and at the time of the trial had been arrested and was then serving sentence in the penitentiary. It is admitted by

all parties that some of the series of notes signed by the intervener and his wife were duplicated, and that he paid to the officers in charge of said bank a number of notes.

William H. Pitzer, an attorney of Nebraska City, received the note from the Chase National Bank for collection and brought suit against the interveners. Upon examination by experts it was found that the Chase National Bank note dated March 1, 1927, was a genuine note and not a forgery, and that the interveners had no defense to the suit which was brought against them to collect said note. By this action they are endeavoring to recover from the receiver the amount paid by them on a note of the same amount which they now believe was a duplicate. It is found that said note of $2,500 paid by them during the time that the said bank was being operated as a going concern by the guaranty fund commission was a voluntary payment, and that the money they paid thereon never came into the hands of the receiver of the bank and was exhausted by the officers of the guaranty fund commission during the time they were operating the bank. The payment was made by the interveners without compulsion, mistake, fraud, duress, coercion or extortion on the part of the special agent of the guaranty fund commission, and the amount paid by the interveners was applied as agreed and the notes paid were surrendered to the interveners at the time of the payment.

1. It has been recently held by this court that, where one has voluntarily, with knowledge of the facts, paid a disputed demand, he cannot ordinarily recover it back on the ground of its invalidity. *Meyer v. Rosenblatt & Son*, 119 Neb. 471. And in the case of *Blain v. Willson*, 32 Neb. 302, where a debtor voluntarily paid a note tainted with usury, he cannot maintain an action to recover such usurious interest.

2. It is claimed that the notes paid to the guaranty fund commission were paid after a discussion with Mr. Eiser, the special agent in charge, in which discussion it

was thought by the intervener that the note then held by the Chase National Bank, which had been sold to it by the Dunbar State Bank, was a forgery; and it is now claimed that the note presented and paid to the guaranty fund commission was in truth a duplicate note executed without consideration, while the note held in New York City was the true and genuine note. There is no doubt that Mr. Eiser was known by the interveners to have no personal knowledge of the fact, as he had not seen the note in the Chase National Bank, and that any statements he made about said note were only a matter of opinion.

Mrs. Lowrey testified that at the time payment was made Mr. Eiser suggested that they look carefully into the matter of the note held by the Chase National Bank, and upon which it was demanding payment, before they should make payment. Mr. Eiser denied in his evidence that he had stated that the Chase National Bank note was a forgery, but suggested that on a number of occasions he had told the interveners that it might be a forgery, and that they should examine into the matter carefully before paying it. It is clear in this case that Mr. Eiser's statements were a mere expression of his opinion, and not a misrepresentation of fact.

This court has held that the rule that charges a party with notice of the truth in all cases where he makes positive representations of existing facts does not apply to representations which in their nature are mere expressions of opinion. *Hamilton Brown Shoe Co. v. Milliken,* 62 Neb. 116.

3. The interveners knew exactly the note they were paying to the special agent of the guaranty fund commission at the time they paid it, and the exact notes they paid were delivered to them. It may be admitted that the interveners at that time thought that the note about which the Chase National Bank had been corresponding with them was a forgery. It is exceedingly unfortunate that they did not have the Chase National Bank note forwarded

for their inspection prior to the payment of these other notes. Caution would have required that they do that, but this court now has no other alternative but to deny the application of the interveners. The Chase National note, it is admitted, is a perfectly *bona fide* note in the hands of an entirely innocent purchaser, purchased for full value before maturity. It is an old rule of law that, when one of two innocent parties must suffer, the one whose oversight or laches has made the occurrence of the event possible must suffer, rather than the one who is entirely without blame.

When the maker of a genuine note pays a duplicate note of the same amount, after personal examination thereof, to the agent in charge of a bank taken over by the guaranty fund commission, the duplication not being known to said agent, the laches and carelessness of the reputed maker thereof in failing to detect the duplication charges him with the loss, rather than to cast it upon the depositors of the failed bank now in receivership.

The court are unanimous in arriving at the conclusion that the order of the district judge in finding for the defendant receiver and dismissing the cause of action of the interveners at their costs is the only conclusion which could be arrived at in this matter.

AFFIRMED.

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STATE, EX REL. C. A. SORENSEN, ATTORNEY GENERAL, V. FARMERS STATE BANK OF POLK, APPELLANT: EDWARD A. LINDQUIST, INTERVENER, APPELLEE.

FILED JULY 17, 1931. No. 27376.

1. **Banks and Banking: INSOLVENCY: PREFERRED CLAIMS: TRUST FUNDS.** The statute giving, subject to taxes, priority to unsecured depositors of an insolvent state bank, and making their claims first liens on all bank assets in the hands of the receiver, does not apply to an unauthorized deposit by the bank, to its credit, of a trust fund unlawfully converted by the bank

as trustee and illegally mingled with a mass of bank assets into which the trust fund is traced as a preferred claim recoverable in equity. Comp. St. 1929, sec. 8-1,102.

2. ———: ———: DISTRIBUTION OF ASSETS. The interpretation by federal courts of federal laws relating to the distribution of assets in the hands of the receiver of an insolvent national bank does not control state courts of Nebraska in interpreting state laws relating to the distribution of assets in the hands of a receiver of a state bank.

3. ———: ———: TRUST FUNDS: CONVERSION: REMEDY. Where a state bank as trustee unlawfully converts and sells the trust property, deposits the proceeds to its own credit without authority, mingles indistinguishably the trust proceeds with the general mass of bank assets which are thus augmented, uses the trust fund in the regular course of the banking business, fails to execute the trust or to return the trust fund to the beneficial owner, and goes into the hands of a receiver, the beneficiary of the trust may resort to equity, charge the mass, and restore the trust fund as a preferred claim payable in full from the general assets, if sufficient.

APPEAL from the district court for Polk county: HARRY D. LANDIS, JUDGE. *Affirmed.*

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

*H. G. Wellensiek* and *Paul E. Boslaugh, contra.*

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

ROSE, J.

In a proceeding in the district court for Polk county to wind up the affairs of the Farmers State Bank, an insolvent banking corporation, Edward A. Lindquist intervened and presented a petition for the allowance of $4,500 as a preferred claim payable in full out of the general mass of assets in control of the receiver.

The claim as pleaded arose in the following manner: For a valuable consideration intervener executed and delivered to the Farmers State Bank, July 3, 1928, his promissory note for $4,500, payable October 1, 1928, and that bank sold and delivered it to the Harvard State Bank.

To pay the note by renewal, intervener executed and delivered a new note to the Farmers State Bank for $4,500, October 5, 1928, and the latter sold and delivered it to the First National Bank of Stromsburg; received for it $4,500, and failed to pay therewith the original note; converted the $4,500 received for the renewal note, without the knowledge or consent of intervener; augmented to that extent the funds in the Farmers State Bank; mingled the converted proceeds of the renewal note with bank assets which fell into the hands of the receiver. Intervener prayed for an order restoring his converted funds and directing the receiver to pay them in full. The answer of the receiver to the petition of intervener was a general denial. A trial of the issues resulted in a judgment granting intervener the relief prayed by him. The receiver appealed to the supreme court.

It is argued that the judgment of the district court is erroneous for the reason that, subject to taxes, the statute gives priority to unsecured depositors in state banks and makes their claims first liens on all assets of the insolvent bank from the time it was closed. Comp. St. 1929, sec. 8-1,102. The argument on this point was ably presented in good faith, but is not conclusive, if the converted proceeds of intervener's note were never assets belonging to the bank, within the meaning of the statute. The transactions in which the bank procured, converted, mingled and used the funds of intervener are material factors in the present inquiry. There is no dispute about any essential fact. Intervener entrusted his renewal note to the Farmers State Bank for the sole purpose of paying the original note. The renewal note was accepted by the Farmers State Bank, hereinafter called "the bank," payee in both notes, for that identical purpose and could not lawfully be otherwise used. The bank thus became a trustee to pay the original note with the renewal note and to return the former note to the intervener. It betrayed its trust; sold the renewal note; took the proceeds—$4,500;

converted the funds without the knowledge or consent of intervener, the beneficial owner; put the equivalent of intervener's proceeds in money in the bank and made the bank books show an increase in its cash and its sight exchange to the extent of $4,500; used the converted funds in the regular course of the banking business; failed to pay the original note and refused to restore to intervener any part of the proceeds of the renewal note. Intervener paid his original note, but did not ratify any unlawful act of the bank, his trustee, in regard to the renewal note, or condone the betrayal of trust, or demand the converted proceeds as deposits. In relation to these funds he was not a depositor. He did not participate in any dishonest or unlawful act. He did not make any agreement authorizing the bank, his trustee, to use his credit or proceeds or money in the banking business. His property was not impounded on any mesne or final process known to the law. By the illegal acts of his trustee, intervener did not lose his title to his own property or his equitable right to follow and reclaim it in a changed form. The bank never acquired intervener's title nor a right to use his credit or proceeds or money in the banking business. In equity his converted property was never a bank asset to which depositors had a right to resort for payment of their general deposits. It was the continuing duty of the bank as a trustee, from the moment intervener's property or its equivalent in money was unlawfully put into its tills, to disclose that fact to the beneficiary and restore it to him or apply it to the specific use for which it was intended. To that standard of accountability equity holds the trustee.

A bank which exercises power emanating from the state by means of legislation and a public charter has no immunity from obligation, duty or business rectitude, while acting in a fiduciary capacity. Contrary to the terms of a trust, a bank has no authority to convert trust property or the equivalent thereof, or to deposit it to its own credit,

or to mingle it with bank assets, or to use it in the general course of the banking business, or to deprive the beneficial owner of it, or to create a fund, by betrayal of trust, to pay general depositors in the event of insolvency. The trust fund, in its original or changed form, belongs to the beneficial owner, and it is the duty of a court of equity, upon proper pleading and proof, to restore the fund to him.

If the statute is construed to authorize the receiver to appropriate any part of intervener's trust funds to the claims of general depositors, it will prevent the exercise of chancery power conferred upon district courts by the Constitution of Nebraska and to that extent will be void. Lack of legislative power to limit chancery jurisdiction was illuminated in a recent opinion by Judge Eberly, who said:

"It may be said that, by the terms of the Constitution, district courts in Nebraska are vested with 'chancery jurisdiction.' Const. art. V, sec. 9. This we have construed as vesting district courts with equity jurisdiction which they may exercise without legislative enactment. *Matteson v. Creighton University,* 105 Neb. 219. Indeed, this court is committed to the view that, not only is equity jurisdiction conferred by the terms of the Constitution, but as thus conferred it is beyond the power of the legislature to limit or control. That, while the legislature may grant such other jurisdiction as it may deem proper, it cannot limit or take from such courts their broad and general jurisdiction which the Constitution has conferred upon them." *Burnham v. Bennison, ante,* p. 291.

It has been held that the proceeds of crime, when deposited in a bank by the criminal, may be recovered by the owner as deposits. *State v. Dunbar State Bank,* 120 Neb. 325. This is not, however, the exclusive remedy. Under equity jurisdiction, which is beyond the power of the legislature to limit or control, it has been determined in repeated decisions that the beneficiary of a trust may

refuse to ratify an unauthorized deposit, and that he may elect to follow and reclaim his converted trust property, even in changed forms, though mingled by the trustee with his own assets or estate. *State v. Bank of Commerce,* 61 Neb. 181; *City of Lincoln v. Morrison,* 64 Neb. 822; *Tarnow v. Carmichael,* 82 Neb. 1; *Logan v. Aabel,* 90 Neb. 754; *Central Nat. Bank v. First Nat. Bank,* 115 Neb. 472.

The statute, therefore, does not make unlawfully converted trust property which has been traced into general assets of an insolvent bank as trustee available to general depositors for the payment of their deposits. Such funds augment the mass of assets in the bank, but are not assets of the bank in the hands of the receiver within the meaning of the statute, since they are assets belonging to the beneficial owner, and not to the bank.

The decree preferring the claim of intervener over claims of general depositors is also assailed on the ground that he did not trace the converted proceeds of the renewal note into any specific property or asset in the hands of the receiver. The rule invoked by the receiver was stated as follows:

"A *cestui que trust,* who seeks a preference out of the estate of an insolvent national bank in the hands of a receiver, must clearly prove that the trust property, or its proceeds, went into a specific fund or property which came into his hands." *Central Nat. Bank v. First Nat. Bank,* 117 Neb. 161. See, also, *Central Nat. Bank v. First Nat. Bank,* 115 Neb. 444.

On the contrary, intervener relies on the rule stated in the dissenting opinion in *Central Nat. Bank v. First Nat. Bank,* 115 Neb. 451, which was subsequently adopted by the majority in *Central Nat. Bank v. First Nat. Bank,* 115 Neb. 472. That majority opinion stated the fundamental rule of equity as follows:

"Where the form of trust property is changed by a fiduciary and the resulting proceeds are wrongfully mingled by him with the mass of assets comprising his insolvent

estate, the beneficiary of the trust, in a proper case, may resort to the mass for redress, if augmented by the trust property." *Central Nat. Bank v. First Nat. Bank,* 115 Neb. 472.

This latter rule of equity, owing to a subsequent change in the personnel of the supreme court, was rejected in an opinion by a majority of one as being at variance with the interpretation of United States courts in administering federal laws applicable to national banks—laws then under consideration. In receding from the rule of equity last quoted, when applicable to a national bank only, the judge who declined to follow it said in his opinion:

"The writer has been very reluctantly driven to the foregoing conclusions as to national banks, but withholds commitment as to trust funds not imperatively ruled by federal law." *Central Nat. Bank v. First Nat. Bank,* 117 Neb. 161.

As applied to state banks under the Constitution and laws of Nebraska, the majority opinion reported in *Central Nat. Bank v. First Nat. Bank,* 115 Neb. 472, has never been overruled. The present record presents this question: Which of the divergent rules shall be applied in administering trust funds unlawfully mingled by a state bank as trustee with the mass of its general assets? Shall the rule formulated under equity power conferred by the Constitution of Nebraska and state legislation relating to state banks be abandoned for the so-called "federal rule" applied by some of the federal courts in winding up the affairs of insolvent national banks under the acts of congress? The affairs of our insolvent state banks should be wound up and the assets distributed under the laws of Nebraska in the light of equity power conferred by the state Constitution upon state courts.

In the suit now under consideration, the bank, as trustee, converted $4,500 belonging to intervener, unlawfully mingled the trust funds belonging to him with the assets of the bank, illegally used the funds in the regular

course of the banking business, became insolvent, and went into the hands of a receiver without executing the trust or refunding the money. Intervener traced his trust funds into the general assets of the bank. They augmented the mass of assets in the bank to the extent of $4,500, but that amount of the mingled funds was an asset belonging to intervener, and not an asset of the bank. Conceding that the identical trust funds were paid out in the regular course of the banking business, they paid obligations or debts of the bank to the extent of $4,500, and thus reduced its general indebtedness. Except for the unlawful use of the trust funds, the outstanding obligations of the bank, when the receiver took charge, would have been greater by $4,500. The general depositors have no valid claim on the trust funds, whether they remained in the bank or reduced bank debts by unlawful payment. In equity the effect is the same. General depositors are not entitled to the fruits of the bank's betrayal of trust. Intervener is not in the same class with them. Their deposits gave the bank lawful control of their deposited money in the regular course of the banking business. The proceeds of intervener's renewal note could only have been lawfully used by the bank in paying the original note. Under the circumstances, equity charges the mass of assets with the trust funds. The doctrine requiring the beneficiary of a trust to trace his trust funds into some specific asset or property in the estate of the trustee or in the hands of his receiver as a condition of reclaiming them did not originate in any moral philosophy or in any sound principle of equity jurisprudence. The defense of that doctrine lacks cogent reasons and involves a resort to opinions reiterating initial fallacies. The following excerpt from *Windstanley v. Second Nat. Bank,* 13 Ind. App. 544, was unanimously adopted in an opinion by Judge Letton:

"The true owner of property has the right to have his property restored to him, not as a debt due and owing, but because it is his property wrongfully withheld. As

between the *cestuis que trustent* and the trustee and all persons claiming under the trustee, except purchasers for value and without notice, all the property belonging to the trust, however much it may have been changed in its form or its nature or character, and all the fruits of such property, whether in its original or altered state, continues to be subject to and affected by the trust. * * * It was formerly held that these rules came to an end the moment the means of ascertaining the identity of the trust property failed. * * * In the case of trust moneys commingled by the trustee with his own moneys, it was held that money has no earmarks, and when so commingled the whole became an indistinguishable mass and the means of ascertainment failed. But equity, adapting itself to the exigencies of such conditions, finally determined that the whole mass of money with which the trust funds were commingled should be treated as a trust." *Logan v. Aabel*, 90 Neb. 754.

The opinion adopting the foregoing language has never been overruled and is in harmony with views expressed by a former chief justice of the supreme court of the United States, who said:

"Formerly the equitable right of following misapplied money or other property into the hands of the parties receiving it depended upon the ability of identifying it; the equity attaching only to the very property misapplied. This right was first extended to the proceeds of the property, namely, to that which was procured in place of it by exchange, purchase, or sale. But if it became confused with other property of the same kind, so as not to be distinguishable, without any fault on the part of the possessor, the equity was lost. Finally, however, it has been held as the better doctrine that confusion does not destroy the equity entirely, but converts it into a charge upon the entire mass, giving to the party injured by the unlawful diversion a priority of right over the other creditors of the possessor." *Peters v. Bain*, 133 U. S. 670, 693.

The money in the hands of the receiver for distribution in the present instance is now greater to the extent of $4,500 on account of the conversion and the other unlawful acts of the bank as trustee. In equity the depositors do not have a valid claim for the amount of these trust funds. Equitably they belong to intervener and the district court wisely ordered the receiver to pay them in full. This procedure is adopted in administering the Nebraska laws applicable to state banks, rather than the federal laws applicable to national banks as interpreted in *Central Nat. Bank v. First Nat. Bank*, 117 Neb. 161.

AFFIRMED.

PAINE, J., concurs in the result.

GOOD AND EBERLY, JJ., dissenting.

For the reasons hereinafter stated, we respectfully dissent from the opinion adopted by a majority of the court.

As announced in the majority opinion, a court of equity will impress a lien for trust funds on all the assets of an insolvent trustee, if it be shown that the trust fund came into the possession of the trustee before he was declared insolvent, and without regard to whether the trust fund remains in or is a part of the assets of the insolvent estate. The rule announced is at variance with that long established by the decisions of this court. The former rule should not now be abrogated or modified unless it is unsound and does not respond to the dictates of conscience and reason. Let us review some of our former decisions and see how they have been applied to a situation similar to that in the instant case.

In *State v. Bank of Commerce*, 54 Neb. 725, it was held: "When trust funds are wrongfully converted and not only do not remain in the hands of, and are not found among the assets of, the wrongdoer, but are actually traced out of his hands and shown to have been dissipated, then the beneficiary of the trust fund is not entitled to have his claim allowed as a preferred one against the estate of the insolvent wrongdoer.

"If the trust property consisted of money, the claim of the beneficiary of the trust fund may be preferred to the extent of the *cash found among the assets of the insolvent trustee at the time of his failure,* unless it affirmatively appears that such cash assets are not part of the trust fund." (Italics ours.)

In that case a county treasurer had deposited trust funds in a bank which afterwards failed. The court held that the county was entitled to have its claim decreed a first lien upon any asset of the insolvent bank which it showed was the product of the beneficiary's moneys. The trust fund was in excess of $15,000. When the bank failed there was but $140 in cash on hand. The trust fund had been used in paying off other depositors of the bank. It was not shown that any part of the trust fund was represented by or invested in any particular asset of the bank other than the cash, which came into the possession of its receiver. The county was held entitled to a lien only to the extent of $140, as being a part of the trust fund, but was not entitled to have a lien against the mass of the bank's assets in the hands of the receiver.

In *Morrison v. Lincoln Savings Bank & Safe Deposit Co.*, 57 Neb. 225, it was held: "The owner of trust property is not, merely by reason of the character of his claim, entitled to a preference over the general creditors of an insolvent trustee.

"A person asserting a claim for preference against an insolvent estate has the burden of showing that such estate has been increased, to some extent, by the misappropriation of trust funds or property belonging to the claimant."

In that case the bank, prior to insolvency, received and misappropriated trust funds. It was sought to establish a lien against the general assets of the bank and in favor of the *cestui que trust.* In the opinion (p. 227) it was said: "The doctrine held in some jurisdictions, that the beneficiary of a trust fund is entitled in a case of this kind to a preference over the general creditors of an in-

solvent without showing that such fund, or part of it, was included in the assets which came into the hands of the receiver, was expressly repudiated by this court in the case of the *State v. Bank of Commerce, supra.*" Again, in the opinion, in speaking of the right to an equitable lien, it was said that it rests "upon the equitable title of the beneficiary, who, seeking to recover specific property or to fix a charge upon a mass, must trace his estate, and show that the specific thing claimed is in equity his property, or that his estate has gone into and *remains in the mass he seeks to charge.*" (Italics ours.)

Again, in *City of Lincoln v. Morrison,* 64 Neb. 822, in an opinion by Pound, C. (now recognized as one of the foremost jurists of the country) the authorities were reviewed, and it was therein held: "Misappropriation of a trust fund does not entitle *cestui que trust,* merely as such, and for that reason alone, to a preference over general creditors of an insolvent trustee."

The rule thus announced by this court has been in force for more than 30 years. Is it inherently unsound? Does it fail to respond to the dictates of conscience and reason? We do not think so. The rule, as announced in the majority opinion, seems to have been first announced in the case of *McLeod v. Evans,* 66 Wis. 401, decided in 1886. Later, the supreme court of Wisconsin specifically overruled this case in *Nonotuck Silk Co. v. Flanders,* 87 Wis. 237. In the latter case the authorities were reviewed quite extensively. In the opinion (p. 241) it was pointed out: "The guiding principle is that a trustee cannot assert a title of his own to trust property. If he destroys a trust fund by dissipating it altogether, there remains nothing to be the subject of the trust. But so long as the trust property can be traced and followed into other property into which it has been converted, that remains subject to the trust."

In the case of *Little v. Chadwick,* 151 Mass. 109, it was said (p. 110): "When trust money becomes so mixed up with the trustee's individual funds that it is impossible

to trace and identify it as entering into some specific property, the trust ceases. The court will go as far as it can in thus tracing and following trust money; but when, as a matter of fact, it cannot be traced, the equitable right of the *cestui que trust* to follow it fails."

By far the greater number of courts passing upon this question adhere to this view. The underlying reason for impressing a lien on specific property for the beneficiary of a trust is because his trust fund is invested in or forms a part of the specific property.

Suppose that an elevator company has several kinds of grain in its elevator belonging to it, among them a quantity of No. 1 wheat, and that it receives for storage from one of its customers a quantity of No. 1 wheat and commingles it in the same bin with its own wheat, and thereafter becomes insolvent. It is conceded that the owner of the stored wheat is entitled to a lien upon the mass of wheat which contains his own. If, prior to becoming insolvent, the elevator company has sold all of the wheat and placed the proceeds to its credit in a bank, it is clear that money, derived from the sale of the customer's wheat, is in the bank account in a specific fund, and he may have a lien upon that particular fund for reimbursement. But suppose again that the elevator company had sold the wheat, received the proceeds and dissipated them, and had on hand its elevator building and other kinds of grain when it became insolvent. Can it be said that the trust property is invested in the elevator building or in such other grain? Certainly not. The elevator company owned the building prior to the reception of the wheat for storage. The stored wheat is not invested in the elevator building or in other grain. Under the rule announced in the majority opinion, the owner of the stored wheat would be entitled to impress a lien upon all of the assets of the insolvent elevator company, including its elevator building. Liens may be created by agreement of the parties, by statute, or by a court of equity to do justice between the parties. We do not deny

that in this case the claimant was entitled to a judgment against the bank, but he had no right to a lien upon the bank's building or the bank's assets, which the bank possessed prior to the time it received its customer's renewal note. To the writer it appears that the rule announced in the majority opinion is not based upon reason or logic and is contrary to the great mass of judicial pronouncement upon the subject.

We are unable to concur in the majority opinion for another reason. Section 8-1,102, Comp. St. 1929, *inter alia*, provides: "The claims of depositors, for deposits, not otherwise secured, and claims of holders of exchange, shall have priority *over all other claims*, except federal, state, county and municipal taxes, and subject to such taxes, shall at the time of the closing of a bank be a first lien on all the assets of the banking corporation from which they are due." (Italics ours.)

By this statute, the lien of a bank's depositors became fixed, subject to the exception for taxes, at least at the time a receiver was appointed. The majority opinion destroys the statutory lien of the depositors upon the assets of the bank. It nullifies the statute, which has heretofore been given full force and effect in more than 100 opinions of this court. The statute in question has been recognized as valid for many years. Only the legislature may properly repeal it; yet the majority opinion, if it stands, effectually modifies and repeals the statute in part. It is not a judicial function to repeal, amend or modify an existing valid statute. Certainly, the bank building, furniture, fixtures and all its bills receivable, which were possessed by the bank prior to the reception of claimant's renewal note, were assets of the bank, and, under the quoted statute, the depositors were entitled to a first lien thereon, subject to taxes. The majority opinion entirely destroys this statutory lien. The statute quoted gives a first lien for federal, state, county and municipal taxes. If the opinion of the majority is sound, then the claimant of a trust fund may have a

first lien thereon to the exclusion of first liens for taxes. Under the rule announced in the majority opinion, if there was a mortgage on the bank building, a *bona fide* indebtedness, existing long before the bank became insolvent and before any trust fund came into its hands, such lien would be displaced in favor of the trust fund. If carried to its logical conclusion and the bank had pledged a part of its bills receivable to another bank for funds, the lien of the collateral holder would be displaced and the claim of the *cestui que trust* be held supreme. Such is not and never has been, until now, the law in this jurisdiction.

In the majority opinion it is, in effect, said that the trust fund is no part of the assets of the bank. This we concede. If the claimant's renewal note had been in the receiver's possession at the time this action was brought, it would be no part of the assets of the bank. If the proceeds of that note could be traced into any specific property in the hands of the receiver, that particular property would not be an asset of the bank; but, as above pointed out, the bank's building, furniture, fixtures and previously-owned bills receivable are assets of the bank, and the trust fund is not invested in them. The claimant was not entitled to a lien upon such assets.

The majority opinion quotes from and apparently relies, as a precedent, on the opinion in *Central Nat. Bank v. First Nat. Bank*, 115 Neb. 472. The opinion in that case never became the law of that case, much less a precedent for this court to follow. That opinion affirmed the judgment of the district court. Afterwards, a rehearing was granted, and another opinion, reported in 117 Neb. 161, was adopted, which reversed the judgment of the district court. That became the ultimate and final opinion of this court in that cause. It superseded and annulled the decision as a precedent, reported in 115 Neb. 472.

To the writer it appears that the rule announced and as applied in the majority opinion is illogical and inherently unsound. For these reasons, we dissent.

STATE, EX REL. C. A. SORENSEN, ATTORNEY GENERAL, V. FARMERS STATE BANK OF POLK, APPELLANT: LEWIS S. LOOMER, INTERVENER, APPELLEE.

FILED JULY 17, 1931. NO. 27377.

**Banks and Banking:** INSOLVENCY: PREFERRED CLAIMS: TRUST FUNDS. Trust funds, traced by the beneficiary into the general mass of assets in control of the receiver of an insolvent state bank, *held* payable in full out of such assets in preference to claims of general depositors. *State v. Farmers State Bank, ante*, p. 532, followed.

APPEAL from the district court for Polk county: HARRY D. LANDIS, JUDGE. *Affirmed.*

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

*H. G. Wellensiek, contra.*

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

ROSE, J.

In a proceeding to wind up the affairs of the Farmers State Bank, an insolvent banking corporation, Lewis S. Loomer intervened and presented a petition for the allowance of $3,350 as a preferred claim payable in full out of the general mass of assets in control of the receiver. The answer to the petition of intervener was a general denial. A trial of the issues resulted in a judgment granting intervener the relief prayed. The receiver appealed to the supreme court.

The decision is controlled by the opinion in *State v. Farmers State Bank, ante*, p. 532.

AFFIRMED.

PAINE, J., concurs in the result.

EBERLY, J., dissenting.

To the application of the principle announced by this court in *State v. Farmers State Bank, ante*, p. 532, as controlling in the two companion cases of the same title, one

wherein Freeman E. Runquist et al. are interveners, and one in which Lewis S. Loomer is intervener, we again respectfully dissent.

These are companion cases. The facts in the Runquist case are so interwoven with the case first referred to as to present identical questions of both law and fact. The *Loomer* case involves the same general considerations. But, in addition to general propositions common to the three cases, the *Loomer* case involves important matters peculiar to itself.

Each of these cases is concerned with the proper administration of our state bank act, and the true effect of the decisions announced by the majority of the court, to which we have heretofore dissented, as well as the decision in the instant case, may only be fairly measured by the express terms of banking legislation in the light of the public policy which that controlling enactment evidences and the course of events which have occurred both before and since its enactment. The statutory terms are alike peremptory to courts of equity as well as law. In this dissent we confine our comments in the main to the *Loomer* case.

Originally adopted by the legislature of 1909 (Laws 1909, ch. 10), "For the regulation, supervision and control of the business of banking" and providing penalties, the Nebraska state bank act marked a distinctive departure from what had theretofore been the established policy of the state. Though the original act has been the subject of numerous important amendments, from time to time, so far as involved in this case its fundamental public policy remains, essentially unchanged. This legislation was clearly the result of social and economic conditions and developments which furnished a legislative reason for the state's intervention in behalf of the depositor class.

It will be remembered that state banking institutions existing at the time of the original adoption of the act under consideration here, as elsewhere, had flourished and

grown because of certain indispensable services they performed in the business world. These services involved the function of the deposit, the exchange, the loan, and to a limited degree the fiduciary or trust relation. This business was generally recognized as quasi-public in its nature, and that the public good was necessarily involved in its successful operation. *Noble State Bank v. Haskell,* 219 U. S. 104; *Shallenberger v. First State Bank,* 219 U. S. 114.

So, also, it was fully appreciated that the function of the deposit was then, and ever since has continued to be, first and preeminent in importance, because it prepares the basis for all other operations carried on by the modern bank. It is indeed a truism that banking institutions can prosper, and properly serve their communities, only when they possess the confidence of depositors, who on this basis entrust them with their funds, and which in turn empower the banks to supply the legitimate loan demands of their customers. While the ratio of bank capital to bank deposits necessarily varies in each institution, we know, speaking generally, the latter is two, four, six and even twenty fold the former.

It is obvious that it was, and still is, of utmost importance that the depositors in the state banks of this state should have satisfactory assurance that at the appointed time of repayment their deposited funds would be forthcoming and their ultimate safety at all times be unquestioned. This indeed is the only possible basis that there could be certainty that, during recurring seasons of financial stress and uncertainty, crippling withdrawals would not be made, disastrous alike to customer and bank.

To accomplish these important purposes the act of 1909 provided in part: "The claims of depositors, for deposits, and the claims of holders of exchange, shall have priority over all other claims, except * * * and * * * shall at the time of the closing of a bank be a first lien on all the assets of the banking corporation from which they are due and thus under receivership, * * * and, upon proof thereof,

they shall be paid immediately out of the available cash in the hands of the receiver." Laws 1909, ch. 10, sec. 52.

This act also created a guaranty fund, as an additional measure of safety for the depositors and holders of exchange, and to whose right of "first lien" this guaranty fund, upon payment by it of such claims, succeeded by virtue of statutory subrogation.

It is important, however, to note that this statute imposes no additional duties or responsibilities on either the depositors or holders of exchange. The depositor still had no voice in the selection of the officers and agents of the institution that carried his deposit. Its business transactions and business policies were not submitted to him for either information or approval. He possessed no powers of visitation or inspection or examination. He still was confined to doing business on the outside of the bank counter, and all transactions of his bank, save with himself, remained, as before, to him a sealed book.

In view of the relation of its depositors to the business involved, as well as the preponderating contributions necessarily required of the depositor class as a prerequisite to its successful and effective prosecution, the situation suggests that the basic principle on which the bank act is framed is clearly analogous to, if not wholly identical with, that which our artisans', laborers', mechanics', and materialmen's lien acts exemplify, and should receive the same favorable construction. At the very least, fairness would indicate that "It is presumed, as well on the ground of good faith as on the ground that the legislature would not do a vain thing, that it intends its acts and every part of them to be valid and capable of being carried into effect." 2 Lewis' Sutherland, Statutory Construction, sec. 497. Therefore in the enforcement of this act no presumption can be followed or indulged in which necessitates on the part of, or exacts from, the depositor that which the act by its terms does not afford him power to have.

So the state in its sovereign power has written the terms

of this statute in the contracts of the depositors with its banks. Its faith stands pledged for the honest enforcement thereof, as fairly understood by common men when they become a party to its terms, and in honest reliance thereon part with the products of their toil; and no condition can justly be imposed to the prejudice of their rights but such as are contemplated by the law, or provided for therein.

And it cannot be gainsaid that bank customers, other than depositors and holders of exchange, employing its services, and securing the benefits of its functions, likewise well understood the situation and the mandate of the law—the preferences the law awarded the depositors. Their engagements with the institution were entered into with full knowledge that in the event of insolvency the assets of the bank would be first for the liquidation of demands other than their own. This is the fundamental basis of the entire business as carried on since the passage of this law by state banks. "Equity follows the law." The fundamental basis involved must be respected, complied with, and conformed to by equity when its powers are invoked to settle and adjust the complicated transactions of bank customers when insolvency has intervened.

These conclusions are in harmony with all our decisions, until the last. DEAN, J., in delivering the opinion of this court in *Abie State Bank v. Weaver*, 119 Neb. 153, affirmed in 282 U. S. 765, says in part: "The paramount object, and clearly the legislative intention in the creation of the depositors' bank guaranty fund law (of which the lien provisions here in controversy are an essential part, and of the fund created thereby an important source), was first for the protection of the depositors' money in the state banks." And, as to the duty of courts in enforcing its provisions, also said: "It is elementary that it is not within the province of the courts to annul a legislative act unless its provisions so clearly contravene a provision of the fundamental law, or it is so clearly against

public policy, that no other resort remains." This decision does not stand alone. For more than twenty years this court has consistently sustained the provisions of this act, and preserved the preferences accorded depositors, substantially unimpaired.

Notwithstanding the situation set forth, and the consistent action of this court in heretofore fully sustaining the same, in the case now under discussion, as well as in the two to which reference has already been made, a majority of this court has now actually and effectually, by construction, not only in effect overruled a consistent line of precedents of this court, relating to trust funds, of more than twenty years standing, but has set aside and annulled the mandate of this statute awarding to depositors in insolvent banks a "priority over all other claims, * * * and * * * a first lien on all the assets of the banking corporation from which they are due." Laws 1909, ch. 10, sec. 52. This was done notwithstanding the words last quoted may fairly and well be said to have entered into and become and, so long as the statute remains unrepealed at least, remain an integral part of all the contracts of the depositors with the Farmers State Bank of Polk. This action was taken by a majority of this court advisedly in the determination of a claim arising out of, and incidental to, engagements entered into and had between claimant and the bank and its officers, not involving deposits or exchange, and constituting no part of legitimate banking, and with complete knowledge on the part of claimant of the prior vested rights of depositors. The judgment in this, as well as the judgments in the other two companion cases, in effect deny the statutory first lien of the depositors, and appropriate more than $8,850 of admitted assets of the Farmers State Bank of Polk to the payment of claimants making no pretentions of being depositors or entitled to preference under the terms of the state bank act.

This express violation of the clear, unambiguous terms

of the statute, the necessary reversal of the public policy evidenced thereby, and the substantial impairment of rights of contract vested thereunder, inevitably invoke the challenge, "By what authority?" The majority have not made use of names or labels and in their opinion have ignored the existence of judicial landmarks. Even notwithstanding the wholly inconsistent and repugnant character of their pronouncement, they have refrained from expressly overruling the many prior decisions of this court in conflict therewith.

Still, in view of what the majority opinion expressly approves, in connection with what is said therein, it is plain that they construe the facts in the case now before us to entitle the claimant therein to an "equitable lien," and to have the same enforced against all the property and effects of the insolvent bank to the exclusion, so far as may be necessary, of the claims of depositors, as a charge or lien senior and superior to the statutory declared "first lien" of the latter. The following definition of the term "equitable lien" is submitted in connection with the statement just made: An equitable lien is a right not recognized at law, and which a court of equity recognizes and enforces as distinct from strictly legal rights, to have a fund, or specific property, or the proceeds, applied in full or in part to the payment of a particular debt or demand; a right of a special nature to or over property which constitutes a charge or incumbrance so that the property itself may be proceeded against in an equitable action or the holder thereof be required to account therefor, or the proceeds thereof.

To epitomize, it may be said that the position of the majority of this court is that, upon the concurrence of the six elements as hereafter set forth, a claimant, not a depositor, is entitled to an equitable lien or preference, viz.: (1) Where a state bank as trustee unlawfully converts and sells the trust property, and (2) deposits the proceeds to its own use without authority, and (3) mingles indistin-

guishably (such unlawfully converted proceeds) with the general mass of bank assets which are thus augmented, and (4) uses such converted trust funds in the regular course of banking business, and (5) fails to execute the trust or return the trust funds to the beneficial owner, and (6) (insolvent) goes into the hands of a receiver, the beneficiary may resort to equity to charge the mass and restore the trust fund as a preferred claim payable in full from "(all) the general assets." His claim is thus determined as a matter of equity senior and superior to the statutory lien of the depositor thereto and without respect to the source of the assets involved, or the fact that they may be nonliquid in character and purchased and wholly paid for by the trustee bank with untainted money long prior to the conversion claimed.

Preliminary to further discussion, it may be said that "augment" is authoritatively defined as, "To enlarge in size; to swell; to increase." 6 C. J. 862.

The following constitutes a summary of the transaction to which the majority opinion, without any discussion, applies the conclusion as determinative principles necessitating the interposition of an equitable lien in behalf of Loomer, which by judicial fiat it not only creates, but makes senior to the mandate of the statute.

The record here discloses, without question, that on and prior to August 27, 1928, the Farmers State Bank of Polk was, and had been, in serious financial difficulty. It also appears that this was but a continuation of a preexisting condition. At some time prior to the date mentioned, the definite date of which the record does not afford, this institution's original capital, due to impairments, had been reduced from $30,000 to $25,000—the irreducible minimum provided by law. Comp. St. 1929, sec. 8-122. In addition, the stockholders had already once replaced an impaired capital to the extent of a voluntary stock assessment of 100 per cent., which had been fully paid in by them. However, these steps wholly failed to remedy the

situation, and on August 27, 1928, according to claimant's evidence, "We (the bank) were low on reserve, and we needed more money." They had barely a 5 per cent. reserve at this time. The state banking department had directed that $21,000 of their bills receivable be charged off as bad paper. The record does not disclose that this institution then had any net surplus or net undivided profits. The extent of the actual impairment then existing of the assets of the bank may be judged from the fact that the board of directors then adopted the plan of securing the payment of another, and the second, voluntary 100 per cent. assessment on outstanding stock. Claimant Loomer during all this was the duly elected, qualified, and acting, vice-president of this bank, and also a member of its board of directors, and thereafter continued to officiate in such positions. It is quite evident that this plan to restore the impairment of the capital stock was Loomer's. He testifies that he made the motion to adopt it which was agreed to by the board. This plan provided in substance that this voluntary assessment should be paid by the stockholders in four equal payments, viz., cash 25 per cent., balance in equal amounts on January 1, 1929, July 1, 1929, and January 1, 1930; notes being given to the bank for deferred payments by stockholders who did not have the cash, among whom was Loomer. Beyond question Loomer and others approved this plan, accepted it, and acted on it. The members of this board of directors, who as stockholders owned approximately $20,000 of the outstanding stock substantially on the day of the adoption of this plan, largely complied with it by delivering the necessary funds and obligations to the bank. Loomer himself drew his check in payment of the cash instalment required, and executed and delivered to the Farmers State Bank of Polk, of which he was then vice-president and director, three promissory notes in the sum of $1,650 each to cover the deferred payments. Loomer contends that the agreement between all parties was that none of the funds

and obligations thus delivered were to be at the disposal of the bank until all stockholders had responded in like manner. But on the happening of that event all of the funds, obligations and promissory notes were without further action of stockholders or directors to become the property of the bank and subject to its immediate disposal. The undisputed testimony of the executive officer of this bank, with reference to the Loomer transaction, is: "The bank was accepting his notes as his payment of the assessment when the assessment was to be consummated." It seems that certain of the stockholders failed to comply with this voluntary assessment and failed to make the payments required thereby. In the meantime on October 13, 1928, it appears that the executive officers of the bank indorsed and transmitted two of the three notes executed by Loomer to one of the bank's correspondents, which discounted the same and credited the proceeds to the account of the Farmers State Bank of Polk. This entire amount was thereafter paid out and exhausted by the correspondent bank while the Polk bank was still a going concern, and no money therefrom was in any form traced back to it, or to any specific assets in its possession when taken over by the state on October 30, 1928. Loomer, so far as shown by the present record, gave the matter no further attention, took no further steps to restore the solvency of his bank, and permitted it to continue as a going concern, at least with his tacit approval. He claims now that the use of his two notes by the bank was wholly without authority and constituted an unlawful conversion thereof, of which he insists he had no knowledge until long after the bank was taken over, in an admitted wholly insolvent condition, on October 30, 1928. There is no evidence in the record disclosing the amount of losses, if any, between August 27 and October 30, nor is any intervening change in the bank's financial situation between the two dates referred to shown. The record as an entirety fairly sustains the inference of a state of continued insolvency

of the bank between the two dates inclusive, which the members of the board of directors well knew, or should have known. On this record the claimant in effect asked for, and by the majority opinion has been awarded, a preference in derogation of and superior to all lawful depositors' "first liens" on the admitted assets of the bank. It may further be said that claimant's brief admits, and indeed it stands undisputed in the record, that no part of this "converted trust fund" has been traced to any particular property, or identified in any specific or identified asset which was taken over by the receiver of this bank, and that the evidence substantiating the facts here summarized is either claimant's own evidence or evidence introduced in the record without objection on his part.

In the light of the situation outlined, the first question suggested by the tendered challenge to the authority assumed by the majority relates to the source from whence is derived legal principles—the law—the existence of which the opinion assumes and by which it is sought to sustain the award made. It is to be remembered that laws are not the creation of courts but are the enactments of the legislative department of state. To legislate is constitutionally forbidden the judiciary. Const. art. II, sec. 1.

There can be no sustainable claim that constitutional mandate or statutory provision authorizes or sustains the judgment approved. Therefore, if the principles essential to sustain this decision actually have existence and being as valid, substantive law, they must be derived from, and have their source in, the common law of England, and from that portion thereof formerly administered in the English chancery courts. In other words, their origin must be clearly identified with "a certain portion of the substantive law" of England, which convenience has named "equity," and which is administered only by those courts which are known as courts of equity. Even if this be accomplished, their validity and existence in this state is

wholly the result of legislation which now appears as section 49-101, Comp. St. 1929, which reads as follows: "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." (Italics ours.)

With reference to this enactment, Irvine, C., whose judicial learning has ever remained unchallenged in the traditions of this tribunal, in delivering the unanimous opinion of this court, with reference to the statute just quoted, says: "The common law is not with us an estate by inheritance, but one by purchase. It is here in force by virtue of statute, which provides: (Here is quoted the exact words of section 49-101, above referred to.) No one would assert that the phrase 'common law' was there used in contradistinction to the rules of equity; it undoubtedly includes the law derived from the English court of chancery." *Bloomfield State Bank v. Miller,* 55 Neb. 243, 248. This conclusion is in accord with the unanimous judicial opinion throughout the nation. 12 C. J. 183; *Goodman v. Carroll,* 205 Ala. 305; *Continental Guaranty Corporation v. Peoples Bus Line,* 31 Del. 595; *Campbell v. Colorado Coal & Iron Co.,* 9 Colo. 60; *Robert v. West & Reid,* 15 Ga. 122; *Beall v. Surviving Exr's of Fox,* 4 Ga. 404; *In the Matter of Pennock's Estate,* 20 Pa. St. 268; *Marks v. Morris,* 14 Va. 463.

As to this statute, this court is further committed to the doctrine: "Any provision of the common law of England that is inconsistent 'with any law passed or to be passed by the legislature of this state' is not made the law of this state by section 3697, Rev. St. 1913 (Comp. St. 1929, sec. 49-101)." *Moran v. Moran,* 101 Neb. 386. See *Bishop v. Liston,* 112 Neb. 559.

As already stated, our state bank act was adopted originally in 1909. Its terms were carried into, and substan-

tially reenacted as, article 16, title 5, ch. 190, Laws 1919, as a portion of the Administrative Code. As to subjects of legislation covered therein, it was at the time of its original adoption and, notwithstanding amendments subsequently made thereto, thereafter continued to be a valid enactment, independent and complete within itself. That as such, if in conflict with, or repugnant to a prior statutory enactment not mentioned therein, or in conflict with and repugnant to any provision of the common law of England in force in this state, or adopted by virtue of section 49-101, Comp. St. 1929, all of such prior laws are thereby repealed, superseded or modified to the extent at least that the former is repugnant to, inimical, or in conflict with such prior laws. *State v. Hevelone,* 92 Neb. 748; *In re Heirship of Robinson,* 119 Neb. 285.

There is no uncertainty as to the actual facts of the three transactions. Unquestionably the property involved constituted bank assets. The nature and source of these, as already discussed and determined, bring these cases squarely within the clear, unambiguous words of the banking statute. The long established rule of construction as to the effect of complete and independent legislative acts upon prior existing laws, whether the common law or prior statutes, is conclusively against the contentions of the claimant herein. Whatever equity, considered as a certain portion of our substantive law, might have authorized or sustained prior to the adoption of the state bank act, when that fact occurred, its provisions and powers were then fronted by the conflicting and repugnant provisions of the last valid expression of legislative intent; what formerly obtained was thereby, and thereupon *ipso facto,* to the full extent of such conflict or repugnancy, repealed and annulled. The plain words of the last enactment must control.

"The court will not read into a statute exceptions not made by the legislature." *Siren v. State,* 78 Neb. 778; *State v. School District,* 99 Neb. 338.

It is only when a statute is ambiguous that it is subject to judicial construction. But when the language is plain, clear and unambiguous, it is not subject to construction or interpretation; this court has no power to amend a statute, and any attempt to give it any other than its plain meaning would be judicial legislation. *Chicago, B. & Q. R. Co. v. Amack,* 112 Neb. 437.

"It is not within the province of the court to set aside, or nullify by construction, an act of the legislature which is free from ambiguity, and clear and explicit in its terms, upon the ground *that to do so would appear equitable;* nor upon the theory that, in the judgment of the court, the legislature made a mistake and did not intend to do that which its language clearly imports." (Italics ours.) *State v. Bratton,* 90 Neb. 382.

Indeed, the construction which the authorities referred to unquestionably sustain is but the required application of a general rule, whose origin is coeval with the establishment of equity, viz.: "Where they are inconsistent and incompatible with each other, a statutory lien excludes and repudiates an equitable lien." 37 C. J. 309.

This court also is fully committed to the doctrine of the controlling effect of statutes whose terms conflict with previously existing equitable rights, principles and liens, as to the subject-matter covered by such statutes. This question was early presented in the history of this tribunal and fully and decisively determined in our vendor lien cases. "The principle on which a vendor's lien is generally regarded as resting is one of natural justice, that one who gets possession of the estate of another ought not in conscience be allowed to keep it without paying the consideration, although other grounds, such as the presumed intention of the parties, or the existence of a trust between them, have been assigned." 39 Cyc. 1789.

As an equitable doctrine, it was admittedly well established in England from the earliest times, and owed its existence there wholly to "that certain portion of (Eng-

lish) substantive law" which is usually denominated "equity." But this equitable doctrine could not be harmonized with our statutes relating to real estate. As an instance, section 50, ch. 73, Comp. St. 1881, provided: "Every conveyance of real estate shall pass all interest of the grantor therein, unless a contrary intent can be reasonably inferred from the terms used." A retained interest or right in or to real estate vested in the vendor, either legal or equitable, after conveyance made, was plainly repugnant to statutory words quoted and plainly wholly inconsistent therewith. Without such retention there could of course be nothing upon which any action either legal or equitable could be based. Accordingly this court was early committed to the view that: "The doctrine that a vendor has a lien on the land conveyed for the purchase money remaining unpaid is repugnant to our statutes in relation to real estate, and is no part of the law of this state." *Edminster v. Higgins,* 6 Neb. 265. See *Rhea v. Reynolds,* 12 Neb. 128; *Ansley v. Pasahro,* 22 Neb. 662; *Bloomfield State Bank v. Miller,* 55 Neb. 243.

The conclusion inevitably follows that our bank act, a valid statute as to all matters within its purview, supersedes and invalidates all substantive equitable principles and provisions, as well as the terms of prior statutes in conflict therewith or repugnant thereto; and that the majority opinion is, without reference to the correctness of their conclusions otherwise, wholly unsustainable as being in direct contravention of the positive terms of a valid statute. 1 Story, Equity Jurisprudence (14th ed.) 69; *Albright v. Albright,* 228 Pa. St. 552; *Dorner v. School District,* 137 Wis. 147; *Rambo v. First State Bank,* 88 Kan. 257; *Allen v. Kitchen,* 16 Idaho, 133; *Hayes v. Schall,* 229 Mo. 114; 3 Stephen, Commentaries on the Laws of England (15th ed.) 418.

It is suggested in the opinion that rules this case that, if the bank act authorize the receiver to appropriate any part of intervener's trust funds to the claims of the gen-

eral depositors, it will prevent the chancery powers conferred on the district courts by the Constitution of the state, and be therefore void. The suggestion is wholly without force as applied to the facts or controlling law presented here. No funds or property of the trustee is here involved. In brief and argument claimant admits that not a dollar of his trust funds have been traced to any one of the many separate assets now before this court. So, too, the Constitution denies to courts of equity as well as law the power to legislate. Const. art II, sec. 1. Neither can a court of equity create new rights not before existing at law, and then take jurisdiction to pass on and enforce them because the law affords no remedy. *Henderson v. Hall,* 134 Ala. 455; *Harper v. Clayton,* 84 Md. 346; *Madison v. Madison Gas & Electric Co.,* 129 Wis. 249; *Holmes v. Millage,* 1 Q. B. (Eng.) 551.

We now advance to further analysis of the intrinsic merits of the pronouncement sponsored by the majority in this case. Fairness demands that the correctness of the judicial doctrines therein expressed be determined by applying thereto the test of the accepted principles of equity, in the light of the course of events occurring both before and since the adoption of our state bank act, and not forgetting the actual facts of the situation, and according due weight to the fundamental basis and real nature of the business involved. We have before us in strictness a statutory procedure equitable in its nature. The opinion under consideration treats the litigation and expresses its conclusions as the determination of a case in equity. It is obvious as the transactions are here presented the maxim, "Equity looks through forms to substance," is applicable without limitation. *Texas v. Hardenberg,* 10 Wall. (U. S.) 68; *Dodd v. Wilson,* 4 Del. Ch. 114; *Stockton v. Central R. Co.,* 50 N. J. Eq. 52; *Weckerly v. Taylor,* 77 Neb. 886; *Fenton v. Tri-State Land Co.,* 89 Neb. 479. So, too, we are here dealing with a wholly insolvent institution, and not with a solvent, going concern.

Bank control by stock is ended. The corporate entity is immaterial. The real contest and the real parties in interest are lawful depositors, not as creditors enforcing an indebtedness, but as lienholders enforcing liens, opposed to claimants who are asserting, not claims against the bank, but claims to the property thereof.

Recurring now to the consideration of the "six points" on which the majority opinion rests, and by which it must be sustained or fall, in a court of reason, and considering first conformity to the result of the transaction, as it is mirrored by the evidence before us, we respectfully submit that the assumptions of the opinion are entirely negatived by the undisputed facts of the record, and therefore the "six points" never concurred. It never happened.

For instance, the "third" essential point of the statement is: "mingles indistinguishably (such unlawfully converted proceeds) with the general mass of bank assets," etc. The evidence sustaining this statement is not referred to in the opinion. The record discloses no witness testifying to it. It does not exist.

In this connection, it is to be remembered that the bill of exceptions before us carries no complaint as to the absence, incorrectness, or insufficiency of the records of the insolvent bank involved. These records in Nebraska are kept under the supervision of the secretary of the department of trade and commerce, under provisions of law requiring such records to be kept "for the purpose of keeping accurate and convenient records of the transactions and accounts of such bank." Comp. St. 1929, sec. 8-102. While these bank books were not introduced in evidence, the testimony in the record relating to their contents tends to sustain the presumption of their correctness and sufficiency.

It appears, as we have already seen, that the two Loomer notes were "unlawfully converted" as the result of a transaction had on the 13th day of October. This bank was taken over by the state on the following 30th of Oc-

tober. The mingling time was therefore restricted to a period of but seventeen days.

As courts are supposed to know and take cognizance of the economic conditions prevailing in their jurisdiction, we may be authorized to add that we are here dealing with a bank of "frozen" assets.

After a careful study of this record in the light of circumstances involved, we have arrived at the conclusion that they contain not the slightest evidence of any "indistinguishably mingled" assets ever reaching the possession of the receiver of this bank. We challenge the majority to name or identify a single asset in possession of this bank when taken over by the state that may truthfully be said to answer that description, or the name of any witness whose testimony establishes that fact.

It must be admitted that property of banks is composed of physical objects and values evidenced by physical things. To "indistinguishably mingle" implies a mixture of elements whose identity has been wholly lost. Its accomplishment inevitably necessitates (1) parties who did it; (2) a time when; (3) and place where it occurred; and (4) the location of the mingled and mixed elements at the time and place where the identities were lost. We assume as a proper application of the principle of the law of evidence that "courts take notice of the general course of the banking business and the common and well-known methods and practices of banks." 7 Ency. of Evi. 936. We assume that, speaking generally, the statement is fully justified as a fact of common knowledge that, ordinarily, excluding real estate which because of its nature has a situs of its own, the great mass of bank property is contained within its banking house. In view of the fact that no evidence was adduced by the parties in the trials below, save and except as to credits with its correspondent banks, that indicates the presence of assets of this bank at any other place than its banking house, the circumstances of the records fully justify the conclusion that the only place where this

bank's assets could have been "indistinguishably mingled," assuming that were possible, was at this selfsame banking house. According to the undisputed evidence it did not happen there or elsewhere, and we are quite convinced that as a physical fact it could not happen anywhere. Under the circumstances of this case, the very nature of the items to be mixed, and their precise identification by the records of the institution, if properly kept, renders that result impossible. For we know, in the light of the principle stated, the property usually possessed by state banks may be classified as "real estate," "other real estate," "bills receivable," "bonds," "judgments," "exchange," "available funds," viz., cash on hand and balances due from solvent banks. This classification embraces, excepting the result of accident, practically all of the assets of any of the smaller, rural banks. Certain it is, we are fully justified by common knowledge in the conclusion that "real estate," and "other real estate," "bills receivable," "bonds," and "judgments" constituted the "great mass of bank assets" this bank possessed. When we visualize the situation and note that "real estate" in banking parlance is the banking house long owned and paid for; that "other real estate" comprises distinct tracts of land, each description of which has a situs, unchangeable, of its own and necessarily involving specific contracts and conveyances, all bearing definite dates with actual persons as parties thereto; that "bills receivable" comprise promissory notes, and other like instruments of indebtedness, but each bearing an identifying number; that "bonds" carry on their face like indicia of identification; that "judgments" each are essentially "unmixable" and fully disclose on their face the sources of the indebtedness merged into them; and when, in addition to the identifying facts enumerated, there is added thereto a proper set of bank records, whose keeping was supervised by the state, and presumably complying with the statutory mandate "that accurate and convenient records of all transactions" shall be kept, and by the way the

sufficiency and completeness of which is unchallenged in this record, the statement that the trust funds herein sought were "indistinguishably mingled" with any of the assets just enumerated is opposed to the physical facts, reason, and common sense.

But two elements of the classification of the possible assets of this bank remain for consideration, viz., "exchange" and "available funds." The latter of course includes actual cash possessed by the bank at its banking house and the amounts due it from its correspondents. The amount of actual cash on hand when this institution was taken over by the state was $1,817.51. There is no evidence of any *exchange* among the assets. It is true money may be "indistinguishably mingled" with money. But in this case the "mingling" must have occurred in the banking house, and to it not a dollar of the proceeds of claimant's converted notes has been traced by the evidence. If indeed it be conceded that the $1,817.51 in the banking house was the results of "mingling" or "mixture," it was wholly distinct from and in no manner mixed with, other bank property. Its condition would afford not the slightest justification for removing almost $10,000 of the depositors' money, wholly untainted, from the assets of this bank.

The conclusion inevitably follows that the basis on which the majority opinion proceeds is wholly without support in evidence or in fact. It also contravenes every principle of public policy evidenced by the state bank act.

The statutory "first lien," created and declared as attaching to all the assets of a bank, in its very essence is superior to rights based upon personal liabilities of the bank created by the stock control, while operating the same. This state bank act did not contemplate, nor will an enlightened public policy permit, vain demands to be made upon the depositor, nor the fundamental basis of his relation to be departed from. In justice the bank act, and equity enforcing the same, can exact no more from the

depositor to sustain his statutory preference in tact than that same law provided for his and its protection. Therefore, in a court of honest conscience, lawful depositors guilty of no wrongs are not chargeable with the frauds of a bank operated by its stock control, nor responsible for its peculations, nor are they to be prejudiced by its breaches of trusts. These conclusions are not only in strict accord with the legislative intent, clearly appearing in its expressed terms, but also are necessarily implied from the provisions of our state bank act. They are also in harmony with the trust fund doctrine as applied by our court in modification of the rights of general creditors of insolvent trustees at the time of the enactment of this statute and which had prevailed in this jurisdiction consistently without interruption since the decision of *State v. Bank of Commerce* (1898) 54 Neb. 725, reaffirmed in *City of Lincoln v. Morrison,* 64 Neb. 822.

Even against a mere general creditor unaided by a statutory lien, it had then been determined, and was the unquestioned law of this state in 1909, that: (a) Misappropriation of a trust fund does not entitle the *cestui que trust* merely as such, for that reason alone, to a preference over the general creditors of an insolvent trustee. (b) Property or assets of the insolvent trustee acquired before, or with the proceeds of property held before, the trust money came into his hands, and not in any way mingled therewith, are not subject to any lien of claim of the *cestui que trust,* and the rights of the latter in respect thereto are those of a general creditor. (c) The burden of tracing the trust fund into an existing asset is on the *cestui que trust.* (d) Even if it is proved that the trust fund has been but recently disbursed and has been used to pay debts that otherwise would be claims against the estate, there would be manifest inequity in requiring that the money so paid out should be refunded out of the assets, for in so doing the general creditors whose demands remain unpaid are in effect contributing to the payment of

the creditors whose demands have extinguished the trust fund. *State v. Citizens State Bank,* 117 Neb. 358.

The rule of statutory construction seems to be that, when the facts in any given case require the application of the terms of the bank act to trust funds, they should be construed in the light of the principles quoted, and which were unquestionably the controlling precedents in this jurisdiction at the date of its enactment; and indeed for this purpose they would disregard any subsequent decisions in effect overruling the same or altering or modifying the rules therein announced. The controlling principle is that the act must be read in the light of the existing state of the law at its adoption. 36 Cyc. 1137; 26 Am. & Eng. Ency. of Law (2d ed.) 632. In the light of this principle of statutory construction, to now accord to the depositors' first lien on all the assets of the bank a construction restricting its scope as to assets covered to less than that accorded the claims of general creditors at the time of the adoption of the state bank act would indeed be a manifest absurdity. But in the majority opinion in the instant case the principles quoted, as announced in the precedents referred to, are wholly ignored and utterly disregarded, though not expressly overruled. And on a record in which claimant admits failure and inability to trace the trust funds involved to any specific assets, and in no manner establishes the mingling of trust funds therein, the majority have appropriated of the insolvent bank's property (all of which was acquired before the trust money came into its hands, or with the proceeds of property held before) the sum of $8,850 and more of the admitted assets of the Farmers State Bank of Polk, in utter disregard of the first lien of its depositors thereon.

Not only has the plain mandate of our written law been ignored, or rather judicially emasculated, and the uniform course of judicial decisions of this tribunal been disregarded, but likewise the course of events of the past decades has been given no consideration whatever. In that

time millions have been deposited in state banks by depositors relying in perfect good faith on the provisions of the state bank act, read in the light of the decisions we have quoted. Certain state banks, through no fault of these depositors as a class, have failed. On December 31, 1928, there were unpaid claims of depositors against state banks in receivership and also state banks operated by the guaranty fund commission, of which the instant bank was one, in the aggregate amounting to $26,400,282; that the total sum of assets to be realized would be $10,451,932, leaving $15,948,350 as a deficit. Dean, J., in *Abie State Bank v. Weaver, supra.* Additional failures of state banks since that date have increased the total claims of depositors and have not reduced the estimated deficit. The rule announced in the instant case in effect changes the law as it has existed for more than twenty years, impairs every depositor's contract with an insolvent state bank, and prejudices his rights of recovery of his just demands. This conclusion is unescapable. At best his only assurance of final liquidation was his first lien on the assets of his immediate bank of deposit, to which was added certain contributions to be made from certain assessments of the guaranty fund, and certain relief to be afforded by the "depositors' final settlement fund." Now the instant decision diminishes the available cash assets in this receivership, at the time of the entry in the trial court, by 33 1/3 per cent. This in turn in like degree increases the demands of the depositors of this bank upon the funds already named as the source of relief to all state bank depositors, and in proportion diminishes the total sum possible to be received by each therefrom. The iniquities of the decision live not alone in the evil precedent, which the future only can measure, but are visited directly to and upon every depositor in insolvent state banks whose own assets fail to pay 100 per cent. to them they owe.

This sad situation necessarily resulting from the overthrow by the majority opinion of a line of cases, well

reasoned and long followed as binding precedents, suggests again the inquiry: Conceding the power, what in law or morals can justify and sustain those responsible for its creation, by their retroactive pronouncement which, in fact if not in law, impairs contracts and divests rights long possessed and exercised? I answer only to quote the supreme court of the United States in a case involving the effect of the judgment of the supreme court of a state reversing a long line of decisions, in reliance on which contracts had been made, which employed the following language: "However we may regard the late case in Iowa as affecting the future, it can have no effect upon the past. 'The sound and true rule is, that if the contract, when made, was valid by the laws of the state as then expounded by all departments of the government, and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent action of legislation, or decision of its courts altering the construction of the law.' The same principle applies where there is a change of judicial decision as to the constitutional power of the legislature to enact the law. To the rule, thus enlarged, we adhere. It is the law of this court. It rests upon the plainest principles of justice. To hold otherwise would be as unjust as to hold that rights acquired under a statute may be lost by its repeal." *Gelpcke v. City of Dubuque*, 1 Wall. (U. S.) 175, 206.

So, also, here are the words of a great judge, addressed to the vital subject now before us, who long ago departed this life and whose memory lingers as a benediction with those who truly love the law: "When a principle of law is established by a long series of decisions, without a single case on the other side, to carry it out in plain good faith is as sacred a duty as any judge has to perform. His notion that it ought to be otherwise is not entitled to a moment's consideration. It is no part of our office to tinker at the law, and patch it up with new materials of our own making. Suitors are entitled to it just as it is.

Bad laws can be borne; but the *jus vagum aut incertum*—the law that shifts and changes every time it passes through the courts—is as sore an evil and as heavy a curse as any people can suffer, and no people who are fit for self-government will suffer it long. Even a legislator, if he is wise and thoughtful, will make no change which is not absolutely necessary. Legislative changes, however, are prospective, and disturb nothing that is past. But judge-made law sweeps away all the rights which may have been acquired on the faith of previous rules. For such wrongs even the legislature can furnish no redress. When the scales of justice are shaken by the hands that hold them here, there is no power elsewhere to adjust them. * * * But 'new lords, new laws,' is the order of the day. Hereafter, if any man be offered a title which the supreme court has decided to be good, let him not buy if the judges who made the decision are dead. If they are living, let him get an insurance on their lives; 'for ye know not what an hour may bring forth.' The majority of this court changes, on the average, once in every nine years, without counting the chances of death and resignation. If each new set of judges shall consider themselves at liberty to overthrow the doctrines of their predecessors, our system of jurisprudence (if system it can be called) would be the most fickle, uncertain, and vicious that the world ever saw. A French Constitution, or a South American republic, or a Mexican administration would be an immortal thing in comparison to the short-lived principles of Pennsylvania law. The rules of property, which ought to be as steadfast as the hills, will become as unstable as water. To avoid this great calamity I know of no resource but that of *stare decisis*. I claim nothing for the great men who have gone before us on the score of their marked and manifest superiority; but I would stand by their decisions because they have passed into the law and become part of it, have been relied upon and acted on, and rights have grown up under them which it is unjust and cruel to take

away." 2 Veeder, Legal Masterpieces, 930.

In view of the dire consequences necessarily entailed by the action of the majority of this court in this case, it would seem that the only possible justification therefor would be that the "results" following would in the future mark a definite forward step in the progress of jurisprudence. It must be admitted such a culmination would indeed be the only possible excuse or extenuation for the wrongs the decision inevitably inflicts.

An analysis of this opinion discloses that, after eliminating the positive provisions of the state bank act from consideration, it disposes of it by the application of certain "general principles of equity," as defined and applied therein. Compare its pronouncement with *McLeod v. Evans* (1886) 66 Wis. 401. Every reason advanced in the Nebraska opinion has its counterpart in the Wisconsin decision. The Wisconsin case is a three-two decision. The dissenting opinion by Justice Cassody states grounds relied on by the minority judges in the instant case. While in the Nebraska case personal notes were involved, and in the Wisconsin case the converted item was a draft, yet in both the proceeds of the converted paper were traced into correspondent banks where credit was given the trustee banks, which was in turn disbursed by such correspondents. The real substantial issue determined was therefore identical. The majority in Wisconsin pronounced the same decision as made by the majority in the instant case. So, too, it may be said that this doctrine was thereafter adopted in a number of western states. But subsequent events discovered the inherent vice of the doctrine set forth in *McLeod v. Evans, supra,* and in *Nonotuck Silk Co. v. Flanders,* 87 Wis. 237, the reasoning upon which the *McLeod* case was based was repudiated, and the decision itself expressly and formally overruled on the distinct ground, not alone that the rule was inequitable, but because "it is very important to the people of the state that this court should, at least on such questions, adhere to the

principles of the common law so well established as to become elementary. It is especially essential that the state and federal courts on such questions should be in harmony."

As years passed, it may be noted that the courts of substantially all the states that adopted the doctrine of *McLeod v. Evans, supra,* materially receded therefrom. This was accomplished in part by limitations and qualifications of the original declaration, and many indeed expressly overruled the cases whereby its doctrine was accepted. A number of these cases are collected at page 482 of 115 Nebraska. It may be said now that not a single jurisdiction, outside our own, sustains the theory and application of the majority opinion. The legal history of Iowa is typical of the states that receded from the rule announced in *McLeod v. Evans, supra.* It is summarized by the supreme court of that state in *Leach v. Iowa State Savings Bank,* 204 Ia. 497. See, also, *Andrew v. State Bank of New Hampton,* 205 Ia. 1064; *Leach v. Burton & Co. State Bank,* 206 Ia. 675; *Arnold Investment Co. v. Citizens State Bank,* 98 Kan. 412; *Rugger v. Hammond,* 95 Wash. 85.

The sober truth is that the action of the majority has not placed this court in the position of leadership in the march of judicial thought. It marks retrogression to an exploded concept of almost half a century ago, which some courts have tried, and all trying have rejected it as unjust, save alone ourselves.

As already suggested certain features of this *Loomer* case are not common to the two companion cases. While the majority have ignored their existence, we submit they ought to preclude recovery in a court of conscience.

The entire situation as outlined by the evidence in this case carries with it the unescapable inference, which the record as an entirety in no manner rebuts, that this institution was insolvent on August 27, 1928, and that the directors then knew or should have known it. The facts before us indicate that claimant Loomer owed certain

duties to this trust which he failed to perform. He was an executive officer and a director during the entire period. It was his duty to know the system of management, and its daily working, including the general financial condition of the bank and all important matters in its dealings. 1 Michie, Banks and Banking, 268; *Merchants Bank v. Rudolf*, 5 Neb. 527.

When these directors were informed of the bank's precarious condition in August, 1928, they were required to give closer attention to its affairs. *Ford v. Taylor*, 176 Ark. 843.

Indeed, the claimant, as to depositors in his bank, occupied substantially the position of trustee, and was liable to them for losses occurring through mismanagement, neglect of duty, or abuse of trust; it is sufficient to show that he has been guilty of a breach of the implied obligations arising out of the nature of his position. 1 Michie, Banks and Banking, 272.

"When a director discovers that the bank is insolvent and fails to take such steps as lie in his power to close the bank for business, and takes part in any arrangement which permits the bank to be kept open, and deposits to be received, he is personally liable for damages to a depositor who is ignorant of the insolvency, and whose deposits were thereafter received. His plain duty, upon discovering the insolvency of the bank, is to call a meeting of the board of directors, or communicate with the superintendent of the banking department, or direct the cashier to discontinue the taking of deposits, or warn individual depositors of such insolvency, and for a failure to perform such duty, an action will lie against him personally." 1 Michie, Banks and Banking, 359.

The above is a fair statement of the obligations of a director of a state bank, in the absence of a statute which either expressly or by implication modifies the same. In Nebraska such a statute exists. By its terms "the claims of depositors * * * shall have priority over all other

claims * * * and * * * shall at the time of the closing of a bank be a first lien on all the assets of the banking corporation from which they are due." Comp. St. 1929, sec. 8-1,102. Under this provision, after insolvency intervened, every item of assets disposed of, every dollar paid out, whether to general creditor or to stockholder, was an irreparable loss to the owners of the deposits remaining therein. For it is undeniable that if an insolvent bank have deposits aggregating $10,000, equally divided between five depositors, with assets aggregating $5,000, each depositor will suffer a loss of 50 per cent. If after insolvency intervenes two depositors are paid in full, the net loss of the unpaid depositors will be 83 1/3 per cent. If, however, the $4,000 be paid to a general creditor, not a depositor, the net loss will now amount to 90 per cent. The only possible method of protecting the depositors' first recourse to the assets was to retain them by the prompt closing of the bank. To permit it to be thereafter conducted as a going concern was to unavoidably subject the rights of the depositor to all losses incident thereto, which necessarily included those caused by the mistakes, errors, frauds, and peculations of the officers and agents in immediate charge thereof.

Loomer's duty as a director was plain, and it is equally plain that he wholly failed to perform it. By his connivance and consent his insolvent bank continued as a going concern, and he thereby furnished the opportunity for the loss of which he complains, and which his own negligence as a director directly permitted. He who comes into equity must come with clean hands, and will not be permitted in a court of conscience to recover on a cause arising out of his own wrong. But this maxim also excludes recovery because of a situation already fully disclosed by the evidence introduced on behalf of the claimant, which we will now discuss. It is to be remembered that Loomer was not only at all times material a director, but he was also at the same time an executive officer of this bank. The trans-

action in which the notes that constitute the foundation of his claim were given by him involved and contemplated that on its completion there would be a debtor and creditor relation between Loomer and his bank, evidenced by the notes, and that the "available funds" would be decreased by the aggregate of the notes. It was a transaction plainly within the inhibition of section 8-149, Comp. St. 1929, which provides: "No officer * * * of any corporation transacting a banking business under this article shall be permitted to borrow any of the funds of the bank, directly or indirectly. * * * Any officer * * * of a corporation transacting a banking business under this article, * * * who shall violate the provisions of this section, or who shall aid, abet or assist in a violation thereof, shall be deemed guilty of a felony," etc. Loomer's own statement in the record fully discloses that, in connection with the two notes, every possible act on his part necessary to a completed criminal transaction was performed. His sole complaint here is that the bank took possession of the notes and sold them, and appropriated the proceeds prior to the happening of a condition, whose performance was wholly dependent on others. But conceding that no crime was actually wholly committed under the provisions of the statute referred to, still criminality remains. For the statute also provides: "If two or more persons conspire to commit any felony * * * and one or more of such parties do any act to effect the object of the conspiracy, each of the parties in such conspiracy shall be fined not more than ten thousand ($10,000) dollars or imprisoned in the penitentiary not more than two years, or both." Comp. St. 1929, sec. 28-301. See *O'Bryan v. State*, 111 Neb. 733. In other words, a conspiracy is a combination of two or more persons by some concerted action, to accomplish some criminal or unlawful purpose, or *to accomplish some purpose not in itself unlawful by criminal means.* In the instant case, so far as the restoration of the dissipated capital of the Farmers State Bank of Polk was contemplated by the plan adopted, it was a

lawful purpose, but the accomplishment of this purpose, as contemplated by this same agreement by the use of the vice-president's notes to the bank, in effect creating a debtor and creditor relation between him and the corporation of which he was then an officer, involved a criminal conspiracy to secure a result not in itself criminal by the use of criminal means. Indeed, when this unlawful agreement was entered into by him and others, and Loomer had illegally executed and delivered the notes to his bank pursuant thereto, and in all things complied with the terms of the criminal agreement, plainly the conditions of the statute as to, "and one or more of such parties do any act to effect the object of the conspiracy," have been met and criminality is complete. The fact that the conspiracy fails in its object, without any opposing volition exercised by the parties thereto, in no manner affects the guilt of those who participated therein.

"The conspiracy, however fully formed, may fail in its object, however earnestly pursued; the contemplated crime may never be consummated; yet the conspiracy is none the less punishable." *United States v. Rabinowich,* 238 U. S. 78. See *Williamson v. United States,* 207 U. S. 425.

There is no question, at least in this jurisdiction, that "Courts will not, even with the consent of the parties, enforce an illegal contract, and will of their own motion take notice of illegal contracts which come before them for adjudication and leave the parties where they have placed themselves." 13 C. J. 507. See *Wilson v. Parrish,* 52 Neb. 6; *Wilde v. Wilde,* 37 Neb. 891.

"No principle of law is better settled than that a party to an illegal contract cannot come into a court of law and ask to have his illegal objects carried out; nor can he set up a case in which he must necessarily disclose an illegal purpose as the groundwork of his claim. The rule is expressed in the maxims, *'Ex dolo malo non oritur actio,'* and, *'In pari delicto potior est conditio defendentis.'* The law in short will not aid either party to an illegal agree-

ment; it leaves the parties where it finds them. The general rule is the same both at law and in equity, and whether the contract is executory or executed." 13 C. J. 492. See *Sunderland & Saunders v. Hibbard,* 97 Neb. 21; *Perry v. Berger,* 85 Neb. 753; *Haurigan v. Chicago & N. W. R. Co.,* 80 Neb. 139; *Johnson v. Owen,* 72 Neb. 477; *Jorgensen v. Kingsley,* 60 Neb. 44; *Storz v. Finklestein,* 46 Neb. 577; *Clarke v. Omaha & S. W. R. Co.,* 5 Neb. 314; *Davis v. Hinman,* 73 Neb. 850.

The proposition that the execution and delivery of the notes by Loomer, then vice-president and director of the payee bank, under the circumstances constituting the transaction, constituted a deliberate and known violation of his implied duties and obligations as director, was wholly without authority in law, and opposed to the public policy of the state, as evidenced by the plain terms of the public statutes relating thereto, may not be contraverted. No power or legal right was vested in him that in any way, or to any degree, authorized the act expressly proscribed and punished by the criminal laws. The same restrictions rested on both the bank as a corporate entity, and the executive officers who acted in its behalf. Not by the wildest stretch of the imagination could this entire transaction be conceived as legitimate business, in which any of the parties thereto, either corporate or natural, might lawfully engage. Eliminate all consideration of the state bank act, still the long-established principle of the common law would deny recovery to the prejudice of the lawful depositor and creditor. For the principle is well established, and long accepted, that "The claims of depositors and other general creditors who trusted the bank in the transaction of its legitimate business may be preferred over claims which originated in the conduct of a business, by the bank, in which it had no legal authority to engage." 1 Michie, Banks and Banking, 592. See *Bank of Chattanooga v. Bank of Memphis,* 56 Tenn. 408; 7 C. J. 752; *State v. Bank of Hemingford,* 58 Neb. 818.

With this last analysis we close this story of "equity" with earnest dissent. We protest that the "great mass of assets" of the modern rural bank is not "indistinguishably" intermixable as oil, or grain, or sand, but is comprised of elements each separate and distinct, which may be identified; that the basis assumed by the majority opinion, unsupported by the evidence, never existed in this case, and in its essentials is what every banker knows to be at variance with the facts of modern banking; that to now, through forms of judicial power, withdraw from the lawful priority and first right of depositors, legislatively declared, judicially approved, and by such depositors relied on, a "mass of property" as "indistinguishably mingled" and mixed with trust funds unlawfully converted, when time, and place, and inherent nature thereof proclaim the same or any distinctive part or parts thereof to be unmixed and unmingled, and incapable of so being, involves both untruth and moral wrong that admitted good faith and unquestioned integrity of judges may not justify, excuse or extenuate; that this court has retrograded and again accepted a long-abandoned and outworn concept of equity coeval with a bygone age; that it now denies the enforcement of the just and fair terms of a valid statute and thereby visits afflictions on unfortunate owners of more than twenty-six millions of deposits in insolvent state banks, and adds to their misfortunes others wholly created by this court. And lastly, with sublime disregard for the valued maxims, this court of conscience has degraded equity and has required her as a handmaiden to serve the malefactor and for him to secure the fruits of his transgressions. Truly of such the prophet spake: "And judgment is turned away backward, and justice standeth afar off: for truth is fallen in the street, and equity cannot enter." Isa. 59:14.

GOOD, J., concurs in the dissent.

STATE, EX REL. C. A. SORENSEN, ATTORNEY GENERAL, V. FARMERS STATE BANK OF POLK, APPELLANT: FREEMAN E. RUNQUIST ET AL., INTERVENERS, APPELLEES.

FILED JULY 17, 1931. No 27378.

**Banks and Banking**: INSOLVENCY: PREFERRED CLAIMS: TRUST FUNDS. Trust funds, traced by the beneficiary into the general mass of assets in control of the receiver of an insolvent state bank, *held* payable in full out of such assets in preference to claims of general depositors. *State v. Farmers State Bank, ante*, p. 532, followed.

APPEAL from the district court for Polk county: HARRY D. LANDIS, JUDGE. *Affirmed.*

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

*H. G. Wellensiek, contra.*

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

ROSE, J.

In a proceeding to wind up the affairs of the Farmers State Bank, an insolvent banking corporation, Runquist & Thesing, partners, intervened and presented a petition for the allowance of $1,000 as a preferred claim payable in full out of the general mass of assets in the control of the receiver. The answer to the petition of interveners was a general denial. A trial of the issues resulted in a judgment granting intervener the relief prayed. The receiver appealed to the supreme court.

The decision is controlled by the opinion in *State v. Farmers State Bank, ante*, p. 532.

AFFIRMED.

PAINE, J., concurs in the result.

# DOROTHY C. BRONDER, EXECUTRIX, APPELLANT, V. OTIS ELEVATOR COMPANY ET AL.: H. A. WOLF COMPANY, APPELLANT: DELMAR DEAN BRONDER, APPELLEE.

FILED JULY 17, 1931. No. 27776.

1. **Master and Servant:** WORKMEN'S COMPENSATION LAW: PAYMENTS BY EMPLOYER: RIGHT TO REIMBURSEMENT PART OF CONTRACT. The provisions of the workmen's compensation law, granting to employer the right to reimbursement for compensation paid to a dependent of employee, if a third person responds in damages for negligence resulting in the employee's death, are parts of the contract of employment and bind alike the employee and the latter's personal representative.
2. ———: ———: ———: SUBROGATION: MEASURE OF RECOVERY. Under the workmen's compensation law, reimbursement for the full amount of compensation properly paid by employer to employee's dependent, with the employer's expenses for making recovery of damages to that extent from a third person whose negligence caused the death of the employee, is the measure of the employer's statutory right to subrogation.
3. **Statutes:** MODIFICATION BY SUBSEQUENT STATUTE. An independent statute, complete in itself and covering the entire subject to which it relates, may modify earlier statutes without referring to them.

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

*Hall, Cline & Williams, Henry J. Beal* and *Byron W. Hunter*, for appellants.

*Smith, Schall & Sheehan* and *Crofoot, Fraser, Connolly & Stryker, contra.*

*Chambers & Holland, amici curiæ.*

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

ROSE, J.

This is an action under Lord Campbell's Act to recover damages for negligence resulting in the death of Frank A. Bronder May 13, 1929. Comp. St. 1929, secs. 30-809, 30-810.

Decedent left surviving him as his only heirs at law his widow, Dorothy C. Bronder, age 30, and Delmar Dean Bronder, age 14, a son by a former wife. Frank A. Bronder was an employee of H. A. Wolf Company, and plaintiff alleged that, while he was performing duties of his employment, he was fatally injured in an elevator shaft in the Paxton Building, Omaha, through negligence of Abel Hamilton who was at the time an employee of Otis Elevator Company. Under the workmen's compensation law the H. A. Wolf Company, a corporation in control of the Paxton Building, but innocent of wrongdoing in connection with its employee's death, paid employer's liability, but declined to sue the wrongdoers, Otis Elevator Company and Abel Hamilton, for negligence. To recover damages therefor in the alleged sum of $40,000, Dorothy C. Bronder, executrix of the estate of her deceased husband, brought this action at law, naming Otis Elevator Company, Abel Hamilton, and H. A. Wolf Company, defendants. In addition to the demand for damages, plaintiff prayed for an order directing payment, out of any judgment recovered by her, of the amount due H. A. Wolf Company for payments made by it under the workmen's compensation law.

The Otis Elevator Company and Hamilton denied the negligence charged by plaintiff. H. A. Wolf Company admitted generally the allegations of plaintiff's petition, pleaded payment of workmen's compensation, and prayed for reimbursement therefor, by right of subrogation, out of any judgment rendered in favor of plaintiff.

Upon a trial to the district court, a jury having been waived, judgment was rendered in favor of plaintiff for $7,500 against the Otis Elevator Company and Hamilton. The Otis Elevator Company complied with a judicial order to pay the amount of the judgment and costs to the clerk of the district court to await distribution and consequently was discharged from further liability.

Delmar Dean Bronder, by Lizzie Randall, his guardian,

intervened and demanded distribution to plaintiff and himself in the same proportions as personal property of an intestate is distributed under the inheritance laws, or one-fourth to plaintiff and three-fourths to intervener. Comp. St. 1929, sec. 30-810.

From the fund of $7,500 for distribution, the district court directed the clerk to pay the attorneys for plaintiff and H. A. Wolf Company $2,500, fees in that sum having been approved by the county court with the consent of all parties to the action. In distributing the remainder, or $5,000, the district court found that H. A. Wolf Company was subrogated to the rights of decedent's widow to the extent of one-fourth of $5,000, or $1,250, on account of payments to her under the workmen's compensation law, and that the minor son of decedent was entitled to three-fourths of $5,000 under the provisions of Lord Campbell's Act, or $3,750. From a judgment ordering distribution according to these findings, plaintiff and H. A. Wolf Company appealed.

The employer, H. A. Wolf Company, contends that it is entitled to reimbursement by right of subrogation for the full amount of compensation paid to the dependent widow under the workmen's compensation law, before any part of the fund recovered from the wrongdoer under Lord Campbell's Act is distributable to heirs of the deceased employee, and that the judgment of the district court to the contrary is erroneous. The following are stipulated facts:

"H. A. Wolf Company has paid in compensation and funeral benefits under said employers' liability law the total sum of $4,791.99 and has likewise expended the sum of $323.20 in expenses in the making of the recovery of said judgment of $7,500 in the above-entitled action, making a total of $5,115.19 thus expended by said H. A. Wolf Company."

The compensation commissioner rendered judgment in favor of the widow, as the only dependent of the deceased employee, against his employer, H. A. Wolf Company, for

the compensation authorized by law. Afterward the district court approved a lump-sum settlement for compensation which the employer paid. The record does not show an appeal from the judgment of the compensation commissioner or from the order approving the settlement. The payments made by the employer for compensation, therefore, were adjudicated claims authorized by the workmen's compensation law. The evidence conclusively shows further that the intervener, Delmar Dean Bronder, is a son of the deceased employee by a former wife, who, after the birth of the son, procured a divorce; that the son was living with his mother at the time of his father's death and was not then a dependent of his father; that the widow of the deceased employee was the only dependent entitled to compensation from the employer. The Otis Elevator Company, defendant, was a "third person" within the meaning of the workmen's compensation law, which provides: "Any recovery by the employer against such third person, in excess of the compensation paid by the employer after deducting the expenses of making such recovery, shall be paid forthwith to the employee or to the dependents." Comp. St. 1929, sec. 48-118. In the present instance, the amount of the employer's claim for "the expenses of making such recovery" is stipulated to be $323.20. As already shown, H. A. Wolf Company paid employer's liability in the sum of $4,791.99 and expenses of $323.20 in making recovery of $7,500 from a third person, or a total of $5,115.19. Is the employer, by statutory right of subrogation, entitled to reimbursement for these payments and expenses in full before any part of the money collected under Lord Campbell's Act can properly be distributed to the heirs of the deceased employee? The right of subrogation is created by the workmen's compensation law which provides:

"Where a third person is liable to the employee or to the dependents, for the injury or death, the employer shall be subrogated to the right of the employee or to the de-

pendents against such third person, and the recovery by such employer shall not be limited to the amount payable as compensation to such employee or dependents, but such employer may recover any amount which such employee or his dependents should have been entitled to recover. Any recovery by the employer against such third person, in excess of the compensation paid by the employer after deducting the expenses of making such recovery, shall be paid forthwith to the employee or to the dependents, and shall be treated as an advance payment by the employer, on account of any future instalments of compensation: Provided, however, that nothing in this section or act shall be construed to deny the right of an injured employee or of his personal representative to bring suit against said third person in his own name or in the name of the personal representative based upon said liability, but in such an event an employer having paid or paying compensation to the said employee or his dependents shall be made a party to the suit for the purpose of reimbursement, under the above provided right of subrogation, of any compensation paid." Comp. St. 1929, sec. 48-118.

This section is part of an act imposing upon employers of labor a liability which did not previously exist. It was competent for the legislature to prescribe the terms and conditions under which the new burdens were imposed. The right of subrogation to provide the means of reimbursement for compensation allowed and paid in consequence of a third person's negligence was an important creation of the legislature. It was intended to benefit the public, the employer and employee, as well as dependents of the latter. The rights to which the employer are subrogated are the rights of "the employee" or of "the dependents," and these rights apply to "any compensation paid." The contract of employment was the employee's contract with his employer. The employee agreed to statutory reimbursement for the protection of the employer to the extent of the compensation paid in the event of a re-

covery from a third person—the wrongdoer whose negligence caused the loss. The statute is by construction a part of the contract of employment and that contract binds alike the employee and the latter's legal representative. *City of Grand Rapids v. Crocker*, 219 Mich. 178.

Under the workmen's compensation law, reimbursement for the full amount of compensation properly paid by employer to employee's dependent, with the employer's expenses for making recovery of damages to that extent from a third person whose negligence caused the death of the employee, is the measure of the employer's statutory right to subrogation. This is obviously the intention of the lawmakers as indicated by the language used, by the spirit of the law in its entirety, and by remedial enactments. Innocent employers who are required to compensate employees for injuries are intentionally granted a measure of relief equivalent to the compensation paid and the expenses incurred, where a third person negligently causes the loss and responds in damages to that extent.

It is argued, however, that the view expressed is at variance with the following provisions of Lord Campbell's Act, under which the money for distribution was recovered:

"Every such action shall be commenced within two years after the death of such person. It shall be brought by and in the name of his personal representative, for the exclusive benefit of the widow or widower and next of kin. The verdict or judgment should be for the amount of damages which the persons in whose behalf the action is brought have sustained, and the avails thereof shall be paid to and distributed among such persons in the same proportions as the personal property of an intestate under the inheritance laws." Comp. St. 1929, sec. 30-810.

The workmen's compensation law is the later enactment. It is an independent statute creating new remedies and liabilities and covering the entire subject of legislation to which it relates. It is well-established law that such a statute may modify inconsistent provisions of an earlier

act without referring to them. In so far as the disbursements required by Lord Campbell's Act are inconsistent with disbursements required by the workmen's compensation law, the provisions of the later act control the specific instances to which it applies. Except as so modified, the provisions of the earlier act are undisturbed. In this view of the law, H. A. Wolf Company, employer of the deceased employee, is entitled to the entire fund remaining in the hands of the clerk of the district court for distribution.

The judgment of the district court is reversed and the cause remanded for a judgment conforming to this opinion.

REVERSED.

GOOD, J., dissents.

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VAN E. PETERSON, RECEIVER, APPELLEE, V. FRANK P. STRAYER ET AL., APPELLANTS.*

FILED JULY 17, 1931. No. 27689.

1. **Banks and Banking**: LIABILITY OF STOCKHOLDERS. Where certain bank stock was sold by the owners thereof, at a time when the bank was under the direction of the department of trade and commerce, such original stockholders are primarily liable for the constitutional double liability under section 7, art. XII of the Constitution, provided the liability accrued while they remained such stockholders.
2. ———: ———. Where certain stock in a bank, then under the direction of the department of trade and commerce, was sold by the owners thereof, the purchasers become stockholders and are bound by the constitutional double liability for such liability as may accrue while they are such stockholders.
3. **Estoppel.** "A party who has, with knowledge of the facts, assumed a particular position in judicial proceedings, and has succeeded in maintaining that position, is estopped to assume a position inconsistent therewith to the prejudice of the adverse party." 21 C. J. 1223.

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

*Norval Brothers* and *Scott & Scott,* for appellants.

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* On rehearing, paragraph 2 of syllabus withdrawn. See opinion, p. 866, *post.*

*Butler & James, H. P. Armitage, C. D. Ritchie* and *Cordeal, Colfer & Russell, contra.*

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

DEAN, J.

This action was begun in the district court for Hitchcock county by the receiver of the Citizens State Bank of Stratton to enforce the double liability of certain stockholders therein.

On or about April 18, 1924, the directors of the bank adopted a resolution declaring an assessment of 100 per cent. on its capital stock. The defendants Frank P. Strayer, E. H. Strayer, Ralph E. Strayer, and J. M. Sutton refused to pay such assessment on the stock respectively owned by them. On or about July 12, 1924, the stock of such defendants was sold to the following parties, who are also made defendants herein, namely: The stock of E. H. Strayer was sold to J. C. Story, who afterwards transferred 20 shares of his stock to the defendant H. P. Armitage; that of Frank P. Strayer was sold to Will C. Dahnke; that of Ralph E. Strayer was sold to Charles W. Wood; and the stock of J. M. Sutton was sold to E. M. Ernest. The original owners of the stock may be hereinafter referred to as the Strayer group, and the purchasers thereof as the Dahnke group. All of the defendants above named have been made parties hereto by the receiver. The trial court found that the Strayer group are primarily liable to the receiver, and that the Dahnke group are secondarily liable for the respective amounts of stock involved in each case, with interest thereon at 7 per cent. The defendants have appealed.

In a former action entitled, *Citizens State Bank v. Strayer,* 114 Neb. 567, arising out of an assessment of 100 per cent. against the capital stock of the bank in suit, we held that the bank could not recover a deficiency of the assessment because such assessment was not authorized by a majority of the stockholders.

In the case now before us the Dahnke group contend that, because this court held that the assessment above mentioned was void, it follows that all proceedings based thereon are also void, and that the group last above named are not stockholders in the bank, and hence are not liable for any of the stock. The Strayer group, however, contend that the sale of the stock to the Dahnke group was valid, and that they, the Strayer group, are no longer stockholders of the bank and are not liable to respond in any event for the obligations and liabilities that arise as against stockholders.

It may be noted here that, in the former action, the Strayer group, then owners of the stock, contended that the assessment was invalid. The same group of defendants now contend, however, that the sale of their stock under the assessment was valid and that they are no longer the owners thereof.

In 21 C. J. 1223, this is said: "A party who has, with knowledge of the facts, assumed a particular position in judicial proceedings, and has succeeded in maintaining that position, is estopped to assume a position inconsistent therewith to the prejudice of the adverse party." And in *United States Fidelity & Guaranty Co. v. Ettenheimer*, 70 Neb. 144, we held that, when a party to an action successfully assailed the proceedings in this court as being unauthorized by law and wholly void, he in turn subjected himself to an estoppel afterwards to assert that they were in any respect valid.

The report of the receiver discloses that, with the exception of cash on hand in the sum of $12,322.32, all the assets of the bank have been exhausted, and that the present liabilities amount to $83,302.19, which the receiver was unable to liquidate. And it is further disclosed by the receiver's report that the deficiency herein amounts to $70,969.87, and this report was approved by the court before the order was issued which authorized the receiver to enforce the constitutional liability against the stockholders herein.

Did the liabilities accrue during the time the Strayer group were stockholders of the bank? Clearly, this must be answered in the affirmative. The bank was placed under the direction of the department of trade and commerce March 10, 1924, at the time the Strayer group was in charge thereof. The stock was sold several months thereafter to the Dahnke group and a receiver was appointed May 25, 1926, to take charge of the affairs of the bank. From an examination of the record we conclude that the losses sustained by the bank were not the result of transactions subsequent to the sale of the stock by the Strayer group to the Dahnke group.

Under section 7, art. XII of the Constitution, this provision appears: "Every stockholder in a banking corporation or institution shall be individually responsible and liable to its creditors over and above the amount of stock by him held to an amount equal to his respective stock or shares so held, for all its liabilities accruing while he remains such stockholder, and all banking corporations shall publish quarterly statements under oath of their assets and liabilities."

It appears to us that language cannot be plainer nor more explicit than the constitutional requirements above cited. And especially is this applicable where the owners sold their stock while the status of the bank, under the law, was doubtful and its affairs were already under the control of the department of trade and commerce.

We have held that the making and the acceptance by the holder of a promissory note for another note then existing does not constitute the payment of an original indebtedness, or financial obligation, in the absence of a specific agreement therefor. And it is elementary that a renewal note is open to all the defenses which might have been made against the original note. *Auld v. Walker*, 107 Neb. 676; *Berwyn State Bank v. Swanson*, 111 Neb. 141; *Exchange Nat. Bank v. Schultz*, 113 Neb. 346; *Willis v. Sponsler*, 117 Neb. 1. And also, as applicable to the facts in the present

case, it clearly appears that the bank herein, when the sale of the stock was made, was under the direction of the department of trade and commerce, and that the original stockholders are therefore primarily liable for the constitutional double liability where the liability accrued during the time they were in charge of the bank. In *Dunn v. Bank of Union,* 74 W. Va. 594, L. R. A. 1915B, 168, the court points out that "the burden of showing such intention and agreement (rests) resting always upon him who claims the benefit of the discharge." See, also, *Scott v. Deweese,* 181 U. S. 202.

While the Daknke group was in charge of the bank for a period covering less than two years after the receiver was appointed, the record discloses that, during such time, deposits were received while the bank was being conducted as a going concern by the department of trade and commerce. The Dahnke group, or some of its members, were in charge of the bank, and, as such officers and stockholders, we think the district court did not err in holding them secondarily liable for such liability as may have accrued while they were such stockholders. We have held that: "A person who voluntarily assumes the status of a stockholder and director of a bank is estopped as against creditors to deny that he is a stockholder when it is sought to hold him liable for the superadded constitutional liability under section 7, art. XII of the Constitution." *Dempster v. Atwood,* 118 Neb. 579. And we also held in the *Dempster* case that the section of the Constitution above cited pertains to stockholders who were such "when the credit was extended to the bank or the liability incurred by the bank."

We conclude that the trial court did not err in the rendition of its judgment, and that such judgment must be and it hereby is

AFFIRMED.

## CHICAGO & NORTHWESTERN RAILWAY COMPANY, APPELLANT, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT, APPELLEE.

FILED JULY 17, 1931. No. 27835.

1. **Taxation**: ASSESSMENT: CORRECTION. Under the provisions of chapter 174, Laws 1927, authority is given a taxing board to levy and collect the taxes under an assessment therefor upon the uncontested value thereof, but the valuation so fixed shall not be construed as a final certification of the amount due, and, upon a final adverse determination by a court, the remainder of the assessment may be collected.
2. ———: ———: VALIDITY. Where all the members of a board of equalization and assessment were present, and all participated in the assessment of certain railroad property, for taxation, such order so fixing the amount of assessment will not be held invalid merely because, at a later hearing in respect of the same property, a quorum but not all members of the board were present.
3. ———: BOARD OF EQUALIZATION AND ASSESSMENT: JURISDICTION. It is to be presumed that a board of equalization and assessment is composed of members who are familiar with and have a knowledge of the details connected with the assessment of properties, and, in the absence of unlawful procedure, or apparent misjudgment or omission of vital facts, this court will not interfere with the board's jurisdiction of the subject-matter.

APPEAL from the State Board of Equalization and Assessment. *Affirmed.*

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

*C. A. Sorensen, Attorney General*, and *Hugh LaMaster, contra.*

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

DEAN, J.

The Chicago & Northwestern Railway Company, hereinafter called the company, has appealed from the assess-

ment imposed upon its property for the year 1930 by the state board of equalization and assessment, hereinafter referred to as the board.

July 14, 1930, the amount of the assessment was fixed at $38,112,640, and an equalized assessment of 75 per cent. of such value was entered by the board in the sum of $28,435,820. Objections to the assessment were filed July 21, 1930, and on July 25 the objections were overruled by the board. The attorney general, on August 5, 1930, filed a motion to have the above proceedings reopened, to the end that additional evidence might be submitted. Afterward, on August 29, 1930, the board complied with the request.

Subsequently, on October 16, 1930, the board certified an assessment of the company's property to the several interested county clerks in the state. Thereupon the company paid the assessment on the basis as certified by the board. The company, however, now contends that the board was without jurisdiction to reopen proceedings, and that the assessment so certified is final. Objections to the jurisdiction of the board were overruled January 5, 1931, when the board met with three of its members present, namely, the governor, the secretary of state, and the state treasurer. Additional evidence was submitted and the original assessment that was made July 14, 1930, was reduced by the board from $28,435,820 to $28,410,095. And it is from this final order of the board that an appeal has been prosecuted.

A letter was written October 16, 1930, by the tax commissioner and forwarded to the various county clerks, in respect of the assessment complained of herein. A copy of the letter follows:

"On August 4th this department certified to you the total assessment of the Chicago & Northwestern Railway Company as fixed by the state board of equalization and assessment. Accompanying this certificate was a letter advising you that the company had contested 25.58 plus per cent. of the assessment.

"It was suggested that extension of taxes against this railway company be deferred until the last possible moment with the thought that a decision in the appeal which they had taken might be rendered before it was necessary to certify the tax list to the county treasurer.

"It is now evident that no decision will be reached in this case for several months and it will be necessary for you to complete your tax lists before that time. Therefore, in extending taxes against the Chicago & Northwestern Railway Company you should extend only 74.41 per cent. of the original amount fixed by this board. This is in accordance with section 8, of chapter 174, Session Laws of 1927, and does not apply to the railroad terminal assessments as the terminal assessments are not in controversy."

Chapter 174, Laws 1927, to which reference is made in the above letter of the tax commissioner, provides that in the event of an appeal from an order of the board to the supreme court a return shall be made "to the respective county clerks of the several counties in which any portion of the railroad property may be located, stating the amount of the assessment as determined by the board and the amount which the railroad company claims same to be in excess of the true value." It is also provided therein that the taxing board shall have authority to levy and collect the taxes under the assessment made against the railroad property upon the uncontested value thereof, and that, upon a final determination by the court of the value of the property, the taxing board shall have authority to correct the assessment to comply with the judgment of the court so pronounced.

The company contends that the board was without jurisdiction to make a "pretended reassessment" of the property after the board had certified to the proper county clerks a valuation of the company's property, which the company paid. But we do not think the letter can be construed as a final certification of the company's property. Under the provisions of chapter 174, Laws 1927,

above cited, authority is given a taxing board to levy and collect the taxes under an assessment therefor upon the uncontested value thereof, but the return so made shall not be construed as a final certification of the amount due, and, upon a final adverse determination by a court, the remainder of the assessment may be collected.

Section 77-509, Comp. St. 1929, provides that, in the event a company is dissatisfied with an assessment as levied, complaint may be filed by such company, or by the attorney general, stating the grounds of the complaint. And it is also provided therein that the board of equalization at its next regular meeting thereafter "shall make such an order in the premises as to the board of equalization and assessment shall seem just and reasonable and said order shall be considered as the final order in the case from which an appeal may be taken to the supreme court." The section further provides that either party desiring to appeal from the assessment "so finally determined" shall file a written notice of intention to appeal from such assessment "so finally determined upon." The attorney general's motion to reopen the proceedings was clearly for the purpose of receiving additional evidence of "the matters and facts upon which said percentage (75%) is based * * * in order that the basis of the board's action may be clearly shown by the record." It does not anywhere appear in the motion so made by the attorney general that he desired to have the order set aside and vacated, as appears to be contended by the company.

It appears to us that, under the provisions of section 77-509, above cited, the order of the board assessing the property in July, 1930, was final, and that all proceedings held subsequent thereto were for the purpose of sustaining the assessment so made. And where all the members of the board of equalization and assessment were present, and all participated in the assessment of the railroad property at that time, the order fixing the rate of taxation will not be held invalid merely because, at a later hearing in

respect of the same property, a quorum but not all members of the board were present.

Complaint is made of the manner in which the assessment was made by the board and the method by which the amount was ascertained. But it is to be presumed that the board is composed of members who are familiar with the value of the company's property, and who have an intimate knowledge of the intricate details connected with the ascertainment of the true valuation and assessment of such property. And, in the absence of unlawful procedure, or apparent misjudgment or omission of vital facts, this court will not interfere with the board's jurisdiction of the subject-matter. "The judgment of a state board empowered to fix a valuation for taxation cannot be set aside by the testimony of witnesses that the valuation was other than that fixed by the board, where there is no evidence of fraud or of gross error in the system on which the valuations were made." *Pittsburgh, C. C. & St. L. R. Co. v. Backus,* 154 U. S. 421. See *Chicago, B. & Q. R. Co. v. Babcock,* 204 U. S. 585. "The state board of equalization and assessment, in valuing and assessing property for taxation, acts in a *quasi* judicial capacity, and its action is not subject to collateral attack, except on grounds of fraud or other wrongful conduct equivalent thereto, or for the exercise of power not conferred upon it by law." *State v. State Board of Equalization and Assessment,* 81 Neb. 139. To substantially the same effect is *Chicago, B. & Q. R. Co. v. Box Butte County,* 99 Neb. 208. And we have held to the proposition that: "There are no settled or infallible rules for the ascertainment of the actual value of railroad property for the purpose of taxation. Approximation to actual value is all that can reasonably be expected. If the value fixed by the state board bears a similar proportion to the actual value that the valuation of other property does, such a valuation for assessment purposes is valid." *Chicago, R. I. & P. R. Co. v. State,* 111 Neb. 362.

In view of the record before us, we conclude that the

irregularity complained of in the assessment of the company's property does not appear in the order of the board of equalization and assessment. It follows that such order must be and it hereby is

AFFIRMED.

The following opinion on motion for rehearing was filed October 9, 1931. *Former judgment vacated, and judgment of district court affirmed as modified.*

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

PER CURIAM.

This cause is before us on a motion for rehearing. The former opinion is reported, *ante*, p. 592.

From a reexamination of the record and the briefs, it appears that a large part of appellant's contentions is based on a misconception of the record. Appellant insists that the state board of equalization and assessment assessed the property of the railway company on the 14th of July, 1930, and thereafter the state board vacated and set aside its assessment; that this left no assessment standing, and that the board was without power to make a new assessment in January following.

Appellant is in error. A few days subsequent to the assessment made on the 14th of July appellant filed objections to the assessment. On the 25th of July the objections made by the railway company were overruled, and it then gave notice of an appeal to the supreme court. Thereupon, the attorney general asked leave to introduce evidence which would explain and show the basis on which the state board had reached its findings and conclusions in making the assessment of the company's property in Nebraska. Thereupon, the board entered an order vacating and setting aside what it called the final order, relating to the assessment of the railway company's property, entered on July 25. The order vacated was the one overruling the objections of the railway company, and did not relate

to the assessment made on the 14th of July. Thereafter, both parties introduced further evidence, and finally the board made some reduction in the assessment that it had previously made on the 14th of July.

Appellant is not in position to complain of a reduction of the assessment that it induced the board to make. The only questions properly before this court on the appeal are: First, did the state board find the true value of the entire system of appellant's railway properties? and, second, did it allocate no more than the proper proportion of such value to the state of Nebraska?

From an examination of the record, we are convinced that the evidence sustains the state board in ascertaining the taxable value of the entire system, save in one respect. It included in such determination two items, consisting of liberty bonds and United States certificates of indebtedness, amounting to $470,734. It does not appear that these items constituted a part of the operating system of the railway company, and, therefore, no part of these two items should have been allocated to the state of Nebraska. Elimination of these two items results in reducing the assessment of the railway company for the state of Nebraska in the amount of $40,365.44, and by that amount the assessment, made by the state board of equalization, is erroneous and excessive. It appears that the same system in ascertaining the value of the property of this appellant was used in ascertaining the value of other railway systems having lines and operating in the state of Nebraska.

From an examination of the record, we are convinced that a proper basis of allocation was used by the state board. It follows, therefore, that the assessment made by the state board of equalization and assessment should be and hereby is reduced from $28,410,095 to $28,369,729.56.

Our former judgment affirming the action of the state board is vacated, and the assessment is reduced to $28,369,729.56. In all other respects the action of the state board of equalization and assessment is affirmed.

AFFIRMED AS MODIFIED.

JOHN P. LAUB ET AL., APPELLEES, V. DONALD LAUB ET AL., APPELLEES: WINNIE LAUB ET AL., APPELLANTS.

FILED JULY 17, 1931. No. 27839.

1. **Partition:** SALE OF DEVISED LAND. A testator in his will named his wife as executrix of his estate, and therein he devised all of his real and personal property to his wife, with the provision that, upon her death, all of the residue of the property then remaining should become the property of the testator's children, or their issue, share and share alike. The will also authorized and empowered the executrix, however, to mortgage the real estate, "if in her opinion it is beneficial or becomes necessary," and, also, if "in her opinion" it was necessary, "to sell by private sale, or in such manner, upon such terms of credit, or otherwise, as she may think right and proper, all or part of my real estate, and deeds to purchasers to execute, acknowledge and deliver in fee simple." *Held*, that, in an action for the construction of the will and a partition of the land, during the lifetime of the executrix, the court did not err in directing a sale of the land with the value of the executrix' life estate therein reserved to her.
2. **Appeal.** A party will not be heard to complain of a decree which does not injuriously affect his substantial rights.

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

*C. C. Flansburg*, for appellants.

*Ross & Sampson, Horth, Cleary & Suhr, P. S. Heaton* and *Donald Laub, contra.*

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

DEAN, J.

November 17, 1907, William Laub, hereinafter referred to as the testator, died testate. His widow, Margaret C. Laub, and his sons John P., Alvin S., William E., and Daniel E. Laub, and two married daughters, namely, Mary E. Costello and Alice R. Parsons, survived him. But Alvin S., William E., and Daniel E. Laub have died since the death of the testator. Under the will of the testator, which is

dated April 9, 1906, his wife is named as the executrix of his estate, which consisted of about 800 acres of farm land in Merrick county and some personal property.

Under the terms of the will, provision is made that all of the testator's real and personal property shall become the property of his wife upon his death, and that, upon her death, all of the residue of the property then remaining, both real and personal, shall become the property of the testator's children, or their issue, and that each shall share alike in such property. The fourth paragraph of the will follows.

"I do hereby nominate and appoint my beloved wife, Margaret C. Laub, executrix of this, my last will and testament, hereby authorizing and empowering her to compromise, adjust, release and discharge in such manner as she may deem proper, the debts and claims due me. I do also authorize and empower her, if in her opinion it is beneficial or becomes necessary, for the purpose of preventing a sacrifice of said estate, or any part thereof, to mortgage the real estate, or any part thereof, belonging to said estate, for such time and upon such terms and conditions as she may deem proper. I do also authorize and empower her if it shall be necessary, in her opinion, for her support, maintenance, care and comfort, or in order to pay my debts, as such executrix, to sell by private sale, or in such manner, upon such terms of credit, or otherwise, as she may think right and proper, all or part of my real estate, and deeds to purchasers to execute, acknowledge and deliver in fee simple."

The executrix and certain of the decedent's children, hereinafter referred to as the plaintiffs, sought to have the terms of the will construed in respect of the authority and power of the executrix "to mortgage her life estate, and regarding her authority and power to sell said lands."

It is alleged that, since the death of the testator, the executrix has made loans and advancements to certain of her children from her private funds and estate, in the

following sums, namely: To John P. Laub, $966.30; to Alvin S. Laub, $900; to William E. Laub, $700; to Mary E. Costello, $700; and to Alice R. Parsons, $2,000. The plaintiffs allege that such sums will be repaid to the widow when the land is sold, and that such sums should be deducted from the distributive shares of each of those to whom such money was advanced. It appears that on or about March 26, 1928, the executrix and her son Daniel E. Laub, since deceased, as above noted, executed two certain promissory notes, in favor of the trustee of the Farmers National Bank of Central City and the Chapman State Bank, in the sums of $4,835 and $1,980, respectively, each bearing interest at the rate of 7 per cent. per annum until paid. As security for the above two notes, a mortgage deed was executed by the executrix and her son involving the land herein. It also appears that the Chapman State bank obtained a judgment against John P. Laub and the executrix in the sum of $3,130.27, with interest thereon at the rate of 8 per cent. per annum.

The court found and decreed that, under the terms of the testator's will, the executrix possessed the right to mortgage or sell the lands involved herein. The court also found that the executrix is now 76 years of age, and that she had a life expectancy of 6.69 years. And the court found that the net rental value of the premises herein is $3,000, and that the present value of her life estate in the lands in suit amounts to $20,000, or approximately that sum. The court also decreed that the executrix was entitled to be reimbursed for the payments made by her of certain liens against the lands of the testator, in the sum of $4,500, from her own money.

Thereafter, in December, 1930, the land involved herein was sold at a referee's sale to various buyers and the amount of money so realized amounted to $61,840, and in the report of the referee it is pointed out that at the sale a down payment was made by each of the purchasers of 15 per cent. of the amounts bid by the respective purchasers.

Objections to the confirmation of the sale were filed by the defendants Winnie Laub and Paul Laub, which were overruled by the court, and we think justly so. Thereupon the court ordered that deeds be issued to the various purchasers of the property in suit. And the court also found and decreed that the present value of the executrix' life estate in the property was $19,500, and that such money should be awarded to her in lieu of her life estate. And in respect of the amounts due the defendant banks, the court ordered that such amounts be paid the banks from the interest of the executrix in the land involved herein.

In *Sparhawk v. Goldthwaite,* 225 Mass. 414, a testator bequeathed certain property to his wife, but with a proviso in the will that she should be entitled to dispose of any part of the property for her sustenance and comfort. It was held that the power was properly exercised and that a deed of conveyance for such property conveyed a valid title as against the remaindermen. In *Warren v. Ingram,* 96 Miss. 438, this rule was announced:

"A devisee has power to convey lands in fee simple where they were devised to her 'to have and to hold during her life and to do with the same as in her judgment she may deem best.' "

And, in a somewhat similar case entitled *Hoxie v. Finney,* 147 Mass. 616, the court there held that the widow, in good faith, might reserve a life estate in real estate and sell the remainder to obtain means for her support. To the same effect is *Yetzer v. Brisse,* 190 Pa. St. 346. In *Phelps v. Harris,* 101 U. S. 370, it was held that the power to "sell and exchange" included the power to make a partition of the land involved in the action. And in *Colburn v. Burlingame,* 190 Cal. 697, the court held that a provision in the testator's will that his wife might use certain designated property for her "benefit" was broader than a mere provision for her "support." In *Kent v. Morrison,* 153 Mass. 137, the court held that the wife there took a life estate, with an absolute and unrestricted right to convey the real estate,

and this included the power to mortgage the property. In *Allen v. Hirlinger*, 219 Pa. St. 56, 13 L. R. A. n. s. 458, where property was devised to one for her use during her natural life, and the will also provided that she was to have full ownership thereof, the court held that a good title might be conveyed, even though the will also undertook to devise to another what was left at the death of the first taker.

In the present case, the only parties who complain of the decree and judgment of the district court have no vested interest in the estate. In fact, they are given more by the decree than in law they were entitled to. The widow under the will was entitled to hold all of the estate during her entire lifetime, and to mortgage and sell so much of it as was necessary for her support and maintenance. Since the decree entered works no injury or harm to the appellants, they have no just ground for complaint. The only one who would have a right to object to the partition is the widow of decedent, who is the executrix. She is not objecting to, but asking for, partition and sale of the premises. Since those who complain have not been harmed, they are not in a position to raise any valid objection to the decree entered.

The judgment is therefore

AFFIRMED.

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DORA M. THOMAS, APPELLANT, V. PRAIRIE HOME COOPERATIVE COMPANY, APPELLEE.

FILED JULY 17, 1931. No. 27714.

1. **Chattel Mortgages**: GROWING CROPS: NOTICE. The filing of a valid chattel mortgage, as provided by section 36-301, Comp. St. 1929, on crops to be grown, executed after the same have been planted, is, according to the generally accepted rule, operative as constructive notice, even after the crops have been grown and severed.
2. *Gillilan v. Kendall & Smith*, 26 Neb. 82, overruled.

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

*Edward C. Fisher* and *Frederick Patz*, for appellant.

*Burkett, Wilson, Brown, Wilson & Van Kirk, contra.*

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

EBERLY, J.

This action was brought in the district court for Lancaster county by Dora M. Thomas as plaintiff against the defendant company for the conversion of certain corn. The plaintiff, a landlord, contended that she had a valid chattel mortgage on such corn, sold by one Harry W. McCall, her tenant, to the defendant, and by it converted to its own use. The defendant answered by a general denial, but pleaded specially that in good faith and without notice, actual or constructive, it had purchased the corn in question on the open market. There was a trial to a jury and verdict and judgment for the defendant. From an order denying a new trial plaintiff appeals.

By exceptions to instructions given, and to admission of certain evidence, as well as by appropriate motions, there is presented, as one of the questions for review, the sufficiency of the description in the chattel mortgage involved in this case (conceded to have been duly filed and indexed), viz., "85 acres of corn now growing on the farm I am now farming, described as (here follows correct description)," to identify the corn after the same has been husked and harvested. The district court answered this question in the negative, and by its order expressly overruled the motion for a new trial, "upon the authority of *Gillilan v. Kendall & Smith*, 26 Neb. 82, which stands somewhat alone and has been much criticized, but remains unreversed and unmodified."

The facts involved in the transaction include the following: Harry W. McCall had lived, as tenant, on the farm

now owned by plaintiff some twelve years. Plaintiff as owner succeeded to her husband's rights on the latter's death some years ago. The farm was situated within view of, and a quarter of a mile distant from, the defendant's elevator. The relation of landlord and tenant between plaintiff and McCall was well known to defendant's manager, Mr. Welch, at all times. He had actual knowledge where the corn in controversy was planted and when; observed its growth; knew when it was husked and placed in cribs; knew when it was shelled and marketed in his elevator; knew that the tenant was going to sell all of it and deliver both the landlord's and tenant's shares, and understood when he was dealing for the corn that he was buying all that was left on the Thomas place, and that the corn was the corn raised on the land in 1929. This manager's evidence is that he is now unable to state the exact date when arrangements for the sale of the corn were first made, but says that "it was in December, just a few days before he delivered it." The manager also testified: "Well, he (McCall) said Mrs. Thomas had told him as soon as he got done shucking she wanted to sell the corn, and he said he was going to sell his corn along with it." Defendant's manager also testifies that when the corn was delivered McCall, the tenant, informed him that the rent corn had been placed in cribs separate from his share, and that the two shares were not confused or mixed. As a matter of fact each share was separately delivered and separately received and paid for by the defendant.

Under these admitted facts, the appellant insists that the district court erred in the application of the rule announced by this court in *Gillilan v. Kendall & Smith*, 26 Neb. 82, viz.: "A chattel mortgage upon growing grain is not constructive notice to third parties of a mortgage on the same grain thereafter lawfully placed in crib or bin; and a dealer in grain who in good faith in open market purchases such grain from the mortgagor, and receives it at his warehouse, will take it free from the lien of the mortgage." In the case just cited it will be noted that

Maxwell, C. J., in the opinion of the court, states in part: "There is no testimony tending to show the entire quantity of corn produced by Ashton on the land of the plaintiff in section thirty, nor what portion of the crop, if any, Ashton was to deliver to the plaintiff for rent. For aught that appears, the amount of corn still remaining on the farm is sufficient to satisfy the mortgages in question." And, in such *Gillilan* case, the sole question to be determined by this court was presented by the exception to the instruction given by the district court in the following language: "A party taking a chattel mortgage upon growing grain, in order to preserve his lien, as against innocent purchasers, is bound to see that, when the corn is gathered, such notice is given to the public of his lien, by keeping the same separate and unmixed with other corn, as will prevent innocent parties from purchasing such corn. And in this case if the jury believe from the evidence that the plaintiff, after the execution of the mortgages offered in evidence by him, did nothing more than to file his mortgages in the office of the county clerk, and allowed the corn to become mixed with other corn, and if the jury further believe from the evidence that the defendants without actual notice of the existence of these mortgages purchased the corn, or some portion of it, at their elevator in the town of Malcolm, in open market, then the plaintiff cannot recover, and your verdict will be for the defendant." In the present case, all the corn raised on the land leased by the plaintiff to McCall is properly accounted for, and it also seems an admitted fact that the plaintiff's rent share was properly separated from the share belonging to the tenant, and that the tenant's share was capable of identification in the bin where it was stored. As between mortgagor and mortgagee the lien of the latter was perfect. *Eigbrett v. State*, 111 Neb. 388.

In the case of *Chicago Lumber Co. v. Hunter*, 58 Neb. 328, a similar question was before the court, wherein the mortgaged property was described as: "'50 acres of corn planted on the S.E.¼ of sec. 17-1-8, being the N.30 of the S.80 acres and the S.20 of the N.80 acres,' accompanied by

the further statement that the mortgaged property is in the possession of the mortgagor in N. county," etc. In that case this court held: "One who bargains for the future delivery of a quantity of corn to be taken from the stalk in a designated field is charged with notice of a then existing, and duly recorded, chattel mortgage in which such corn is described as a growing crop." Further, it was held: "When such corn is husked and delivered in execution of the contract, the purchaser is presumed to know that it is part of the crop covered by the mortgage."

And in *Fines v. Bolin*, 36 Neb. 621, this court expressly held that the rule announced in *Gillilan v. Kendall & Smith, supra*, "does not prevail where the person who assisted in husking the corn afterwards becomes the purchaser, while it is yet in the same pile or crib, and receives it there, having at the time actual knowledge that it is the same corn he helped harvest. In such case the purchaser will take the corn subject to the lien of the mortgage."

It would seem that the qualification made by the two cases last cited to the rule announced in the *Gillilan* case is important in the instant case.

This conclusion is reinforced by the pronouncement of this court in *Security State Bank v. Schomberg*, 119 Neb. 598, wherein we held: "The rule that a chattel mortgage enabling a third person, aided by inquiries suggested by the instrument itself, to identify the mortgaged property is sufficiently definite applies to chattel mortgages on growing crops." And further held: "As described in the opinion, the contents of a registered chattel mortgage on growing grain and also on the matured crop, whether 'in the field, in cribs or bins, in elevator or any other place,' *held* sufficient to suggest to a third person inquiries which, if pursued, would elicit knowledge that such grain, when delivered by the mortgagor at an elevator and sold by him there, was incumbered by the lien of the chattel mortgage." The foundation on which this opinion proceeds is that with a mortgage constructively before the purchaser containing the words, "in the field, in cribs or bins, in elevator or any other place," it suggests to the third person the aiding in-

quiries: "Where was this grain, in the field, what crib or bin or elevator was it stored in before being presented for sale?" It suggests inquiries which would logically cover the growth, production, harvest and storage of grain until presented in the open market for sale. But in the instant case, as well as in *Fines v. Bolin, supra,* and *Chicago Lumber Co. v. Hunter, supra,* no inquiries are or were necessary, for the defendants in each of these cases had actual knowledge of the history and identity of the grain, and the constructive knowledge of the original existence of the chattel mortgage added by law. The law does not require vain things, and therefore in each of the three cases just cited this court held the rule announced in *Gillilan v. Kendall & Smith, supra,* to be without application. The defendant in the instant case, under undisputed evidence, must be charged with actual knowledge that, at the time of the purchase by it, half of the corn grown on plaintiff's farm belonged to plaintiff as her rent share of the crop, and that the other half was the tenant's share, and that these shares were in no manner mixed. So long as the corn was standing in the field the law unquestionably imputed to the defendant knowledge or notice of the existence of the chattel mortgage on the tenant's share for plaintiff's benefit. Thus, what plaintiff's mortgage might have supplied to complete constructive notice as set forth and approved in *Security State Bank v. Schomberg, supra,* the defendant had actual, complete, contemporaneous knowledge of. The evidence fully discloses that when it made its deal with McCall, the tenant, for his tenant's share, it had actual knowledge of all the facts pertaining to the planting, growth, maturity, husking, storing, and shelling and marketing of the corn then purchased. As stated in *Fines v. Bolin, supra,* under this state of facts the rule of *Gillilan v. Kendall & Smith, supra,* does not prevail, and the purchaser will take the corn subject to the lien of the chattel mortgage.

While the facts in this record thus necessitate the reversal of the judgment, and a new trial, we are asked to overrule, or restate, the rule announced in *Gillilan v. Kendall & Smith, supra.*

As to the "doctrine of the law of the case" as a controlling precedent, the following is submitted for consideration, as applied to the question before us: "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. "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. See *Wilson v. Ulysses Township*, 72 Neb. 807; *State v. Marsh*, 107 Neb. 637.

The sole question presented to and decided by this court in the case of *Gillilan v. Kendall & Smith*, 26 Neb. 82, is the correctness of the instruction of the district court as the same appears on page 84. In response to this question this court held: "A mortgage, therefore, of growing grain is not notice of a mortgage on grain in a crib or bin, when it has been lawfully placed there by the mortgagee or by the mortgagor with his consent."

There can be no question that in practically all other jurisdictions the recording of a chattel mortgage on crops to be grown, executed after the same have been planted, is, according to the generally accepted rule, operative as constructive notice, even after the crops have been severed. 11 C. J. 541; *Arnold v. Peasley*, 128 Wash. 176; *Adams v. Caldwell Milling & Elevator Co.*, 33 Idaho, 677; *Endreson v. Larson*, 101 Minn. 417; *Keel v. Levy*, 19 Or. 450; *Phillip Best Brewing Co. v. Pillsbury & Hurlbut Elevator Co.*, 5 Dak. 62; *Smith v. Taber*, 46 Hun (N. Y.) 313; Jones, Chattel Mortgages (5th ed.) 118, sec. 69; *United States Nat. Bank v. Great Western Sugar Co.*, 60 Mont. 342; *Close v. Hodges*, 44 Minn. 204; *Rider v. Edgar*, 54 Cal. 127; *Nichols, Shepard & Co. v. Barnes*, 3 Dak. 148; *Wilson v. Prouty*, 70 Cal. 196; *Pierce v. Langdon*, 3 Idaho, 141; *Zorn v. Livesley*, 44 Or. 501; *Duke v. Strickland*, 43 Ind. 494; *Wright v. Dickey Co.*, 83 Ia. 332.

The reasoning and conclusions of the court as stated by the learned author of the opinion in *Gillilan v. Kendall & Smith, supra,* is not only opposed to the decided weight of authority elsewhere, but is not in harmony with the terms of the subsequent cases in this jurisdiction. That opinion proceeds on the assumption that, "At law, a chattel mortgage passes the legal title in the property mortgaged to the mortgagee." This has been utterly repudiated in this jurisdiction. *Camp v. Pollock,* 45 Neb. 771. Nor do the later authorities in Nebraska support the rule expressed in this opinion as to the effect on the transaction relating to the growing of crops, because "of the amount of labor necessary to be performed by the mortgagor before the fruit of his labor may be reaped," as to difficulties involved due to the nature of the property mortgaged. 11 C. J. 442; *Sporer v. McDermott,* 69 Neb. 533; *Hayes v. First State Bank of Bertrand,* 5 Neb. (Unof.) 298; *Monnich v. Schwartz,* 4 Neb. (Unof.) 811; *Johns v. Kamarad,* 2 Neb. (Unof.) 157.

So, as to the language employed, the opinion may receive no support from the "market overt" theory suggested by the learned author. As to this, it is quite apparent that, "In the United States the rule has never been recognized that a sale in market overt protects a *bona fide* purchaser against the claims of the real owner from whom property has been stolen or tortiously taken, and it may be laid down as the established American doctrine that a purchaser in a public, open market acquires no better title to goods than if he had bought them elsewhere." 18 R. C. L. 368, sec. 4. It is also true that this court, so far as the doctrine of "market overt" is concerned, is wholly in harmony with the authority last referred to.

But there is legislation which has a bearing on the question before us. As part of the evidence, exhibit No. 2 in this case is a farm lease entered into on the 1st day of December, 1928, between Dora M. Thomas, Lincoln, Nebraska, and Harry W. McCall, Lincoln, Nebraska, which, by the employment of the usual terms, leases the land described for a certain rental, a part of which is in the na-

ture of grain rent, and part to be paid in cash on dates subsequent to the making of the lease. It also contains the following stipulation: "And it is further expressly agreed that the second party shall secure the performance of the terms and conditions of this lease on his part by giving to the first party on demand a chattel mortgage upon all or any part of the crops growing or gathered on said premises during said term."

Chapter 36, Laws 1927, under the title "An act to amend section 2550, Compiled Statutes of Nebraska for 1922, relating to chattel mortgages; providing that the recording of a lease containing an agreement for a chattel mortgage on unplanted crops shall constitute notice;" provided as follows: "Provided, that the filing of a lease containing an agreement for the execution of a chattel mortgage, or, therein constituting a chattel mortgage, on unplanted crops shall constitute notice of such an obligation and lien and protect the lessor against chattel mortgages given to other creditors by the lessee." We assume that the act referred to is remedial in its nature; that it is to be liberally construed, to the end that the legislative purpose and intent may be effectually carried out. It is obvious then that, as to cases within the purview of this statute, the doctrine of *Gillilan v. Kendall & Smith, supra,* has been wholly superseded.

As the result of the doctrines announced in *Fines v. Bolin, supra, Chicago Lumber Co. v. Hunter, supra,* and *Security State Bank v. Schomberg, supra,* the *Gillilan* case, if not in effect overruled *pro tanto,* has been materially qualified, and the legislation referred to plainly indicates the adoption of a public policy at variance with the fundamental proposition on which the case proceeds.

We are all agreed in the instant case that the lien of the mortgage was perfect while the corn was attached to the stalk, and, as between the parties thereto, continued after the same had been harvested and placed in bins. *Eigbrett v. State,* 111 Neb. 388.

Courts take judicial notice of the phenomena of vegetable life which are matters of general knowledge in their

own jurisdictions *(Meyers v. Menter,* 63 Neb. 427); and of the ordinary course and law of nature; and will also take cognizance of the course of the seasons and of husbandry. They know judicially the season for planting and harvesting crops ordinarily planted in their own jurisdictions. These facts are well known, not only to all courts, but to all persons, and necessarily enter into and form the basis of all reasoning and inference in the ordinary affairs of life. It would follow that where a valid lien attached to growing crops as such, which is good as between the parties after it is harvested and stored, parties to whom constructive notice is imputable while the crops are unharvested must at their peril take notice of the phenomena of vegetable life, and the ordinary and usual course of the seasons and husbandry, and the ordinary and usual result thereof as affecting the product with which they deal. It would also follow that the doctrines as originally announced in *Gillilan v. Kendall & Smith, supra,* having been in effect substantially repudiated by this court, that case is now formally overruled. In lieu thereof the following is substituted: The filing of a chattel mortgage, as provided by section 36-301, Comp. St. 1929, on crops to be grown, executed after the same have been planted, is, according to the generally accepted rule, operative as constructive notice, even after the crops have been grown and severed.

The judgment of the district court is, therefore, reversed and the cause remanded for further proceedings in harmony with this opinion.

REVERSED.

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SAMUEL H. RUDOLPH, APPELLANT, V. ANDREW MURPHY & SON, APPELLEE.

FILED JULY 17, 1931. No. 27784.

1. **Corporations: RIGHTS OF PURCHASER OF STOCK.** A *bona fide* purchaser of the capital stock of a corporation may sue in equity to compel the corporation to enter the assignment on its books, and to issue a new certificate therefor.

2. **Principal and Agent:** REVOCATION OF AGENCY. Agency depends usually upon the assent of both parties. A principal may, in general, withdraw his assent at any time, subject to liability in damages in case he does so in violation of his agreement. Substantially correlative is the situation of the agent. He may, in general, renounce his agency at any time. His power to do this, in the sense that his further performance will not be specifically enforced, is coextensive with the principal's power to revoke.
3. ———: ———: REMEDY. An action for damages is ordinarily the only remedy for the breach of an agency contract, for it is well settled, as a general rule, that courts will not undertake to enforce the specific performance of contracts for personal service.
4. **Specific Performance.** If one party to a contract cannot enforce substantial performance, a court of equity will not decree specific performance at the instance of the other party. The right to specific performance must be mutual and reciprocal.
5. **Evidence** in the record examined and *held* not to establish, but rather to negative, the existence of the oral contract of agency pleaded by defendant.

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

*A. C. R. Swenson* and *Hawthorne Arey*, for appellant.

*Smith, Schall & Sheehan, contra.*

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

EBERLY, J.

This proceeding involves, first, an action by the plaintiff to compel the defendant corporation to transfer on its books to the plaintiff 5 shares of common stock, evidenced by certificate of stock No. 12, 15 shares of preferred stock, evidenced by certificate of stock No. 46, 10 shares of preferred stock, evidenced by stock certificate No. 103, 15 shares of preferred stock, evidenced by stock certificate No. 111, and 10 shares of preferred stock, evidenced by stock certificate No. 141. These various certificates are all in due form, were duly issued by the defendant corporation, and bear suitable assignments thereon to plaintiff. The evidence further discloses that plaintiff purchased this

stock, and, so far as the certificates of stock are concerned, is the owner thereof; that as such owner he made due presentation to, and demand upon, the defendant for proper registration; that he is *prima facie* entitled to have this stock transferred on the books of the defendant corporation and new certificates issued therefor. Shares of corporate stock being regarded as property, the owner of such shares may, as a general rule, dispose of them as he sees fit, unless of course the owner's privilege of disposing of his shares has been hampered by his own action. The printed form of transfer, with power of attorney commonly placed upon the back of the stock certificate, furnishes a convenient and appropriate means of transfer in the ordinary course of business. Such was the method properly employed in the instant case.

Indeed, though certificates of stock are not negotiable in the sense of the law merchant like bills and notes, still they are so framed and dealt with as to be transferable when properly indorsed, by mere delivery, and as they frequently convey by estoppel against a corporation or against prior holders, and as a large commercial use is made of such certificates as collateral security, it is to the public interest that such use should be simplified and facilitated by placing them as nearly as possible in the place of commercial paper. They are often spoken of and treated as quasi negotiable, that is, having some of the attributes and partaking of the character of negotiable instruments passing from hand to hand. Nor are these conclusions at variance with our statutory provisions which purport to give a corporation the power "to render interest of stockholders transferable." This we have construed as not intended to make the transferability of stock dependent on some affirmative act of the corporation authorizing its transfer, but to impress the stock with that quality as a consequence of the act of incorporation. *Miller v. Farmers Milling & Elevator Co.*, 78 Neb. 441.

We are also committed to the rule: "A *bona fide* purchaser of the capital stock of a corporation may sue in equity to compel the corporation to enter the assignment

upon its books, and to issue a new certificate therefor." *Everitt v. Farmers & Merchants Bank,* 82 Neb. 191.

It follows that, if the plaintiff is in truth and in fact the *bona fide* owner of the stock in suit, he is entitled to the relief for which he prays.

On the part of the defendant corporation, the proceedings before us involve a cross-action in the nature of an action for the specific performance of a certain oral contract made with one Baker, of which it is alleged the plaintiff had due notice prior to the purchase of the stock in controversy by him. It would, of course, follow that, if the defendant is the real owner of the stock in suit, plaintiff cannot prevail. Defendant in his pleading alleges, for the basis of his relief, that "on or about the 1st day of July, 1927, * * * defendant entered into an oral contract with the said C. E. Baker whereby the said C. E. Baker agreed, as the agent of said defendant, to solicit for said defendant, the purchase of stock in defendant company, * * * in consideration of which services said defendant agreed to pay the said C. E. Baker $55 per share on all purchases of stock which the said C. E. Baker was able to procure where stockholders were willing to sell for less than $55 per share, it being further agreed that where stockholders were asking a price greater than $55 per share, the said C. E. Baker was to report the same to the defendant company and the defendant company was to exercise its discretion as to whether or not it would purchase the same, in which event the said C. E. Baker was to receive nothing for his services in connection with that character of purchase." It is admitted that the defendant never paid Baker any money either for compensation or for carrying on, or to be used in, the business on its behalf. Thereafter the defendant in its pleading in effect sets forth that Baker in his own behalf, not pursuant to the contract of agency, but in violation of its terms, proceeded to purchase for and on behalf of himself stock in suit, which was purchased by the plaintiff from Baker with due notice of the terms of the oral contract of agency between the defendant and Baker. As relief, the defendant

asks for specific performance of this contract, and "that said plaintiff be required to deliver said stock to the defendant upon the payment to the plaintiff by the defendant of the amount ascertained by the court to have been paid by said plaintiff for said stock," etc. It is nowhere alleged that either plaintiff or Baker are insolvent.

Thus, we have in effect a proceeding in equity to which Baker was not a party, prosecuted by the defendant against plaintiff, to secure specific performance of this oral contract of agency with Baker, which contract plaintiff never made or assumed. If this oral contract was ever made, the facts alleged in defendant's answer disclose that it was in fact renounced and repudiated by the agent Baker. As to the power of renunciation possessed by agents under contracts of agency, the principles applicable are: "It has already been seen that agency depends usually upon the assent of both parties. It has been seen also that the principal may, in general, withdraw his assent at any time, subject to liability in damages in case he does so in violation of his agreement. Substantially correlative is the situation of the agent. He may, in general, renounce his agency at any time. His *power* to do this, in the sense that his further performance will not be specifically enforced, is coextensive with the principal's power to revoke; but his *right* to do so, is, like the principal's right to revoke, limited by his contracts in the premises. Where the agency is indefinite in duration the agent may, upon giving reasonable notice, sever the relation at any stage without liability to the principal, and will be entitled to compensation and reimbursement for his services and expenses up to that time. Where, however, the agency was created for a definite period, or the accomplishment of a particular result was undertaken for a valuable consideration, the agent who renounces before the expiration of that period, or before the performance of his undertaking, will be liable to his principal for the damages he may sustain thereby." 1 Mechem, Agency (2d ed.) 456, sec. 641. This is undoubtedly in principle the law of Nebraska. *Sjogren v. Clark*, 106 Neb. 600; *Staats v. Mangelsen*, 105 Neb. 282;

*Hallstead v. Perrigo*, 87 Neb. 128. As to what redress the injured principal may be entitled where a valid contract of agency is wrongfully renounced, the same authority above quoted from (Mechem on Agency) says in section 642: "The action for damages, as suggested in the last section (641) is, moreover, ordinarily the only remedy for the breach of the contract, for it is well settled, as a general rule, that courts will not undertake to enforce the specific performance of contracts for personal service, or interfere by injunction to prevent their breach." See, also, 5 Pomeroy, Equity Jurisprudence (2d ed.) 4893, sec. 2181, and note.

Indeed, on the right to compel the specific performance of a contract to serve another, a distinguished jurist has said: "It would be an invasion of one's natural liberty to compel him to work for, or to remain in the personal service of, another. One who is placed under such restraint is in a condition of involuntary servitude — a condition which the supreme law of the land declares shall not exist within the United States, or in any place subject to their jurisdiction." *Arthur v. Oakes*, 63 Fed. 310.

Specific performance is not generally a matter of legal right, but is directed rather to the sound legal discretion of the court, and it will not be granted where its enforcement would be unjust. *Edmiston v. Hupp*, 98 Neb. 84; *Hoctor-Johnston Co. v. Billings*, 65 Neb. 214.

"To warrant the exercise of the court's discretion, the case must be a clear one. * * *. And relief may be denied, although the proof may come far short of a showing sufficient to authorize the court to grant a rescission or cancelation of a contract. Not only must the contract to be enforced be a legal obligation, mutual, certain in its terms, and based on a sufficient consideration, but it must also be equitable." 23 Standard Ency. of Procedure, 1009, 1010.

This court is committed to the doctrine: "If one party to a contract cannot enforce substantial performance, a court of equity will not decree specific performance at the instance of the other party. The right to specific performance must be mutual and reciprocal." *Moore v. Markel*,

112 Neb. 743. See *Hoctor-Johnston Co. v. Billings*, 65 Neb. 214.

In this case there is no mutuality of contract between the litigants whatever. Baker, the alleged maker of the contract sought to be enforced, is not even a party to the proceedings. Even if we have before us an attempt to secure redress against the plaintiff for wilfully and wrongfully interfering with the contract of agency pleaded, and enticing and inducing the agent to abandon the performance of his duty to his principal, this will not sustain the equitable proceeding. At most, it would amount to a tort involving a liability for damage constitutionally to be determined by a jury. 2 C. J. 886.

But plaintiff has denied the alleged making of this contract of agency by the defendant with Baker, and expressly denied that he had any knowledge of that fact, if it was a fact, prior to the purchase. We are required to determine this question *de novo*. Even though giving due consideration to the fact that the trial court personally observed the witnesses, still we are forced to the conclusion that the evidence contained in the bill of exceptions in view of all the admitted facts and circumstances, preponderates in favor of the plaintiff. Particularly is this true as to the fact that the plaintiff had no notice of the alleged contract in suit at or prior to the purchase of this stock.

It follows, therefore, that both on the question of fact as well as law the trial court erred in its determination of this case, and plaintiff is entitled to judgment as prayed. The judgment for defendant will, therefore, be reversed, and the cause remanded, with directions to enter judgment in favor of plaintiff and against defendant, as prayed in plaintiff's petition.

REVERSED.

## STATE, EX REL. PAUL BIZE, GUARDIAN, APPELLEE, V. GLEN B. YOUNG ET AL., APPELLANTS.

FILED JULY 17, 1931. No. 27791.

1. **Guardian and Ward:** STATUTORY PROVISION. If a minor have no father or mother living, and competent to have the custody and care of the education of such minor, the guardian so appointed shall have the custody and tuition of his ward.
2. ———: CUSTODY OF MINOR WARD. However, the right of the guardian to custody of the ward is not an absolute one, but the matter of custody is subject to control by the court, which may deprive the guardian of such custody or refuse to take the child from the custody of others and commit it to the custody of the guardian; the controlling consideration in the matter of custody, as in the matter of selecting the guardian, being the best interests of the child.
3. **Infants:** CUSTODY. Every child has, from the time it comes into existence, a birthright of citizenship which vests it with rights and privileges, entitling it to governmental protection. Such government is obligated, by its duty of protection, to consult the welfare, comfort, and interests of such child in regulating its custody during the period of its minority.
4. ———: ———. In awarding the custody of a minor child of over nine years of age, and of apparent intelligence and discretion, the express wishes of the child will usually be accorded great weight.
5. ———: ———. The question of religion in which children shall be brought up is entitled to careful consideration, and if their temporal interests will be as well taken care of when they are placed in the custody of persons of the same faith as their parents, that fact should be controlling.
6. ———: ———. The controlling public policy of Nebraska is that its courts, in committing children to the custody of others, shall place them, as far as practicable, in the care and custody of some individual holding the same religious faith as the parent of such child, or with some association which is controlled by persons of like religious faith of the parent of said child.
7. **Guardian and Ward:** CUSTODY OF MINOR WARD. Evidence in the record examined, and *held* to present no matter of substantial conflict, and to establish clearly that the continuance of the custody of Valentine Grivel in and with the respondents, Glen B. Young and wife, is required by the welfare and best interests of the child, is in accord with her expressed wish, and is in harmony with the rule requiring a minor to be placed in the custody of persons of the same religious faith as her parent, particularly in the absence of any proof of any temporal advantages to be expected from a different disposition.

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

*Ernest F. Armstrong* and *F. P. Marconnit,* for appellants.

*Robert M. Armstrong, contra.*

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

EBERLY, J.

This is a habeas corpus proceeding; a controversy over the custody of a child, now ten years old, named Valentine Grivel. The relator prevailed, and respondents appeal.

The fair inference from the record before us is, that her parents, Joseph Grivel and Judith Grivel, migrated from France to America and settled in Nemaha county; that French thereafter continued to be the language of the home. They there acquired a 66-acre farm, and at the time of the father's death had accumulated, in addition to the farm, more than $5,000 in personal property. To Joseph Grivel and Judith Grivel were born four children: Martin, Henry, Joseph, Jr., and Valentine, who were respectively, at the inception of the litigation out of which the present controversy arose, 16, 15, 9 and 8 years of age. Glen B. Young was the banker and family adviser of both the father and mother, and apparently possessed their confidence and esteem. The sole relation by blood this family possessed in America was Mrs. Marie Anville, an aunt or cousin of the minors. The father died and Judith Grivel on January 12, 1928, filed a petition in the county court for Nemaha county for her own appointment as guardian for her minor children. She was duly appointed and served until her death on February 3, 1929. Thereafter on February 5, 1929, Martin and Henry Grivel, then aged 16 and 15 years respectively, caused to be filed a petition setting forth the death of their mother and the facts establishing the necessity of the appointment of a successor to Judith Grivel, deceased, as guardian, and nominated Glen B. Young for appointment as their guardian, and

likewise prayed for his appointment as guardian for their minor brother Joseph, aged 9, and their sister Valentine, then aged 8. *Seward v. Didier,* 16 Neb. 58. No objections or answer were filed thereto. Due notice appears to have been given of this proceeding, and the county court for Nemaha county, by a decree dated February 7, 1929, found: "Since the commencement of this hearing there has been filed in this court a petition for probate of the will of the mother of said minors, and for the appointment of Glen B. Young as administrator with the will annexed, and it is within the knowledge of the court that the mother of said minors, now deceased, was their guardian, and it will be necessary for the administrator to make settlement with the guardian, and that a conflict of interest might arise if Glen B. Young were appointed guardian of said minors. The court further finds that it is not for the best interest of said minors that Glen B. Young be appointed their guardian." Their nomination of, and prayer for the appointment of, Glen B. Young was accordingly disapproved and denied; and one Jules Bernard was thereupon appointed as guardian for all of the four children. However, Jules Bernard refused to accept the appointment thus made and failed to qualify. On March 2, 1929, the county court, so far as disclosed by the record before us, without further notice or any consultation or communication with the minors involved, and without any order of continuance, or order setting the time for hearing of the matter, appointed Paul Bize as their guardian, who thereupon on March 4, 1929, qualified by taking the oath and giving bond as required by law. On March 15, 1929, all of the minors involved, by their next friend and next of kin, Marie Anville, gave notice of and perfected an appeal from the order of March 2, 1929, making the appointment of Paul Bize as guardian. On April 24, 1929, this appeal proceeding was dismissed on behalf of the parties taking same. On May 3, 1929, Martin Grivel, aged 16, Henry Grivel, aged 15, and Marie Anville, an aunt or cousin of the minors, and "the only blood relative of all of said minors living in the United States," filed their

petition in the county court for Nemaha county for the removal of Paul Bize as guardian, and the appointment of Jules Bernard in place thereof. This pleading alleged, among other things: That the minors and next of kin involved had no knowledge or notice of the failure of Jules Bernard to qualify as guardian under the appointment made February 7, 1929, nor of the hearing had on March 2, 1929, at which time Bize was appointed, nor did they have any knowledge of the county court's intention to appoint Paul Bize as guardian; that his appointment is not agreeable to them; that the parents of said minors, who died within the last two years, lived in the same community with the said Paul Bize for many years, and did not have a favorable acquaintanceship with him, and that the minors likewise did not have a favorable acquaintance with him; that said minors and said Marie Anville have not in the past had any dealings with Paul Bize and prefer a guardian with whom they are acquainted, and that all of said minors refuse to be controlled or live with the said Paul Bize, and if compelled to submit to personal direction with reference to their person, it will be against their will; that Jules Bernard (who had theretofore, without suggestion from the minors, been appointed by the court, but who had once refused the appointment) was a competent and suitable person to act as guardian, and had now consented to act if appointed by the court; and prayed for the removal of Paul Bize. (It is to be remembered, in this connection, that "Jules" is the French form of the name "Julius.") To this petition, answer was filed by Bize, and, on hearing of the issues thus joined, the county court found for the defendant and against all of the minors, and failed to remove its appointee, denying the prayer of the petition wholly. An appeal was prosecuted from this judgment to the district court for Nemaha county. It was there heard on June 26, 1930, taken under advisement, and later determined and judgment entered on July 1, 1930, reversing the order of the county judge appointing Paul Bize as guardian for Martin Grivel and Henry Grivel, but affirming it as to Joseph, Jr., and Valentine, the findings

of the district court as to Joseph and Valentine being limited to the following: "The court finds that the county court had jurisdiction to appoint Paul Bize guardian of Joseph Grivel and Valentine Grivel, minors under the age of fourteen years, and no cause has been shown why Paul Bize should be removed as their guardian."

During the proceedings herein referred to, a petition for the unconditional adoption of Valentine Grivel by the Youngs was forwarded to Paul Bize for his consent as guardian. This he refused absolutely, and this without reason or justification in the record. Thereupon this habeas corpus proceeding was instituted, the determination of which by the district court is now presented by the respondents for review.

The proof in the record presented to the district court on this issue is practically without material conflict, and essentially undisputed, so far as evidential facts are concerned. It may be said to be solely a question of the ascertainment and proper application of the law to admitted facts.

We, therefore, accept the appellee's brief as summarizing the testimony in behalf of the relator, which (in addition to the record evidence as to court proceedings) states it in the following language: "Mr. Bize testified that he had talked the matter over with his wife and was ready and willing to take the little girl into their home; that if he obtained her custody he would keep her for quite a while if it was agreeable to both parties; if not, that he would find a better place for her with the consent of the county court, and that he was ready, willing and able to give his ward all of the advantages of a home and of an education. Mrs. Bize, wife of the relator, testified that she was ready and willing to take this little girl into their home and to give her a home at all times; that the child should have every advantage that an own child should have in a home and that she would be treated as an own child and given every advantage that they could, including not only a high school education, but a college education. The guardian and his wife are substantial citizens of Nemaha

county, residing upon and owning 480 acres of farm land south of Julian on a paved highway, with a new modern home near a modern consolidated school of twelve grades, and are amply able to give their ward every advantage of a wholesome and christian home life with ample means to provide for all the wants of any girl, including support, care and higher education."

For a more complete understanding of the résumé quoted, we quote the following from the direct examination of Paul Bize:

"Q. Mr. Bize, after the court appointed you as guardian for this little girl, did you have any plans or intentions with reference to the custody and care for the child? A. I said that I wanted to have her in my home for a while. Q. For what reason? A. Why, so that we would get better acquainted together. Q. Did you talk with Mrs. Bize about this matter? A. I did. Q. Tell the court whether or not it was agreeable to her to take this little girl into the home? A. She said it would be agreeable to her. Q. Upon obtaining the custody of the little girl, what is your present intention, your plan as her guardian with reference to her care and education and her rearing? A. Well, if it was agreeable to both parties, her and us, I will keep her quite a while; if not, I would find a better place, with the consent of the county court, why I would put her some place else. Q. That is, when you say, if it was agreeable to both parties, you mean that if the relations between you and your wife and the little girl were agreeable? A. Yes. Q. What were your plans with reference to where she would attend school? A. At Julian. Q. State whether or not you are ready and willing and able to give her all of the advantages of an education and medical care? A. I am."

And from his cross-examination the following:

"Q. Now, did you and the father and mother of Valentine visit back and forth as a rule between your families before the death of themselves? A. No; we didn't go to each other's house, if that is what you mean. * * * Q. Now, have you ever been informed by Mr. and Mrs. Young

that they were willing to adopt Valentine as their lawful child? A. There was a petition sent to me; yes. Q. And that was for the unqualified adoption, is that not true? A. Yes; I think so; yes. Q. Now, you stated on your direct examination that you wanted to take this child from its present home and take it to your home for a while? A. Yes. Q. Now, you state that is for the purpose of getting better acquainted with the child, is that true? A. Yes; that is one. Q. Would you be willing to adopt this child yourself? A. No; I don't know that I would; I don't know; it is according to circumstances I think, after this. * * * Q. That would depend on many things, is that right? A. Well, yes. Q. At this time you have no—have not made up your mind whether you would or not? A. No; I have not."

And, further, we quote from the cross-examination of Mrs. Paul Bize, the following:

"Q. Did you neighbor with Mrs. Grivel when she lived, Mrs. Bize? A. Ever? Q. Did you ever? A. I did not neighbor with Mrs. Grivel; she couldn't talk our language. Q. Now, do you speak French? A. No, sir; I do not. Q. They lived near by you folks, didn't they, a mile or so, or two? A. Two miles and a half they really lived. Q. About a mile and a half, wasn't it? A. Two miles and a half."

The following constitutes a résumé of the important evidence introduced at the trial on behalf of the respondents; substantially as shown by the record:

Mrs. Glen B. Young, respondent, testified that she was thirty-three years of age; that she was the wife of Glen B. Young, the other respondent; that she had lived with her husband in Lincoln, Nebraska, since June, 1930; prior to then living with him at Julian; that they had the custody of Valentine Grivel since her mother's death in February, 1929; that she had been acquainted with the parents of Valentine Grivel; that her husband had business relations with Mrs. Grivel; that Valentine was at Mrs. Anville's, a cousin of Mrs. Grivel, at the time of the latter's death, when she first received custody of the little girl; that Mrs. Anville was the only living relative of Mrs.

Grivel in this country; that she made an agreement with Mrs. Anville, with the consent of her husband, to take the custody of Valentine; that they took her into their home; sent her to school; that she appears contented and satisfied; that she has been there since her mother's death; that the respondents have given her considerable medical attention; that her tonsils were removed; her teeth given attention; that she has been fitted with glasses; that the respondents have supplied Valentine with considerable clothing, toys, and playthings; that the money for these things has been furnished by the respondents; that no demand has been made to the relator for their payment. Mrs. Young further stated that the relator had never been to visit the child, nor had he ever inquired about her welfare; that the child has been kept in school; that she does well in her studies; that Valentine is given special instructions in dramatic art each week; that the respondents live in a modern apartment; that they are financially able to take care of Valentine; that she makes constant inquiries from Valentine's teachers as to her welfare; that the respondents have no children of their own; that they desire to adopt this little girl; that since they have had custody of the child she has been brought under no vicious or immoral influence; that they intend to give the child the best education possible; that the father and mother of respondent's husband have shown great affection for Valentine, and have given her clothing and toys; that the little girl calls them grandfather and grandmother.

On cross-examination Mrs. Young testified that her husband was cashier of the Bank of Julian until it closed; that he then operated a teachers' agency, and is now in connection with banking business again; that he has a monthly income of about $175. Mrs. Young stated that she had been married since 1917; that neither she nor her husband had been married before; that they have a pleasant congenial home relationship; that they have never had domestic troubles; that they are not related to Valentine Grivel; that she took the child into her home to love her and give her a home, and that she wanted to keep her, and

that is why she did not want to turn her custody over to the legal guardian; that she often takes Valentine to visit her brothers, Martin, Henry, and Joseph; that she has Valentine write them each week, and encourages her to love and be proud of them; and that, although the relator was guardian of one of Valentine's brothers, he had not taken him into his home.

Mina H. Hoemans testified that she lives in Lincoln, Nebraska; that she knew the respondents and the little Grivel girl; that she frequently visited in the Young home; that she had observed that Valentine was always well dressed; that the Youngs showed an affectionate attitude toward her, and that the child appeared to love them; that in her opinion the respondents were suitable persons to have the care of the child.

Mrs. Blanche Frantz testified that she lived in Lincoln, Nebraska; that she had known the Youngs for about twenty years; has often visited in their home; has observed the attitude of the respondents and the little girl; that it was one of happiness and devotion between them; that the respondents were proper people for the custodians of the child; and that she is not related to the respondents.

Edith Miller testified that she had formerly taught school at Julian; had taught Valentine Grivel; had lived at the home of the respondents during the time Valentine was with them; that Valentine was kept in school regularly; that the respondents took an interest in her work, and kept a close watch over her welfare; that Valentine was an apt pupil; that she was an easily managed little girl; and that the home influence provided by the respondents was excellent; and that Valentine would accompany the respondents when they went places. Miss Miller stated on cross-examination that Valentine was a bright student when she lived with her parents, and then gave testimony that, upon the death of the child's mother, friends and neighbors gave the little girl articles of clothing.

Mrs. Ellen Welch stated that she lived at Julian, had known the respondents for about ten years; that she had the custody of Martin Grivel, Valentine's brother; that the

Youngs often bring Valentine to see Martin; that the attitude between the respondents and the little child is very loving; that they never have any trouble with her, and that Valentine is in good physical condition; that the Youngs are proper persons to have the custody of this child. Mrs. Welch testified on cross-examination that she had had both business and social relations with the respondents; that the Youngs had no domestic troubles; and that Mr. Young's reputation for morality was good.

Mrs. I. M. Maag testified that her daughter had her tonsils removed at the same time the respondents had Valentine's tonsils removed, and that Mrs. Young gave the child a fine motherly care and attention.

Mrs. Dale Lyons testified that she had lived near Julian for about twenty years; that she knows the respondents and Valentine Grivel; that she has visited in their home; and the attitude between the respondents and the child is excellent; that the child is dressed well; and that she seems happy and enjoys her home.

Mrs. Leona Christie testified that she had been a neighbor of the respondents when they lived in Julian; that the Youngs gave a great deal of care and attention to the little girl; kept her in school; that the child seemed happy in the respondents' home; that the witness has a small daughter that was a playmate of Valentine's; that the Youngs took Valentine with them when they went places; and that Mr. Young was very fond of Valentine and her playmates; and that he would play games with them.

Elizabeth Strange testified that she lived in Julian; knew the respondents and the little Grivel girl; that she was their neighbor and frequently visited in their home; that there was a very affectionate attitude between the child and the Youngs; that the respondents did not leave home without taking the child with them; that they gave her medical attention; and played with the child.

Valentine Grivel was called as a witness, but was not sworn. She told her name; said that she was nine years of age; told her birthday; said she attended school; that she lived in Lincoln with the Youngs; named her teachers;

stated that she took music lessons and dramatic art instructions since living with the Youngs; that the Youngs were good to her; that she wanted to live with them; that she often visited her brothers; that the respondents play games and read rhymes to her; and she called Mr. Young "Daddy" in speaking of him.

The respondents rested their case by recalling Mrs. Young, who testified as to some of Valentine's dresses, which were brought into the courtroom, but which were refused to be admitted in evidence as exhibits.

This unusually extended recital of the facts disclosed by the record in this case, we feel, is justified by the peculiar nature of the questions to be determined by this court.

It may be said that analysis reduces relator's contentions to the primary one, that in this case, in view of the record, questions of fact and law presented by the respondents in their answer are all foreclosed by his appointment as guardian by the county court for Nemaha county. And even if it were otherwise, the best interests of the minor will be promoted by awarding him the custody of his ward. He relies upon, as controlling, our statutory provision: "If the minor have no father or mother living, and competent to have the custody and care of the education of such minor, the guardian so appointed shall have the custody and tuition of his ward." Comp. St. 1929, sec. 38-108. He further cites, and quotes from, as sustaining his contention, 12 R. C. L. 1119, which, in substance, as a general proposition, supports his view, and establishes as a principle that to the person of the ward the guardian stands in *loco parentis*.

But, if we continue the quotation from 12 R. C. L. 1119, we have also the following: "He (the guardian) may enforce this right (of custody) by habeas corpus proceedings, or by proper action in equity. The right of the guardian to the custody of the ward exists, however, solely for the latter's benefit, and may be regulated, controlled or denied by the courts when necessary to the promotion of the best interests of the ward." 12 R. C. L. 1119, sec. 21. See *Townsend v. Kendall*, 4 Minn. 412, 77 Am. Dec.

534; *Wood v. Wood,* 5 Paige Ch. (N. Y.) 596, 28 Am. Dec. 451; *Armstrong v. Armstrong,* 192 N. W. (Ia.) 146; *Dunn v. Jackson,* 231 S. W. (Tex.) 351.

So, also, in the words of another recognized authority: "The right of the guardian to custody of the ward is not an absolute one, but the matter of custody is subject to control by the court, which may deprive the guardian of such custody, or refuse to take the child from the custody of others and commit it to the custody of the guardian, the controlling consideration in the matter of custody, as in the matter of selecting the guardian, being the best interests of the child." 28 C. J. 1110.

"Every child born in the United States has, from the time it comes into existence, a birthright of citizenship which vests it with rights and privileges, entitling it to governmental protection, 'and such government is obligated by its duty of protection, to consult the welfare, comfort, and interests of such child in regulating its custody during the period of its minority.' *Mercein v. People,* 25 Wend. (N. Y.) 64, 35 Am. Dec. 653." *In re Gould,* 174 Mich. 663, 679.

In matters of awarding custody, as well as in the selection of a guardian, the true interest of the infant is of paramount consideration. By this is meant his lasting good, and in making its disposition of the matter the court will take into consideration not merely the temporal welfare, but the state of the minor's affections and attachments, and his training, education (secular and religious) and morals. 28 C. J. 1075.

While the wishes of a child under the age of fourteen years are not controlling where in conflict with what the courts regard as the minor's best interest, still, "Even though an infant is under the age of fourteen, if he has reached an age sufficient to enable him to form an intelligent preference, it is proper that his wishes should be consulted in connection with the selection of a guardian." 28 C. J. 1077. And this is also true upon matters of custody involved in the exercise of the guardian's powers for even more cogent reasons. This principle is certainly in

accord with dictates of justice and common humanity. *Brown's Estate,* 166 Pa. St. 249; *In re Gould,* 174 Mich. 663; *Knochemus v. King,* 193 Ia. 1282; *Dunn v. Jackson,* 231 S. W. (Tex.) 351.

The record, as well as the statements of counsel at the bar of this court on argument of the case, challenge our attention that the effect of the judgment appealed from will be to remove the minor from the custody of those who are now, and have been, sympathetically causing this minor to be properly instructed in the religious faith of her fathers, and vesting it in a party adhering to a creed substantially and fundamentally opposed to the minor's religious beliefs and to instructions so far received. There is not the slightest indication in the record that a suitable person of the faith preferred by the parent may not be easily found, nor are there any things connected with the minor's estate or circumstances that indicate that personal qualification of the present guardian are of particular value. The general rule appears to be: "The religious views of the parents of the child, and their wishes as to his religious training and environment, should, however, be taken into consideration in the selection of a guardian. * * * Where there is a difference of religious preference between a father and mother, in the absence of other controlling consideration, a guardian of the father's religious views will be appointed, certainly where the child expresses a desire to continue in the faith of his father." 28 C. J. 1077, 1078.

In Nebraska, legislative action has substantially adopted this principle, and established it as a public policy applicable to guardianship and custody of minors. It was entitled "An act to regulate the treatment and control of dependent, neglected, and delinquent children," and was enacted as chapter 59, Laws 1905. It defines a "dependent child" as one who is "under the age of sixteen (16), who for any reason is destitute or homeless or abandoned, or dependent upon the public for support, or has not proper parental care or guardianship." Section 15 thereof provides: "The court in committing children under the pro-

visions of this act, shall place them as far as practicable in the care and custody of some individual holding the same religious belief as the parents of said child, or with some association which is controlled by persons of like religious faith of the parents of the said child."

Certainly this plain recognition, by an authoritative agency of the state, of the principle just referred to, and its solemn pronouncement thus made, constitutes a proper and appropriate declaration of public policy on the subject to which it relates, so far as within the reason which its words suggest. Indeed, it must be conceded that the public policy of a state finds its highest source, as well as its most authoritative declaration, in its Constitution, in its laws, and in the decisions of its courts. 50 C. J. 857, 858.

These great principles thus recognized, which we have discussed, are in harmony with the care, sympathy and protection extended by the policy of the law to orphaned minors. They are truly favorites of the law. To them the law is not only protective, fair, and just, but truly merciful as well. For, save when in the presence of unavoidable necessity, it never countenances the adding of a single drop to that cup of sorrow and bitterness that circumstances unescapable have presented to its wards. It constantly guards with care and protects with unwearied fidelity its helpless charges against the errors, infirmities, ambitions, and cupidity of men, as well as against the manifest failure of judicial process.

Without announcing it as having the force of a binding rule in this jurisdiction, it may be said, in the discharge of this high trust and duty, American courts of excellent standing unquestionably adhere to the principle that, "So far as the interests and rights of the child itself are concerned the court is not bound by any previous adjudication." 10 Standard Ency. of Procedure, 953.

This jurisdiction, however, is fully committed to the doctrine that in a habeas corpus proceeding for the custody of a child of tender years, such as here presented, the general rule that the controlling consideration is the

child's own best interest applies. *Schroeder v. State,* 41 Neb. 745; *State v. Porter,* 78 Neb. 811; *In re Burdick,* 91 Neb. 639; *State v. Bryant,* 95 Neb. 129; *State v. Highberger,* 103 Neb. 258; *State v. Mason,* 179 Minn. 472.

On the question of scope of review and procedure permissible in this case at this time, there would seem to be no difficulty. In *Jensen v. Sorenson,* 233 N. W. (Ia.) 717, 723, we find the following language employed: "Where the issue turns upon the best welfare of the child and involves the overturning of presumptive parental rights in the interest of the child, we have found it difficult to separate questions of law from questions of fact, and have found ourselves unable to adhere very strictly to the rule contended for by appellee. We have necessarily recognized the fact that the determination of such issues carries us into the field of equity, and that it is indispensable that principles of equity be applied. In our recent case of *Barnett v. Blakley,* 202 Ia. 1, we said: 'As now used and recognized, in cases involving the custody of children, the writ of habeas corpus operates to invoke the broad powers of the court of an equitable nature to determine the question of custody of a minor child according as the welfare and best interests of the child may require, having due regard to the legal rights of parents, or others.' "

We have no disputed facts before us. Substantially they are admitted, and we are to consider them solely with an eye to the minor's best interests and happiness. Do Paul Bize and his good wife love this child? If taken to their home, will she share an equal place in their hearts with their son of 28 years, their son of 26, and their daughter of 22? Will their sons and daughter receive her into that family as a little sister? Or, will she be doomed to remain as a stranger in the household, tolerated and retained through a sense of responsibility, of charity, and of duty? True, she will receive her schooling at a public school, a mile and a half distant on a public road over which she will be required to proceed daily, be the weather fair or foul. Will the religious teaching imparted to her in her natural home by her natural parents before they passed

to the beyond be sympathetically cherished, encouraged and developed? In view of the full situation already detailed, will her own brothers be welcomed and encouraged to visit her at a place where the members of her family were strangers while the father and mother lived, and to which these brothers strenuously objected to her being taken after their parents' death?

On the other hand, take the facts supporting the respondents. This evidence discloses, without contradiction, that the Youngs are both in the early thirties, and unusually well-fitted to rear this little girl. They are a young couple, of good moral standing. They took this little orphan into their home as their own child. For two years they have admittedly surrounded her with the fostering care that a child of such tender years should have, in a manner which would reflect credit upon natural parents. They have clothed her well; they have had her tonsils removed, teeth attended, and eyes fitted with glasses; they have kept her in school, and she has received private instructions in music and dramatic art, all at their own cost and expense. They take her to see her brothers, and leave and encourage her to write to them; they are teaching her to love and remember them. They are sympathetically having her trained in the faith of her fathers.

Indeed, Mr. and Mrs. Young care for and love this child as their own; she accompanies them when they go places; and the little girl loves them as parents. She is happy; she calls them "Daddy" and "Mother," and she wants to remain with them. By none in the household is she deemed an interloper or intruder. They not only are desirous that she stay, but have offered to, and are willing to, adopt her and make her as their own in law and in fact. The situation for the minor is ideal. Truly, in the Young home, in the language of Justice Rose, employed in *In re Burdick*, 91 Neb. 639: "At the time of the trial the child's happiness and welfare were assured, for the present at least. To make a change would be an experiment at best"—and would deny her just rights conferred upon her even as a minor, by the policy of the law, and for which the entire

evidence discloses not the slightest justification for failure to respect and to accord.

The undisputed facts of this record clearly disclosing that the best interests of the minor will be promoted by her continuing in the custody of the respondents, which will also be in accord with the announced public policy of this state, and further disclosing that the judgment entered in the trial court is contrary to the preponderance and weight of the evidence, the district court erred in awarding the custody of the minor to the guardian herein.

Therefore, said judgment entered in the district court is reversed at the costs of the relator, and the proceedings dismissed.

REVERSED AND DISMISSED.

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MARTHA E. ALLEN, APPELLANT, V. ARTHUR N. ALLEN, APPELLEE.

FILED JULY 17, 1931. No. 27826.

Marriage: DIVORCE: SUFFICIENCY OF EVIDENCE. The evidence in the record considered *de novo*, and *held* to establish a valid marriage between the plaintiff and the defendant; to sustain the charges of cruelty and nonsupport set forth in plaintiff's petition; and to entitle plaintiff to a divorce as prayed.

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

*Raymond & Fitzgerald,* for appellant.

*Morrow & Morrow* and *Glebe & Elliott, contra.*

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

EBERLY, J.

This is an action for divorce and alimony. The petition, in usual form, alleges marriage of the parties "at Denver, Colorado, September 28, 1923;" charges the defendant with cruelty and nonsupport; alleges that he is the owner of property of approximately $10,000 in value; and prays for a divorce and alimony.

In his answer and cross-petition, defendant denies that "plaintiff and defendant were married at Denver, Colorado, September 28, 1923," or any other time; alleges that plaintiff and defendant are not married, but "that they agreed when they started living together not to become man and wife, and no marriage was ever contracted by said parties." He further denies the acts of cruelty alleged by plaintiff, and alleges on his part cruel treatment of defendant by plaintiff; also that plaintiff was on the 29th day of September, 1914, married to one Charles Henry Cameron; and on information and belief defendant alleges that no divorce has been obtained by either party, and that plaintiff is now the wife of said Cameron.

By an "Amended Reply and Answer" the plaintiff joined issue as to the allegations of new matter contained in defendant's answer and cross-petition.

There was a trial to the court and a finding and judgment in favor of defendant. The district court found specially that the defendant and plaintiff were never legally married, and that the purported common-law marriage was void under section 1492, Comp. St. 1922, as amended by section 2, ch. 40, Laws 1923; and thereupon entered a further order making disposition of certain property rights of the parties, but made no allowance as alimony.

Plaintiff appeals, and defendant on his part prosecutes a cross-appeal.

It appears from the record that plaintiff was married to one Charles Henry Cameron on September 29, 1914; that Cameron deserted plaintiff and plaintiff's minor children in the holiday season of 1916 and 1917. Thereafter, according to plaintiff, he was never heard from, and plaintiff believed him dead at the time of her present marriage. Plaintiff's evidence (disputed by the evidence of defendant) also tends to establish that on September 28, 1923, a marriage to the defendant was solemnized by one Reverend Wilson, an Adventist minister, at Denver, Colorado, where both plaintiff and defendant were then engaged in business, and were *bona fide* residents; that all preliminary arrangements for the marriage ceremony, including the

selection of the minister, were made by defendant, and that plaintiff entered into this ceremony in good faith, received a certificate of marriage from the officiating clergyman, and thereafter lived in the *bona fide* belief that she was legally married to the defendant.

There is no dispute in the evidence that after the date of the alleged marriage ceremony, so far as the world was concerned, the parties held each other out as husband and wife. They lived and cohabited together as man and wife, and were so recognized and received for the six years next ensuing in the various communities where they afterwards resided. It also appears that plaintiff was called upon to, and did, execute real estate mortgages as the wife of the defendant. It may be said that in every way, so far as the public were concerned, these people lived and enacted the part of husband and wife duly married.

The first question presented is: Was the marriage ceremony actually performed? Defendant strenuously denies this under oath, and plaintiff in like manner affirms. There is no other oral evidence of eyewitnesses presented. The trial court evidently found against the plaintiff on this issue.

The defendant contends: "Where a trial is had to the court, and the evidence on a particular point is in irreconcilable conflict, the court will, in its determination of that question, consider the findings of the trial court, although it is required by statute to try the case on the record *de novo*." *Greusel v. Payne*, 107 Neb. 84. See *McGill v. McGill*, 114 Neb. 636; *In re Estate of Waller*, 116 Neb. 352; *Jones v. Dooley*, 107 Neb. 162; *Corn Exchange Nat. Bank v. Jansen*, 70 Neb. 579.

It will be noted that the controlling evidence in the cases upon which the defendant relies to sustain his contention was almost wholly the testimony of witnesses in open court in which there was irreconcilable conflict. Indeed, the above rule, by its very terms, appears to be limited to this particular class of cases.

In the present case it is true that, while the evidence of the defendant and the plaintiff on the point under consid-

eration is at variance, six years of their joint lives, following this important date, furnishes circumstantial evidence on the same question disclosing controlling facts and circumstances which are in no manner denied or questioned. This situation brings the instant case fairly within the terms of the statute as interpreted by the following decisions: "The supreme court is not bound by the findings and judgment of the trial court in an equity case, but it is the duty of this court to try the case *de novo*, and to reach an independent conclusion as to the weight, credibility and effect of evidence, and to render judgment accordingly. *Colby v. Foxworthy*, 80 Neb. 244. And the conclusions of the trial court, derived from the consideration of the evidence of witnesses in the presence of the court, will not be regarded, unless upon the whole record, in view of the position of the trial court in weighing such evidence, they appear to be right. *Grandin v. First Nat. Bank*, 70 Neb. 730." *Nelson v. City of Florence*, 94 Neb. 848.

Applying the rule thus announced to the evidence in the record, in the light of the presumption which ordinarily applies to questions of this kind, we are impressed with the view that the testimony before us, supported by the uncontradicted facts and circumstances, is such as to fully support the conclusion that the ceremony of marriage was had between the plaintiff and the defendant substantially as testified to by the plaintiff. In fact the admitted circumstances surrounding the lives of these two parties from the time of the performance of this ceremony to the date of the institution of these proceedings are such that, if the mouths of both were sealed in death, these facts would fully sustain any civil action based upon the proposition of a legal marriage having taken place between the parties to this lawsuit. Plaintiff is certainly entitled to the benefit of this circumstantial evidence in a determination of her rights in this action, and it, together with her evidence, plainly establish her contention by a preponderance of the evidence.

But this does not dispose of the case. It must be con-

ceded that, if it be established that the former husband, Charles Henry Cameron, was alive and undivorced at the date of this marriage ceremony, the incapacity of plaintiff to make it would be established and its legal effect nullified.

In view of the fact that we have before us a Colorado contract, the discussion of a similar question by the supreme court of that state in the case of *Pittinger v. Pittinger,* 28 Colo. 308, is of peculiar interest. Gabbert, J., in delivering the opinion of the court in that case, says in part: "No man is presumed to do an unlawful act. When a marriage has been shown, the law raises a strong presumption in favor of its legality. By some of the authorities this presumption is said to be one of the strongest known to the law. Its strength increases with the lapse of time. This presumption arises because the law presumes morality and not immorality and that every intendment is in favor of matrimony. *Lampkin v. Insurance Co.,* 11 Colo. App. 249; 2 Nelson, Divorce and Separation, sec. 580; *Boulden v. McIntire,* 21 N. E. 445; *In re Rash's Estate,* 53 Pac. 312; *Teter v. Teter,* 101 Ind. 129; *Johnson v. Johnson,* 114 Ill. 611." See *McKibbin v. McKibbin,* 139 Cal. 448.

Indeed, where the celebration of a marriage is proved, the capacity of the parties thereto is presumed. *United States v. De Amador,* 6 N. M. 173; *Ferrell v. State,* 45 Fla. 26.

So, also, "Where a marriage has been shown, whether regular or irregular, the law raises a strong presumption of its legality, and the party who asserts its illegality must assume the burden of that issue. The law is so positive in requiring a party who attacks a marriage to take the burden of proving its invalidity that such requirement is enforced even when it requires the proof of a negative. This is based on the rule that, where a negative is essential to the existence of a right, the party claiming the right has the burden of proving such negative. The person having the burden of proof is required to make plain, against the constant pressure of the presumption of legality, the

truth of law and fact that the marriage was not legal. The evidence to repel that presumption must be strong, distinct, and satisfactory. Thus, if it is claimed that, at the time of the marriage, one of the parties had a living spouse, it is incumbent upon him who attacks the marriage upon this ground to overcome the presumption of its validity, by establishing the former marriage, in all respects in conformity to law, and that the former spouse was living at the time that the second marriage was entered into, *and undivorced.*" 18 R. C. L. 427, sec. 56. See *McKibbin v. McKibbin*, 139 Cal. 448; *Winter v. Dibble*, 251 Ill. 200; *Estes v. Merrill*, 121 Ark. 361; *Kinney v. Tri-State Telephone Co.*, 201 S. W. (Tex. Civ. App.) 1180.

So, too, the rule is established by the weight of authority that "The general presumption is that the life of a person continues for seven years after he is last heard from, and that his death is presumed after the lapse of that time, but where the presumption of the validity of a marriage, arising from the performance of a ceremony, conflicts with the presumption of the continued life of a former spouse of one of the parties, if neither is aided by proof of facts or circumstances corroborating it, the presumption of the validity of the second marriage will prevail over the presumption of the continuance of the life of the former spouse although the full seven years has not elapsed. * * * While the law does not raise any presumption as to the time when, within the seven years, the death in fact occurred, still if the full period has elapsed at the time the question is raised it may well be presumed, in the absence of any evidence to the contrary, to have taken place before the second marriage." 18 R. C. L. 417, sec. 42.

"Where it appears that the parties to a prior marriage were living at the time of a subsequent marriage of one of the parties to a third person, it will be presumed that the disability of the prior marriage has been removed by a divorce before the time of the second marriage in the absence of any contervailing evidence or corroborating circumstances." 18 R. C. L. 418, sec. 43. Also, *Greenwood*

*v. Frick,* 233 Fed. 629; *Goset v. Goset,* 112 Ark. 47; *In re Pusey,* 173 Cal. 141; *Smith v. Fuller,* 108 N. W. (Ia.) 765; *In re McCausland's Estate,* 213 Pa. St. 189; *Wagoner v. Wagoner,* 128 Mich. 635; *Vreeland v. Vreeland,* 78 N. J. Eq. 256.

In the light of all the evidence in the record, it is plain that the defendant wholly failed to meet the burden that the law placed upon him in the establishment of the illegality of the marriage contract. Nor does the fact that no record now exists of such marriage in Colorado militate against the plaintiff. The accessories to the ceremony were all provided by the defendant; by implication at least he represented that they were legal, proper, and in accord with the law of the state in which the ceremony took place. We are committed to the rule that, where one party to the marriage relation "induces the other to believe, in good faith, that the contract is made and is binding, the law will hold the party taking such advantage to the full terms of the agreement as in other cases." *Coad v. Coad,* 87 Neb. 290.

Nor do we find that, under the facts established by the evidence, this marriage ceremony and contract in any manner contravened the provisions of section 1492, Comp. St. 1922, as amended by section 2, ch. 40, Laws 1923. The provisions of the section referred to are certainly limited by their terms to "marriages solemnized in the state of Nebraska." This is a Colorado marriage. "All marriages contracted without the state, which would be valid by the laws of the country in which the same were contracted, shall be valid in all courts and places in this state." Comp. St. 1929, sec. 42-117. See *Gibson v. Gibson,* 24 Neb. 394; *Bailey v. State,* 36 Neb. 808; *Hills v. State,* 61 Neb. 589; *State v. Hand,* 87 Neb. 189; *Staley v. State,* 89 Neb. 701.

A careful examination of the record as an entirety supports the conclusion that the allegations of plaintiff's petition are adequately supported by the evidence; that the charges of cruelty and nonsupport therein contained are sustained; and that the plaintiff is entitled to a decree of divorce, and that the trial court erred in its finding and judgment in denial thereof.

It appears, however, that the question of alimony and allowances to which the plaintiff is entitled has not been passed upon by the trial court. The findings and judgment of the district court are, therefore, set aside and reversed, and the cause is remanded, with directions to enter a decree of divorce for the plaintiff as prayed, and to proceed to the determination of the amount of alimony and allowances to which the plaintiff may be entitled, including attorney fees, with permission, upon application of the parties, to allow the introduction of additional evidence as to properties involved and the values thereof.

REVERSED.

DAY, J., Dissents.

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FIRST NATIONAL BANK OF CRIPPLE CREEK, APPELLEE, V. V. C. REDDING, APPELLANT.

FILED JULY 17, 1931. No. 27813.

1. **Banks and Banking**: AGENCY. The making of a note payable at a particular bank does not, of itself, constitute that bank the agent for the collection of the note.
2. ———: NOTES: PAYMENT. Payment in full of a certain note to a bank at which it is payable, by a check drawn on itself, is not a payment of the note when the note itself is held by its owner at a distant point.
3. ———: ———: ———: AGENCY. In such a case, the one to whom such money is paid, in the absence of other facts, is an agent of the payor, and not the agent of the payee.
4. **Bills and Notes**: PAYMENT. A loss resulting from the failure of a bank at which a note is payable, and in which the maker has placed funds to pay it before it is due, does not fall upon the owner and holder thereof who had never sent such note for payment.

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

*Morrow & Morrow*, for appellant.

*Mothersead & York, contra.*

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

PAINE, J.

The plaintiff sued the defendant upon a promissory note dated January 2, 1929, payable March 3, 1929, for $1,000 bearing 10 per cent. interest, said note being given to the State Bank of Minatare, which bank indorsed the same without recourse and sold it to the First National Bank of Cripple Creek, plaintiff, upon January 14, 1929, this note being one of several notes given as collateral security for a loan of $12,950.

Petition was filed in the district court for Scotts Bluff county to collect this note. The answer set up as a defense to the payment of said note that the maker had paid the same in full with an undated check, being exhibit No. 1, for $1,003.78, given to the State Bank of Minatare, but which check was never charged to his account in that bank, although he had ample money on deposit to pay the same, and that said bank was closed on February 21, 1929, and the check so given had never been charged to defendant's account in said bank. His defense is founded upon the claim that the bank to which he had given the note and to which he gave the check was the agent of the bank by which it was then owned.

Evidence was taken in the case, and at the close of the evidence the plaintiff moved the court to instruct the jury to return a verdict for the plaintiff, and the court sustained the motion, and the jury thereupon returned a verdict against the defendant in the sum of $1,132.77, which was the amount due upon April 30, 1930, on which date the jury returned a verdict. A motion for new trial was then filed, argued and overruled, and the case has been presented to this court for hearing.

It is shown in the evidence by the bank statement, exhibit No. 2, that upon the 19th day of January, 1929, the defendant made a deposit in said bank of $6,148.92, and that soon after making this deposit he drew the undated check, exhibit No. 1, in payment of the note in suit.

On February 1 the bank gave him his monthly balance sheet with his canceled checks, and this showed plainly that the check he had drawn had never been charged against

his account, and the bank's doors were open for nearly three weeks after that time and he took no further steps in the matter except to talk to an attorney, Mr. Morrow, and to the officers of the bank. On the trial of the case the defendant had said check in his possession and offered it in evidence.

A large number of letters between L. F. Johnson, president of the State Bank of Minatare, and V. H. Mann, vice-president of the First National Bank of Cripple Creek, were offered to show agency. These letters bore dates from about January 20 to April 1, 1929, and were all written after the note had been given and the check signed and given to the Minatare bank in payment of the note, which was then owned and held in Cripple Creek, Colorado, but the court excluded several of the letters offered.

The appellee insists that there was no competent evidence to require the case to go to the jury; that the transaction of the defendant in drawing the check did not amount to payment because he never parted with anything of value, as the check was never charged against his account in the Minatare bank and no proceeds were ever sent to Cripple Creek in payment of his note then owned and held there.

The appellant in his excellent brief presents as authority for his defense of agency the case of *Harrison Nat. Bank v. Austin,* 65 Neb. 632, and the case of *Pochin v. Knoebel,* 63 Neb. 768; and the appellee dismisses these with the simple statement that in both of these cases there was actual authority to make the collections in question, and our court held that where an agent had actual authority to make the collections the person making payment to such agent will be protected, even though the instrument he is paying is not in the actual possession of the agent at that time.

It is contended that to support his defense the defendant must show first that he actually paid the State Bank of Minatare the amount of the note, and that at that time the State Bank of Minatare was the agent of the First National Bank of Cripple Creek, and there is cited *Mc-*

*Cormick v. Keith,* 8 Neb. 142, in which paragraphs 2 and 3 of the syllabus read as follows:

"An agent for the collection of a debt cannot lawfully accept in discharge thereof his own individual obligation to the debtor, unless authorized to do so by his principal.

"And even if the agent be specially empowered to compromise, and accept personal property in satisfaction of money demands, this will not authorize him to extinguish a debt due the principal by setting off against it his own debt."

This case and all other Nebraska cases up to 1923 upon the subject of agency are considered and reviewed in an article by Professor Seavey in part I, No. 4, vol. 1, Nebraska Law Bulletin, citations to the valuable articles in which bulletin are now being regularly made in the new edition of Shepard's Citations.

"The giving of a check by a debtor for the amount of his indebtedness to the payee is not, in the absence of an express or implied agreement to that effect, a payment, or discharge of the debt." *Baker-Evans Grain Co. v. Ricord,* 126 Kan. 107.

No proceeds were ever remitted to the Cripple Creek bank, which owned the note. In such a case, the one to whom such money is paid is an agent of the payor, and not the agent of the payee. 8 C. J. 601.

A loss resulting from the failure of a bank at which a note is payable, and in which the maker has placed funds to pay it before it is due, does not fall upon the owner and holder thereof who had never sent such note for payment. *Binghampton Pharmacy v. First Nat. Bank,* 131 *Tenn.* 711, 2 A. L. R. 1377, and note; *Baker-Evans Grain Co. v. Ricord, supra.*

The burden of proof rests in this case upon the appellant to prove that the State Bank of Minatare was the agent of the First National Bank of Cripple Creek, and upon failure thereof the trial court was justified in instructing the jury to return a verdict for the appellee. Finding no error in the record, the judgment is hereby

AFFIRMED.

CASES DETERMINED

IN THE

# SUPREME COURT OF NEBRASKA

SEPTEMBER TERM, 1931.

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## CHARLES C. GEORGE, APPELLANT, V. AETNA CASUALTY & SURETY COMPANY, APPELLEE.

FILED OCTOBER 1, 1931. No. 27734.

1. Insurance: NOTICE OF ACCIDENT: "IMMEDIATE." The word "immediate," in referring to notice required in an insurance policy, means with reasonable celerity, with reasonable and proper diligence, and what is reasonable time depends upon all of the facts and circumstances of each particular case.
2. ———: ———: ———. A requirement in a public liability insurance policy that notice of an accident shall be given immediately, or forthwith, or at once, will not be literally construed; but it is sufficient if the required notice be given within a reasonable time under the circumstances of each particular case.
3. ———: FORFEITURES. Forfeitures are not favored under Nebraska laws, and will not be held to have been intended, in the absence of language in the policy of insurance clearly indicating the contrary.
4. Statutory Provision. The statutes of Nebraska provide that a breach of condition in any policy of insurance shall not avoid liability nor avail the insurer to avoid liability unless such breach shall contribute to the loss. Comp. St. 1929, sec. 44-322.
5. Insurance: NOTICE OF ACCIDENT: REASONABLE TIME: QUESTION FOR JURY. The question of whether a notice given some eleven months after the accident occurred is timely or reasonable, when the policy provided for immediate notice, is one that should be submitted to a jury, together with all the facts and circumstances as set out in the record in this case and under proper instructions.

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

*Gaines, McGilton, McLaughlin & Gaines*, for appellant.

*Brown, Fitch & West, contra.*

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

PAINE, J.

A judgment was entered in the lower court in favor of the Aetna Casualty & Surety Company, defendant, in an action brought against it by Charles C. George, plaintiff, upon a public liability policy. The plaintiff appeals.

The facts as disclosed in the record show that August 1, 1925, said plaintiff, George, purchased of defendant a renewal of his combination public liability policy upon his residence property, located at 5218 Chicago street, in Happy Hollow addition to Omaha, paying therefor a premium of $103.35. This policy was to protect him from loss or expense arising or resulting from claims for damages on account of personal injuries or death accidentally suffered by any person or persons while within, about, or adjacent to his residence.

About 5:00 p. m. on the evening of January 20, 1926, while this public liability insurance policy was in force, one Anna M. Lindstrom, about 50 years of age, was walking along the sidewalk in front of plaintiff's residence, and claimed that by reason of the snow and ice, which had not been removed from the sidewalk, she slipped, fell and broke her leg. Plaintiff first learned of the accident several weeks after it occurred, when a sister of the woman called at his office and said that she had received an injury, but he does not recall that she said it was a broken leg, and wanted to know if he would be willing to help her pay some of the doctor's expenses, but plaintiff does not recall that any reference to a hospital was made at that time. Plaintiff knew Anna M. Lindstrom, as she had served as a waitress at his home on different occasions several years before that time; that when he learned of her injuries he did not know and had no reason to believe or suppose that he was in any way responsible or liable therefor; that immediately thereafter plaintiff left Omaha on a trip and was gone for several weeks; that he heard nothing more of the matter for months, but in November or December, 1926, an attorney named Palmer called on

him and claimed he was liable for the accident. The plaintiff immediately notified the agent of the defendant insurance company.

Anna M. Lindstrom filed her petition for $25,000 damages against the plaintiff herein upon December 21, 1926, and service of summons was had on the plaintiff on December 23, 1926. The plaintiff herein gave a written report of the accident to the insurance company on December 29, 1926, on a form furnished him by the agent of the insurance company. Thereupon a representative came to Mr. George's office and asked him to write out a statement for the company, which he did, and it was received in evidence as exhibit 5, and reads as follows:

"Omaha, Nebr. Jan. 5th, 1927.

"I, C. C. George, state in reference to suit brought against me by Anna M. Lindstrom for injury resulting from slipping on the sidewalk in front of my residence at 5218 Chicago St. sometime about a year ago, that my first knowledge of this accident was gained sometime in the spring of 1926, in either February or March, when the sister of the injured woman called at my office and told me of the accident. The sister made no claim on me for damages but asked me if I could not do something to help the injured out. The sister of the injured at the time hinted that there might be some liability on my part for the occurrence of the accident. However, the discussion was friendly and she did not press the point. I advised this sister that I did not consider myself in any way liable. Shortly after this conversation I left Omaha for a trip of a month and I heard nothing more from Miss Lindstrom or any representative of hers until about a week before the lawsuit was brought when an attorney named Palmer called on me and made demand for damages.

"Charles C. George.

"Witness W. B. Taylor."

The insurance company refused to defend the suit and denied liability to plaintiff under its policy on the ground that plaintiff had failed to give them notice of the accident within a reasonable time after its occurrence, as required

by the terms of his policy, a provision therein reading as follows: "A. Upon the occurrence of an accident the assured shall give immediate written notice thereof with the fullest information obtainable to the company or its duly authorized agent. Notice given by or on behalf of the assured to any authorized agent of the insurer within the state, with particulars sufficient to identify the assured, shall be deemed to be notice to the insurer. Failure to give any notice required to be given by this policy within the time specified therein shall not invalidate any claim made by the assured if it shall be shown not to have been reasonably possible to give such notice within the prescribed time and that notice was given as soon as was reasonably possible. If suit is brought against the assured to enforce such a claim for damages he shall immediately forward to the company every summons or other process as soon as the same shall have been served upon him, and the company will, at its own costs, defend such suit in the name and on behalf of the assured. The company may at its option settle any claim or suit."

The plaintiff was thereupon compelled to employ attorneys to defend him in the suit filed against him. They prepared the answer in the case, and in that connection testified that there was a considerable amount of briefing done and investigation of the law, because there were a number of legal propositions that they had to go into before being in a position to prepare the defense of the case. They first made an investigation as to whether or not there was involved a violation of any city ordinance. They decided there was no city ordinance requiring a property owner to remove ice from his sidewalk. Then they investigated as to whether it was private property or a public highway, and as to the elevation of the property, whether or not there was a terrace there and a natural flow of water from melting snow, how the water had lodged, etc. Shortly before the time of trial Mr. George's attorneys investigated the records of the rainfall and the temperatures and everything in connection with the condition of things at the time of this accident. They interviewed a number of witnesses,

some of them having been interviewed several times. The actual trial of the case took about two days, and the total accumulation of time spent in getting ready for trial would be over two weeks of the time of both Attorney F. H. Gaines and his son, F. S. Gaines. They made two arguments to the jury and won the case for the plaintiff. There was a motion for a new trial filed, which was argued and won.

The plaintiff filed this suit against defendant insurance company upon October 13, 1928, setting out the facts and praying for a judgment for his attorneys' fees in the sum of $1,500 and expenses of $45.50, making a total of $1,545.50 which he had been compelled to expend to defeat the damage case brought against him, together with 7 per cent. interest from May 28, 1927, and costs and attorneys' fees.

The answer alleged that the plaintiff had knowledge of the accident of Anna M. Lindstrom shortly after the accident occurred, and that plaintiff knew shortly after the accident that said Anna M. Lindstrom had suffered a serious injury, and that plaintiff knew that in all likelihood a claim would be made upon him because of said accident and injury and, notwithstanding the conditions and provisions of said policy requiring plaintiff to give immediate notice with the fullest information obtainable to the defendant company, or its duly authorized agents, of any accidental occurrence, plaintiff in breach of said condition and contract failed and omitted to give defendant any notice thereof until December 26, 1926, and plaintiff, by his failure and neglect to give defendant immediate notice as required by said contract, thereby deprived defendant of a full opportunity to make an investigation of the facts, conditions and circumstances surrounding said accident, and thereby deprived defendant of an opportunity not only to investigate the accident but to bring about a settlement thereof. The answer further alleged that the cost and expenses, including attorneys' fees rendered the plaintiff in the action, do not exceed the sum of $500. The answer contained the statement that in setting up the defense with

respect to the reasonableness of the attorneys' fees the defendant did so without waiving its first defense previously pleaded.

The plaintiff by way of reply to the answer of defendant alleged that, while he learned within a few weeks thereafter of the injury to Anna M. Lindstrom which occurred on the public streets of Omaha, he did not know and had no reason to believe that she intended to or would make any claims whatever against him because of her injury, and plaintiff further stated that as soon as he learned that the said Anna M. Lindstrom made claim that he was in any way liable for her injury he gave notice to the defendant company in December, 1926. The reply contained a general denial of all other matters pleaded in the answer.

Trial was had to a jury. Evidence as to the value of the attorneys' fees was given by Francis S. Gaines, Frank S. Howell, Alfred G. Ellick and E. G. McGilton for plaintiff, and by Benjamin S. Baker, George L. De Lacy and George N. Mecham for defendant. At the close of the evidence the defendant moved the court to instruct the jury to return a verdict for the defendant, or, in the alternative, to discharge the jury and enter judgment in favor of the defendant. It was ordered by the district judge that the cause be dismissed at costs of plaintiff. The motion for new trial was overruled.

1. It is sometimes a disputed question as to whether an "accident" has happened within a provision demanding that a notice be sent to the insured when an accident occurs. *McKenna v. International Indemnity Co.*, 125 Wash. 28.

It is not every trivial mishap or occurrence that the insured under such a policy must regard as an accident, of which notice should be given immediately to the insurer, even though it may prove afterwards to result in serious injuries. *Melcher v. Ocean Accident & Guarantee Corporation*, 226 N. Y. 51.

The word "immediate" means in such convenient time as is reasonably necessary under the circumstances. 7 Couch, Cyclopedia of Insurance Law, sec. 1538f; *Feder v.*

*Midland Casualty Co.*, 316 Ill. 552; *Cady v. Fidelity & Casualty Co.*, 134 Wis. 322, 17 L. R. A. n.s. 260.

Courts have held that the synonymous term "forthwith" means with all reasonable celerity or with reasonable and proper diligence, and what is a reasonable time depends on the circumstances of each particular case. *Simmons v. National Live Stock Ins. Co.*, 187 Mich. 551, Ann. Cas. 1917D, 42.

Notice is not required until such facts have developed as would suggest to a person of ordinary and reasonable prudence that liability may arise, and the requirement of notice is met by giving notice within a reasonable time after the injury presents an aspect suggestive of a possible claim for damages. 7 Couch, Cyclopedia of Insurance Law, sec. 1538f; *Chapin v. Ocean Accident & Guarantee Corporation*, 96 Neb. 213; *Aetna Life Ins. Co. v. Bethel*, 140 Ky. 609; *Southern Surety Co. v. Heyburn*, 234 Ky. 739; 3 Blashfield, Cyclopedia of Automobile Law, 2662; *Kaneft v. Mutual Benefit Health & Accident Ass'n*, 102 Neb. 87.

The term "immediate notice" is to be reasonably construed in connection with the attendant circumstances, and in a case where there is no bodily injury apparent at the time of the accidental occurrence and there is no reasonable ground for believing that a claim for damages may arise therefrom, the assured is not required to give the insurer notice until the subsequent facts as to the injury are brought to his attention, and if notice is given immediately thereafter with full information as to the accident, such notice will be sufficient compliance. *Midland Glass & Paint Co. v. Ocean Accident & Guarantee Corporation*, 102 Neb. 349.

Immediate notice means within a reasonable time after discovery of a ground for liability or after such a discovery should have been made. *Lucas v. New Amsterdam Casualty Co.*, 162 N. Y. Supp. 191.

The term "immediate," as applied to the time of giving notice of an accident, does not in all cases mean "at once" or "instanter" but has in many cases a relative meaning.

2. Where the serious results of an accident do not make

themselves apparent until some time after the accident, such fact may be taken into account as tending to excuse the delay in giving notice. 7 Cooley, Briefs on Insurance (2d ed.) 5917, 5918, 5921.

A requirement for notice or proof of death immediately or forthwith or at once will not be literally construed, but it is sufficient if the required documents are furnished within a reasonable time under the circumstances of each particular case. *Travelers Ins. Co. v. Nax,* 142 Fed. 653.

In 7 Cooley, Briefs on Insurance (2d ed.) 6089, it is set out that, where no bodily injury is apparent as the result of an accident when it occurs; and there is no reasonable ground to believe a claim for damages will arise therefrom, one is not required to give notice until subsequent facts as to an injury would suggest to a person of ordinary and reasonable prudence that a liability on the part of the owner to the injured person might arise. *Fischer Auto & Service Co. v. General Accident, Fire & Life Assurance Corporation,* 8 Ohio App. 176.

A requirement in a public liability insurance policy that notice of an accident shall be given immediately or forthwith or at once will not be literally construed; but it is sufficient if the required notice be given within a reasonable time under the circumstances of each particular case.

3. Forfeitures are looked upon with disfavor in Nebraska, and in insurance cases a forfeiture will not be declared unless the contract specifically provides for such forfeiture. *Haas v. Mutual Life Ins. Co.,* 84 Neb. 682. This court has held repeatedly that it will not impose a forfeiture by implication or by construction of a contract where there is no specific provision contained in the contract imposing forfeiture. The rule is set out in the syllabus of *Hagelin v. Commonwealth Life Ins. Co.,* 106 Neb. 187, as follows: "Where there is no specific provision in a policy of life insurance for forfeiture, either whole or partial, on a breach of a condition by the assured, the court will not write one in; nor can the insurer afterwards impose new conditions creating a forfeiture without the consent of the insured, and without a new consideration."

"Forfeitures are not favored, and in contracts of insurance a construction resulting in a loss of the indemnity for which the insured has contracted will not be adopted except to give effect to the obvious intention of the parties." *Phenix Ins. Co. v. Holcombe,* 57 Neb. 622. See *Haas v. Mutual Life Ins. Co.,* 84 Neb. 682.

The policy in the case at bar provided that the insured should give immediate notice of an accident, but a careful reading of the policy discloses that it contained no forfeiture clause. This court repeatedly has held that denial of liability on account of failure to comply with a provision in a policy requiring immediate notice to insurer of the happening of an accident amounts to a forfeiture, and that such a forfeiture will not be enforced where, as in the present case, the policy does not provide for such a forfeiture. *Klingler v. Milwaukee Mechanics Ins. Co.,* 193 Wis. 72.

4. In reference to the failure to give immediate notice, insured cannot avoid liability unless it is shown that such breach of condition contributed to the loss. The question of fact as to whether such breach of condition contributed to the loss should be submitted to the jury for determination.

In this case, after the notice was given and the defendant company refused to defend, the plaintiff secured able counsel, who carefully and promptly prepared the case for trial. These attorneys briefed the law, discovered the witnesses, and analyzed the facts and won the case. The representatives of the defendant, with their special training and experience in this particular class of cases, could doubtless have done as well. In what way can it be contended that failure to give notice contributed to a loss which the trial decided did not exist?

The insurer, having positively repudiated all liability under the policy for the accident, thereby relieved the plaintiff of complying with other conditions and compelled him to employ such attorneys as he thought would win the case, and now after they have won the case insurer insists that their fees are excessive. Possibly other attorneys with less

ability or experience might have been found who would have taken the case for less money, but would they have won the case?

Insurance policies prepared by the insurer are ordinarily construed most strongly against the insurer (26 C. J. 72-74); especially where a forfeiture is involved, so that indemnity will be granted rather than denied. 14 R. C. L. 926, sec. 103.

Plaintiff calls our attention to the last portion of section 44-322, Comp. St. 1929, reading as follows: "The breach of a warranty or condition in any contract or policy of insurance shall not avoid the policy nor avail the insurer to avoid liability unless such breach shall exist at the time of the loss and contribute to the loss, anything in the policy or contract of insurance to the contrary notwithstanding."

A lack of literal compliance with provisions of the policy is insufficient to avoid liability where it does not contribute to the loss or injure insurer. *McGillicuddy v. New Brunswick Fire Ins. Co.*, 126 Wash. 201; *Klingler v. Milwaukee Mechanics Ins. Co.*, 193 Wis. 72.

5. "In the case at bar there is no charge of fraud or claim of bad faith, nor can there be any pretense that the delay in giving the notice was prejudicial to the insurer. Neither can it be urged that there are not circumstances tending to justify the delay. * * * We are, however, out of harmony with the view, that, in a case of the character under investigation, with its attendant circumstances, where the facts are not disputed, what is a sufficient compliance with the policy requirements as to notice is a question of law. On the contrary, we feel that the insured has a right to have a jury pass on the question and determine whether the circumstances of this particular case did not justify and excuse his conduct." *Employers Liability Assurance Corporation v. Roehm*, 99 Ohio St. 343, 7 A. L. R. 182. See *Metropolitan Casualty Ins. Co. v. Johnston*, 247 Fed. 65, 7 A. L. R. 175.

It is usually for the jury to say whether under all the facts and circumstances the insured had sufficient information to persuade him as a reasonable man that he was

in an accident and that under his policy he should have given written notice to the insurer of the particulars thereof. *Hermance v. Globe Indemnity Co.*, 223 N. Y. Supp. 93.

The most frequently cited Nebraska case is *Woodmen Accident Ass'n v. Pratt*, 62 Neb. 673, 55 L. R. A. 291, 89 Am. St. Rep. 777. Some expressions found in the various syllabi may be condensed as follows: Provisions as to the time in which notice is required to be given are not necessarily and in every instance to be literally complied with. A reasonable and natural construction will be given to such provisions. In this case by a fall from the windmill tower the insured became mentally deranged, and when his wife later discovered the accident policy he denied that he had such insurance. However, she sent in notice of his accident. Our court say: "The verdict of the jury was proper and the evidence sufficient in our opinion to excuse the plaintiff from earlier notifying the defendant of the accident."

In the note in 29 A. L. R. 501, it is said: "It is very generally held that when the facts are not disputed, and the inferences are certain, the question whether the notice given was, under all the circumstances, 'timely' or 'reasonable' or 'immediate,' is one of law for the court, but if the evidence is conflicting, or the inferences uncertain, it should be determined by the jury under proper instructions. *Peele v. Provident Fund Soc.* (1896) 147 Ind. 543, 44 N. E. 661, 46 N. E. 990; *Aetna Life Ins. Co. v. Bethel* (1910) 140 Ky. 609; *Ewing v. Commercial Travelers Mut. Acci. Asso.* (1900) 55 App. Div. 241."

When a policy of liability insurance provides for giving immediate notice of an accident and the insurer denies liability because of a delay in the giving of such notice, and the insured testifies that he did not learn of the accident until six or eight weeks after it occurred, and further pleads as an excuse for not reporting it then that there was no reasonable ground to believe that a claim for damages would arise therefrom, and admits that he did not report it to the insurer until an attorney made a demand upon him for damages some months thereafter; in

such a case the insured is entitled to have all of the facts and attendant circumstances, including the question of whether the facts known to the insured would require a person of ordinary and reasonable prudence to believe that liability to the injured person might arise, submitted to a jury for determination under proper instructions.

For the error in refusing to submit this case to the jury, the judgment of the district court is reversed and the cause is remanded for further proceedings.

REVERSED.

ROSE, J., dissents.

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## BERT NELSON V. STATE OF NEBRASKA.

FILED OCTOBER 1, 1931. No. 27782.

1. **Chattel Mortgages:** UNPLANTED CROPS. A chattel mortgage upon an unplanted crop or upon property not *in esse* is ineffectual to create a lien, either legal or equitable, in favor of the mortgagee, until the intervention of some new act.
2. **Criminal Law:** SALE OF MORTGAGED CROPS. Section 36-301, Comp. St. 1929, providing that the filing of a lease or chattel mortgage *on unplanted crops* shall constitute *notice*, is clearly intended to protect landlords against chattel mortgages given by tenants, after the crop is *in esse*, to other creditors. But a chattel mortgage in such a lease does not constitute a valid chattel mortgage upon which the tenant may be convicted in case he sells such crops which were not planted at the time the lease agreement was executed.
3. ———: INSTRUCTIONS. If a district court desires, he may set out the law in the exact language of the statute in giving an instruction to the jury; but, if in an instruction he copies a portion thereof from the statute and closes with his own conclusion as to the remainder, it will be error if the result confuses the jury as to the law upon that point.
4. **Bills and Notes:** PAYMENT: TENDER. In case a note is payable at a special place, as a certain bank, the appearance of the debtor at that place and an ability and readiness to pay at the time and place of payment, although the note is not there, is equivalent to tender.
5. **New Trial:** NEWLY DISCOVERED EVIDENCE. If newly discovered evidence presents a material and important fact, germane to the issue in controversy, which, considered with the evidence presented on the trial, might cause a jury to take the other

view, then a new trial should be granted, if diligence to secure the same has been shown.

ERROR to the district court for Pawnee county: JOHN B. RAPER, JUDGE. *Reversed.*

*F. C. Radke* and *Magdalene Craft Radke,* for plaintiff in error.

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

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

PAINE, J.

This is a proceeding in error by Bert Nelson, hereinafter called the defendant, from a conviction upon an information which charged him with selling 298 bushels of mortgaged corn in the first count, and with removing 75 bushels of mortgaged corn from Pawnee county without the written consent of the mortgagee in the second count. Upon the argument of the motion for a new trial, it was granted by the district court as to count two, but overruled as to count one, upon which count he was sentenced by the court.

The bill of exceptions consists of 236 pages, covering the testimony of some ten witnesses. The following brief statement gives a summary of the evidence upon some of the disputed questions.

I. B. Pope lives in Lincoln, is 73 years of age, and is agent of Mrs. Lou Auman, of Rupert, Vermont, who is the owner of the southeast quarter of section four, township three, range ten, Pawnee county, which farm was rented to the defendant for the year beginning March 1, 1927, under a written lease providing for the payment of $75 a year in cash for the pasture and buildings, together with a one-third share of the crops. The crop was short, defendant had sickness in the family and also suffered a loss from hog cholera, and although he paid the one-third share of all crops he was unable to raise the $75 cash rent.

However, the farm was rented to him for another year, beginning March 1, 1928. Two copies, not carbon copies, but each independent leases, were drawn and brought to

the defendant in the field for signature. On the bottom of the lease was a form of promissory note, which could be detached at a dotted line. This note on the copy of lease retained by the agent, Mr. Pope, was filled in for $150 to cover the cash payments due for both years. In this lease it provided "that to secure the payment of the promissory note hereinbefore mentioned for $150, payable by lessee to lessor, or order, on the first day of January of the lease period, lessee agrees to and hereby does sell and mortgage unto the lessor, all the lessee's share under this lease in and to all the corn, wheat, oats, seed and hay, *to be planted* and sowed and grown on said real estate during the lease period."

The two copies of the lease vary as to date, for the one left with defendant's wife, when Mr. Pope went up to the house to get her to sign as a witness to her husband's signature, is dated March 1, 1928, while the one filed by Mr. Pope with the county clerk is dated "the ..... day of May, 1928," and was filed upon May 22, 1928, the promissory note for $150 being left attached to it at the time it was filed.

The date of the lease is very important as showing whether the corn crop which was mortgaged had yet been planted at the time the lease was signed. The defendant insists that the two copies of the 1928 lease were executed before the corn crop was planted. He claims that he was disking the ground in late March or early April, 1928, when the leases were signed by him out in the field; that on account of the heavy April snows the planting season was delayed until late in May. The information against Mr. Nelson fixes the date of the lease signing as May 8, but Mr. Pope's testimony is uncertain as to the exact date; he is only sure that the corn was nearly all planted. He did not know whether the machine with which Mr. Nelson was working was a lister or a disk, whether there were two leases or one signed that day, but he was sure the corn was in the ground.

The defendant's testimony was that the leases might have been signed late in March or early in April. Three

witnesses, Irvin Pyle, August Werman, and Hattie Nelson, testify that on May 13, 1928, Mr. Nelson had not yet begun to plant corn.

On this point the testimony of August Werman is corroborated by a memorandum which he made at the time. The defendant owed him money and he went over and bought 12 dozen eggs for setting. While waiting for Mrs. Nelson to get these eggs ready, he went out in the field and saw the defendant still disking, and testifies that no corn had been planted at that time. He made the entry in his account book as follows: "May 10, 1928, eggs for setting, 12 doz-25-$3," being a memorandum of a credit of $3 on the account that the defendant owed him and supporting his statement that up to May 10, 1928, the defendant had planted no corn, although the chattel mortgage lease and note were given at some date between the last of March and May 8, the date charged in the information upon which he was convicted.

Defendant Nelson testified that early in December, 1928, Mr. Pope gave him oral instructions at the farm to look around for a market for the corn as soon as husking was done and sell at the best price obtainable. Mr. Pope denied such a conversation. But on January 17, 1929, exhibit 7 shows that the defendant began hauling the corn to Mayberry, Nebraska, to Mr. Richardson, agent for the elevator owned there by the Derby Grain Company, of Topeka, Kansas, and hauled in 12 loads, amounting to over 600 bushels, at 71 cents a bushel, for which they gave him one check payable to himself for $211.80 and another payable to I. B. Pope for $175.73, both checks being dated January 22, 1929, when he finished hauling. In addition to this Mr. Pope testifies that the defendant left about 100 bushels of corn on the place when he moved off.

The defendant testifies that after he had sold this corn he went to the bank at Lewiston, where the note was payable, with the money to pay it, and asked them for the note and was told it was not there. The defendant then held the check payable to Mr. Pope for the landlord's share until February 8, 1929, when he wrote him a letter, which is exhibit 4 and reads as follows:

"Steinauer Nebr Febr 8, 1929. Mr. I. B. Pope Lincoln Nebr. Dear Sir—find inclosed check for rent corn—175.73 and if you will let me know where the contract and note is will pay the cash rent and oblige Bert Nelson."

The defendant, having written Mr. Pope in this letter that he wanted the note, admits that when Mr. Pope called to collect and said he did not have the note, but only a release of the mortgage, he became very angry. It is clear that a violent quarrel ensued, in which each one swore at the other, and that thereafter they were the bitterest of enemies.

The defendant testifies that as Mr. Pope left he said he would leave the release at the bank and whatever he left there would be all right. Defendant testifies that he went to the Bank of Lewiston two or three times to pay off this note, but the note was not there, simply a release, and he would not pay it until he got his note back, and that he did not see Mr. Pope again until he saw him in the court-room after he had been arrested; but he testified that he had a telephone conversation with him on March 5, 1929, just before moving up to near Crab Orchard, and Pope said to leave everything on the place, and the defendant wanted $25 credit on the note for some wire fencing and other things he owned and was leaving there, or "if he could deliver me the note, I give him one hundred and fifty dollars and let me move this stuff; he wouldn't give me five cents for the property and wasn't delivering no note."

Doubtless shortly after this Mr. Pope did send the note to the Bank of Lewiston, but the defendant never came back to the bank after the bank held it, and on March 27, 1929, the bank, upon orders from Mr. Pope, mailed it to the county attorney, as shown by exhibit 17.

T. R. Richardson testified that he was connected with the Lewiston bank, and that Mr. Pope left a collection at the bank some time in the spring of 1929 with reference to settlement of some rental between him and Mr. Nelson. He left a release of a chattel mortgage, with instructions to turn it over to Mr. Nelson on payment of $150, but did not leave any note with the release. Within a few

days afterward Mr. Nelson came to the bank and asked for the note, and witness replied that Mr. Pope did not leave any notes, but left a release of a mortgage. Mr. Nelson refused to pay unless he got the note. Mr. Pope came back to the bank within a few days after Mr. Nelson was there, and witness told him why Nelson had refused to pay. Nelson did not object to the release, only he wanted the note. The note was later brought to the bank by Mr. Pope sometime after the 1st of March. Mr. Nelson never came in after the note was at the bank, and the note was not paid, and witness said he never told Mr. Nelson that the note was there, and the county attorney filed the information for his arrest upon April 18, 1929.

The elderly Mr. Pope is doubtless an energetic collector of rents for nonresident clients, and when crossed by a stubborn tenant easily lost his temper, and the testimony discloses that the defendant, on the other hand, did not restrain his anger in any way, and, as described in the brief of the state, "the defendant assumed a very truculent attitude, swore profusely, made violent accusations that the note and mortgage were forgeries and promised Mr. Pope that he would 'fix' him."

1. In count one the information charges that the defendant did on May 8, 1929, in due form mortgage to Mrs. Lou Auman an undivided two-thirds interest in the corn crop *then planted and growing* on this farm, and afterwards on January 16, 1929, the defendant unlawfully, fraudulently, knowingly, and feloniously, did sell, etc., 298 bushels to Derby Grain Company of Mayberry without first procuring the consent in writing of Mrs. Lou Auman.

In the opinion of this court the great weight of the evidence clearly sustains the contention of the defendant that the lease was signed by the defendant before any corn was planted and while he was at work disking in the field.

A chattel mortgage upon an unplanted crop or upon property not *in esse* is ineffectual to create a lien, either legal or equitable, in favor of the mortgagee until the intervention of some new act, and in support of this the defendant cites *Cole v. Kerr,* 19 Neb. 553; *Steele v. Ashen-*

*felter*, 40 Neb. 770; *Battle Creek Valley Bank v. First Nat. Bank of Madison*, 62 Neb. 825, 56 L. R. A. 124; *Brown v. Neilson*, 61 Neb. 765, 54 L. R. A. 328, 87 Am. St. Rep. 525; *American State Bank v. Keller*, 112 Neb. 761; *Thostesen v. Doxsee*, 78 Neb. 40; *Wilcox & Co. v. Deines*, 119 Neb. 692; *Skala v. Michael*, 109 Neb. 305; *Peterson v. Citizens Bank*, 117 Neb. 327.

Shepard's new Nebraska Citations call attention to an excellent article in 3 Nebraska Law Bulletin, 439, in which many of the cases above cited are reviewed, and it is said: "Nebraska courts have held that, in regard to attaching creditors and subsequent purchasers and mortgagees without notice, a mortgage on goods not *in esse* is not valid unless there is some subsequent intervening act by the mortgagee." The author says this "works a great hardship upon tenant farmers, as it makes it impossible for them to get money for the purpose of growing crops for the ensuing year, for if the mortgagee cannot be protected by constructive notice, he will not risk his money. The only way in which an agreement to give a mortgage could be treated as constructive notice when recorded would be to overthrow the whole rule that a mortgage on crops not yet planted is void."

2. However, the state insists that an amendment in 1927 changed the old law in Nebraska, and that as soon as the corn is planted and comes into existence it is under the mortgage by virtue of the new provision found as a part of section 36-301, Comp. St. 1929, and reading as follows: "Provided, that the filing of a lease containing an agreement for the execution of a chattel mortgage, or, therein constituting a chattel mortgage, on unplanted crops shall constitute *notice of such an obligation and lien* and protect the lessor against chattel mortgages given to other creditors by the lessee;" etc.

We see nothing in this amendment which changes the Nebraska law or the decisions cited except that the "notice" protects the landlord as against any additional chattel mortgages which the renter might give later to other creditors after he had signed the lease.

It requires a strained construction of this provision to read into it a declaration of law setting aside all former holdings of our court to the effect that the lien of a chattel mortgage on a crop of corn not planted will not attach to the crop, even when it comes into existence, unless possession is taken by the mortgagee. *Cole v. Kerr,* 19 Neb. 553. As said by Goss, C. J., in *Peterson v. Citizens Bank,* 117 Neb. 327, "the reason for the rule is that the thing mortgaged has no existence."

It is said that prior to the passage of this amendment for the protection of the landlord against dishonest tenants several cases have come before this court in which the court, in its own language, was "constrained" to give priority to the claims of others over the claim of the landlord for his rent from the crops, namely, in *American State Bank v. Keller,* 112 Neb. 761; *State Bank of Gering v. Grover,* 110 Neb. 421.

3. In considering this 1927 amendment, set out above, the district court referred to this new law in instruction No. 3 given the jury, in the following words: "The statutes further provide that the filing in the county clerk's office of a lease containing an agreement for the execution of a chattel mortgage, or therein constituting a chattel mortgage, on unplanted crops shall constitute *such a lien.* The language used in the lease, exhibit 2, and in exhibit 6, does create a valid chattel mortgage lien on the crops therein named, those then unplanted as well as those that were planted, at the time the lease was signed."

It will be seen that the district judge, in making a quotation from a portion of section 36-301, Comp. St. 1929, closes his quotation by substituting the three words italicized above, to wit, "such a lien," in the place of the words as found in the statute, which are, "notice of such an obligation and lien and protect the lessor against chattel mortgages given to other creditors by the lessee."

In the opinion of the court his statement might be understood by jurors to mean that a chattel mortgage on unplanted crops found in such a lease was an absolute chattel mortgage, which is not the law and may have confused the jury in arriving at their verdict.

As the Nebraska cases clearly hold that a mortgage upon unplanted corn is invalid upon which to base a conviction such as this, the defendant offered this instruction, No. 2: "You are further instructed that in order to establish the chattel mortgage in this case as a valid chattel mortgage, it will be necessary, among other things, for the state to prove beyond a reasonable doubt that the crop of corn in question was planted and growing at the time the said mortgage was given; and if you should find from the evidence that the said crop of corn was not planted and growing at the time the alleged mortgage was given you will find the defendant not guilty." But the district judge refused to give this requested instruction, which we hold should have been given under the evidence in this case. *Mays v. State*, 33 Okla. Cr. 185.

4. There is considerable discussion in the briefs about the court's instruction on "tender," being instruction No. 11. The two portions in dispute read as follows: "The note, exhibit No. 3, was made payable at the Bank of Lewiston. The defendant had the right to go to said bank at any time after it was due, *and tender the money in payment* to the bank the amount of the note and demand the note. * * * Of course, the defendant was not obliged to actually pay the money for the note until the note was surrendered to him. The tender of payment, the actual offering of the money to pay the note, would operate to discharge the mortgage."

Under our negotiable instruments law a portion of section 62-601, Comp. St. 1929, reads as follows: "Presentment for payment is not necessary in order to charge the person primarily liable on the instrument; but if the instrument is, by its terms, payable at a special place, and he is *able and willing to pay it there* at maturity, such ability and willingness *are equivalent to a tender* of payment on his part."

The evidence on this point appears to be that the defendant received a check for his part of the corn from the elevator on January 22, 1929, in the amount of $211.80, and on February 8 he mailed the check of $175.73 to Mr.

Pope, to whom it was payable, and he testifies that just before February 8 he went to the Bank of Lewiston to pay the note, and that a few days after that Mr. Pope came to the place without the note, and he understood he would send it to the bank, so he went back there again to see if it was there and he would pay it off. The testimony shows that he carried his own check of $211.80 from January 22, 1929, the day he received it from the elevator, until he finally deposited it in his own bank account in the Farmers State Bank of Tecumseh on February 19, 1929, a period of 28 days, during all of which time he was ready, able and willing to pay off the note with the $211.80 check which he was carrying around for that purpose.

Nebraska courts have held many times that a formal tender of money is never required, where it is disclosed, if it had been made, it would have been fruitless. *Graham v. Frazier*, 49 Neb. 90; *Bundy v. Wills*, 88 Neb. 554.

Circumstances may justify a failure to actually count out the money. "So in the case of a note payable at a named place, a readiness at the time and place of payment, although the note is not there, is equivalent to a tender." 26 R. C. L. 623, sec. 2.

"An effective tender can be made without actually producing, exhibiting, and counting the money at the time of the offer to pay." *Texas Auto Co. v. Clark*, 12 S. W. (2d) 655.

Justice Oliver Wendell Holmes, in *Simmons v. Swan*, 275 U. S. 113, said: "But the jury might find also that the defendant's behavior signified a refusal to go farther with the matter and therefore that the plaintiff was not called upon to do anything more."

In case a note is payable at a special place, as a certain bank, the appearance of the debtor at that place and an ability and readiness to pay at the time and place of payment, although the note is not there, is equivalent to tender. *United States Nat. Bank of Red Lodge v. Shupak*, 54 Mont. 542; *Mechanics American Nat. Bank v. Helmbacher*, 199 Mo. App. 173; *Moore v. Knemeyer*, 271 S. W. (Tex. Civ. App.) 653.

5. A letter of most unusual interest was attached to the affidavits for a motion for new trial. The defendant had testified that he had not received a letter from Mr. Pope directing him to sell the corn in question, but had been so instructed by word of mouth. The statute, section 69-109, Comp. St. 1929, upon which the conviction was based, reads that if the defendant sells the mortgaged property "without first procuring the consent, in writing, of the owner," etc. After the trial the defendant's wife was sure that Mr. Pope had written her husband such a letter authorizing him to sell the corn. The story the wife tells is that she made vigorous search and, although they had moved four times since it was received, she finally found the important letter in a box of the children's cast-off toys, where they had been playing post-office with old letters. This letter, all admit, is a genuine letter, on Mr. Pope's letterhead and in his handwriting. It appears in the bill of exceptions on page 212. In it Mr. Pope, as agent of mortgagee, uses this language: "As weather, roads, health, etc., will not permit me to come down at this time I will say you get prices on our corn if prices are satisfactory with you at all sell the corn do the best you can I don't think there would be anything gained in way of price by holding"—thus giving the defendant the consent of mortgagee in writing to sell.

The state at once charged that this letter has had the date 1927 changed to a year later by making the "7" into a figure "8," and in their brief make this statement: "In the instant case, it is obvious that counsel, in the matter of the missing letter, have been imposed upon by an unscrupulous client. A casual examination with the naked eye shows plainly that there has been an erasure of the original date and the figure '8' has been substituted for whatever figure formerly appeared."

It is clear to one who carefully examines this letter that the figure "8" has been made with the light line of a sharpened leadpencil, but as to an erasure having been made it is very difficult to determine, for the letter has been so soiled by much handling.

The defendant in his affidavit answers that the letter could not have been written in the year 1927 for Mr. Pope sold the corn himself that year and had no occasion to write such a letter.

This letter is of outstanding importance. If it was written in 1928 it disposes of this case by giving the defendant written authority to sell the corn that he stands convicted of selling without authority. If, on the other hand, the defendant has fabricated a piece of evidence by inserting a new date in an old letter, this fact would doubtless increase the sentence given him in case of a second conviction.

But the jury are the sole judges of this evidence and of the weight to be given to it. Upon a new trial the best handwriting experts can examine this letter with the greatest care for both sides and with their assistance a jury can determine the truth of the matter. If, with the help of the testimony of such experts, the jury believe that this letter was written in 1928, then it is a vital and important piece of evidence germane to the question of the guilt or innocence of the accused. When evidence is so sharply conflicting upon a point going directly to the gist of the offense, it is clearly for the jury.

It has been held by this court that a motion for new trial will not be granted where the newly discovered evidence is simply cumulative and which could not affect the result. *Keim & Co. v. Avery,* 7 Neb. 54; *Hill v. Helman,* 33 Neb. 731; *Campion v. Lattimer,* 70 Neb. 245; *Christoffersen v. Weir,* 110 Neb. 390.

But, on the other hand, a new trial should be granted when such newly discovered evidence might change the result of the trial. *Williams v. Miles,* 73 Neb. 193. Or where the new evidence was not merely cumulative. *City of Lincoln v. Holmes,* 20 Neb. 39; *Coon v. Drainage District,* 99 Neb. 138; *Henderson v. Edwards,* 191 Ia. 871, 16 A. L. R. 1090; *Vickers v. Phillip Carey Co.,* L. R. A. 1916C, 1164, note.

If newly discovered evidence presents a material and important fact, germane to the issue in controversy, which,

considered with the evidence presented on the trial, might cause a jury to take the other view, then a new trial should be granted, if diligence to secure the same has been shown.

For errors herein set out, it is ordered that the judgment and sentence of the court be set aside and a new trial ordered.

REVERSED.

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GEORGE H. ZIMMERMAN, APPELLANT, V. WILLIAM G. BUFFINGTON, APPELLEE.

FILED OCTOBER 1, 1931. No. 27722.

Process: EXEMPTION FROM SERVICE. A duly accredited agent of a sister state, under a requisition issued by the governor of such state, and addressed to the governor of Nebraska, demanding any person, charged with a crime in the former state and with being a fugitive from justice therefrom, is privileged from service of civil process, not only while coming to, returning from, and attending upon, the governor of Nebraska in his line of duty by virtue of such requisition, but for a reasonable time thereafter, in which to prepare for his return to the state issuing such requisition.

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

*Loren H. Laughlin,* for appellant.

*Claude S. Wilson, Roy F. Gilkeson* and *Hymen Rosenberg, contra.*

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

HORTH, District Judge.

The action is one for false arrest and false imprisonment. The parties will be referred to in the order in which they appeared in the trial court, and the question for determination is: Was the defendant immune from the service of summons in this action, he being at the time of such service the duly appointed agent of the state of Kansas under a requisition issued by the governor of that

state and addressed to the governor of the state of Nebraska asking for the extradition of the plaintiff, and by virtue of which the defendant was in the state of Nebraska at the time of such service?

On the 7th day of March, 1930, the plaintiff, a resident of Gage county, Nebraska, filed his petition in the district court for Lancaster county, Nebraska, against the defendant, a resident of Sumner county, in the state of Kansas, seeking to recover damages for the wrongs complained of in his petition, and alleging, among other things, that the defendant in swearing to the complaint which brought about plaintiff's arrest and imprisonment acted in bad faith and with malicious motives, and that the complaint did not charge a crime under the laws of the state of Kansas. On the day of the filing of the petition, the defendant was served with summons in this action in Lancaster county, and in due season filed his special appearance challenging the jurisdiction of the court over his person and claiming immunity from service under the facts in the case. It appears from the record that on the 21st day of February, 1930, the defendant filed his verified complaint with a justice of the peace in and for the county of Sumner and state of Kansas, wherein the defendant charged, or attempted to charge, the plaintiff with unlawfully and feloniously obtaining property by means of false pretenses in Sumner county, Kansas. Thereupon said justice of the peace issued his warrant for the arrest of the plaintiff and delivered the same to the sheriff of Sumner county, Kansas, who caused plaintiff to be arrested at his home in Beatrice, Nebraska, by the sheriff of Gage county, who imprisoned plaintiff in the county jail of Gage county for several hours and until he was released by an order of the district court for Gage county admitting him to bail. Thereafter said warrant, a copy of the verified complaint, and a supporting affidavit showing, among other things, that the plaintiff was a fugitive from justice from the state of Kansas, that the application for plaintiff's extradition was made in good faith for the punishment of crime, and not for the purpose of collecting a debt or of recovering

the alleged fugitive to a foreign jurisdiction with a view to there serving him with civil process, were presented to the governor of the state of Kansas, who issued his requisition, addressed to the governor of the state of Nebraska, for the extradition of plaintiff, and appointed the defendant, who at the time was a deputy sheriff of Sumner county, Kansas, as agent for the state of Kansas to present such request to the governor of the state of Nebraska for his warrant authorizing the agent to take and transport the plaintiff into the state of Kansas; that the defendant's presence in the state of Nebraska and in Lancaster county at the time he was served with summons herein was for the purpose of presenting such requisition papers to the governor of the state of Nebraska and attending as a witness any hearing thereon before such governor, and for no other purpose; that on the 7th day of March, 1930, such agent of the state of Kansas presented such requisition papers to the governor of the state of Nebraska at Lincoln, and after a hearing thereon, for reasons satisfactory to himself, the governor of Nebraska found the plaintiff was not a fugitive from justice from the state of Kansas and denied his extradition. On the same day and immediately following such hearing and before the defendant had a reasonable time in which to depart from the state of Nebraska, he was served with summons in this action.

The district court sustained the special appearance, and plaintiff appeals.

The questions presented by the record are of public interest, as they not only involve the rights of the individual litigants, but also the reciprocal duties and obligations of one state to protect from the annoyance of service of civil process an agent of a sister state who comes within its borders clothed with a requisition issued by the governor of a state seeking the extradition of one charged with a crime therein and with being a fugitive from justice therefrom, and addressed to the governor of the state in which the alleged fugitive has found an asylum.

The surrender of fugitives from justice as between the

states depends on section 2, art. IV of the Constitution of the United States, which is in the following words: "A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime."

The Constitution having established the right on the part of one state to demand from another state one charged with a crime and who flees from justice and is found in another state, and the obligation on the part of the other state to surrender such fugitive from justice, it became necessary to provide by law the mode of carrying it into execution, and congress passed the act of 1793 which, so far as it relates to this subject, is in the following words:

"Section 1. * * * That whenever the executive authority of any state in the Union, or either of the territories northwest or south of the river Ohio, shall demand any person as a fugitive from justice, of the executive authority of any such state or territory to which such person shall have fled, and shall moreover produce the copy of an indictment found, or an affidavit made before a magistrate of any state or territory as aforesaid, charging the person so demanded, with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the state or territory from whence the person so charged fled, it shall be the duty of the executive authority of the state or territory to which such person shall have fled, to cause him or her to be arrested and secured, and notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear. But if no such agent shall appear within six months from the time of the arrest, the prisoner may be discharged. And all costs or expenses incurred in the apprehending, securing, and transmitting such fugitive to the state or territory making such demand, shall be paid by such state or territory.

"Section 2. And be it further enacted, That any agent, appointed as aforesaid, who shall receive the fugitive into his custody, shall be empowered to transport him or her to the state or territory from which he or she shall have fled. And if any person or persons shall by force set at liberty or rescue the fugitive from such agent while transporting, as aforesaid, the person or persons so offending shall, on conviction, be fined not exceeding five hundred dollars, and be imprisoned not exceeding one year." 1 U. S. St. at Large, 302.

A brief reference to the origin, history and purpose of the laws of the United States governing interstate extradition will be of assistance in arriving at a proper understanding of the conclusions reached in this opinion, and this we can best accomplish by quoting the language of Chief Justice Taney, in *Commonwealth of Kentucky v. Dennison,* 24 How. (U. S.) 66, 100, where, in speaking of the foregoing section of the Constitution, he said:

"This was not a compact of peace and comity between separate nations who had no claim on each other for mutual support, but a compact binding them to give aid and assistance to each other in executing their laws, and to support each other in preserving order and law within its confines, whenever such aid was needed and required; for it is manifest that the statesmen who framed the Constitution were fully sensible, that from the complex character of the government, it must fail unless the states mutually supported each other and the general government; and that nothing would be more likely to disturb its peace, and end in discord, than permitting an offender against the laws of a state, by passing over a mathematical line which divides it from another, to defy its process, and stand ready, under the protection of the state, to repeat the offense as soon as another opportunity offered.

"Indeed, the necessity of this policy of mutual support, in bringing offenders to justice, without any exception as to the character and nature of the crime, seems to have been first recognized and acted on by the American Colonies; for we find, by Winthrop's History of Massachu-

setts, vol. 2, pages 121 and 126, that as early as 1643, by 'Articles of Confederation between the plantations under the government of Massachusetts, the plantation under the government of New Plymouth, the plantations under the government of Connecticut, and the government of New Haven, with the plantations in combination therewith,' these plantations pledged themselves to each other, that, upon the escape of any prisoner or fugitive for any criminal cause, whether by breaking prison, or getting from the officer, or otherwise escaping, upon the certificate of two magistrates of the jurisdiction out of which the escape was made that he was a prisoner or such an offender at the time of the escape, the magistrate, or some of them, of the jurisdiction where, for the present, the said prisoner or fugitive abideth, shall forthwith grant such a warrant as the case will bear, for the apprehending of any such person, and the delivery of him into the hands of the officer or other person who pursueth him; and if there be help required for the safe returning of any such offender, then it shall be granted unto him that craves the same, he paying the charges thereof. It will be seen that this agreement gave no discretion to the magistrate of the government where the offender was found; but he was bound to arrest and deliver, upon the production of the certificate under which he was demanded.

"When the thirteen colonies formed a Confederation for mutual support, a similar provision was introduced, most probably suggested by the advantages which the plantations had derived from their compact with one another. But, as these colonies had then, by the Declaration of Independence, become separate and independent sovereignties, against which treason might be committed, their compact is carefully worded, so as to include treason and felony—that is, political offenses—as well as crimes of an inferior grade. It is in the following words: 'If any person, guilty of or charged with treason, felony, or other high misdemeanor, in any state, shall flee from justice, and be found in any other of the United States, he shall, upon demand of the governor or executive power of the state

from which he fled, be delivered up and removed to the state having jurisdiction of his offense.'

"And when these colonies were about to form a still closer union by the present Constitution, but yet preserving their sovereignty, they had learned from experience the necessity of this provision for the internal safety of each of them, and to promote concord and harmony among all their members; and it is introduced in the Constitution substantially in the same words, but substituting the word 'crime' for the words 'high misdemeanor,' and thereby showing the deliberate purpose to include every offense known to the law of the state from which the party charged had fled. * * *

"Looking, therefore, to the words of the Constitution—to the obvious policy and necessity of this provision to preserve harmony between states, and order and law within their respective borders, and to its early adoption by the colonies, and then by the confederated states, whose mutual interest it was to give each other aid and support whenever it was needed—the conclusion is irresistible, that this compact engrafted in the Constitution included, and was intended to include, every offense made punishable by the law of the state in which it was committed, and that it gives the right to the executive authority of the state to demand the fugitive from the executive authority of the state in which he is found; that the right given to 'demand' implies that it is an absolute right; and it follows that there must be a correlative obligation to deliver, without any reference to the character of the crime charged, or to the policy or laws of the state to which the fugitive fled.

"This is evidently the construction put upon this article in the Act of Congress of 1793, under which the proceedings now before us are instituted. It is therefore the construction put upon it almost cotemporaneously with the commencement of the government itself, and when Washington was still at its head, and many of those who had assisted in framing it were members of the congress which enacted the law."

It will thus be seen that the supreme court of the United States, in construing the laws governing interstate extradition, has said that these laws came into existence by reason of strong public necessity, their purpose being to preserve harmony between the several states, and law and order within their respective borders, and that a sense of justice and of mutual interest demanded, from the several states, a faithful execution of these laws, so "absolutely essential to their peace and well being in their internal concerns as well as members of the Union."

In *Dennison v. Christian,* 72 Neb. 703, and, again, in *In re Willard,* 93 Neb. 298, it is said: "This court is bound by the construction of the extradition laws adopted by the supreme court of the United States."

Taking what we have said for our premises, we now turn to the question of exemption from service of civil process, the reasons therefor, and the application of such rule to the case before us for determination, and in this connection cases will be cited, including one from this court, involving the immunity of nonresident suitors and witnesses from service of civil process while going to, remaining at, and returning from the place of hearing of such causes, and this, not with a view of showing such immunity to suitors and witnesses, for this is almost universally recognized by the courts wherever the common law is known and administered, but rather for the purpose of calling attention to the reasons given for the rule, foremost among them being that of public policy, the very meaning of which, Justice Holmes tells us, in *Beasley v. Texas & P. R. Co.,* 191 U. S. 492, is the interest of others than the parties, and that interest is not to be at the mercy of the parties alone.

Mr. Bowers, in his work on Process and Service, section 367, says: "There are certain officers who, as long as they remain such and are engaged in the performance of their official duties, and certain classes of individuals who, as long as they are found in certain designated situations, are not amenable to the service of civil process. The exemptions from such service may accrue from the rules of

the common law, or from considerations of public policy, or they may be expressly declared by federal or state Constitutions or legislative provision. Thus, by the comity of nations, or under the precepts of international law, ambassadors and ministers of foreign countries are not subject to the jurisdiction of the courts of the country to which they are assigned, and cannot, therefore, be served with process emanating from those courts. So, public policy forbids service on persons in the state militia or the regular army when in actual service or in going to or returning from any muster or state encampment."

In *Sofge v. Lowe,* 131 Tenn. 626, L. R. A. 1916A, 734, the court held that a suitor is not subject to service of process in an intermediate state through which he is passing in a suit instituted there, while enroute from a trial which he had attended as suitor and witness in one state to his home in another state. The court said: "The privilege of immunity from service rests upon grounds of public policy, and of such policy as it relates to a matter of supreme importance—the administration of justice. In order that causes may be fully heard and a just result reached, and that an orderly and unhampered administration of justice may be assured, the law has announced the rule of exemption. If parties to a pending cause, or their witnesses, are liable to be thus sued, they may be intimidated and prevented from complying with the foreign court's mandate, if actually summoned or subpœnaed, or from attending voluntarily as is their privilege. It is against public policy to permit them to be deterred by fear of being subjected to suit while attending, or so going or returning.

"This principle of public policy is common to Arkansas and Tennessee. Justice, in such connection, is to be conceived of as a thing integral and not partible by state or jurisdictional lines; all courts must be presumed to interest themselves alike in promoting and keeping unhampered its fair administration. The courts of this state cannot be unconcerned in respect of the embarrassment in that regard to be experienced by the courts of Arkansas if the

courts of this and other states which surround that state deny to suitors and witnesses returning to their homes from her courts this exemption from suit. Of what considerable avail is it that Arkansas extends her own protection, if the other states refuse any exertion of their sovereign power through their courts to the same end? * * * A liberal interpretation in favor of the privilege is manifested in the authorities, state and federal, and we deem our ruling to be in accord with that trend."

In speaking on the same subject, Elliott, J., in *Wilson v. Donaldson,* 117 Ind. 356, said: "High considerations of public policy require that the law should encourage him to freely enter our forums by granting immunity from process in other civil actions, and not discourage him by burdening him with the obligation to submit to the writs of our courts if he comes within our borders."

In *Mitchell v. Huron Circuit Judge,* 53 Mich. 541, having reference to the same subject, Cooley, Chief Justice, writing the opinion, said: "Public policy, the due administration of justice, and protection to parties and witnesses alike demand it."

In *Stewart v. Ramsay,* 61 L. Ed. 192 (242 U. S. 128), it was said: "Suitors, as well as witnesses, coming from another state or jurisdiction, are exempt from the service of civil process while in attendance upon court and during a reasonable time in coming and going." Justice Pitney, who wrote the opinion, adopted the language of United States District Judge Kane, in *Parker v. Hotchkiss,* 1 Wall. Jr. 269. Judge Kane there said: "The privilege which is asserted here is the privilege of the court, rather than of the defendant. It is founded in the necessities of the judicial administration, which would be often embarrassed, and sometimes interrupted, if the suitor might be vexed with process while attending upon the court for the protection of his rights, or the witness while attending to testify. Witnesses would be chary of coming within our jurisdiction, and would be exposed to dangerous influences, if they might be punished with a lawsuit for displeasing parties by their testimony; and even parties in interest,

whether on the record or not, might be deterred from the rightfully fearless assertion of a claim or the rightfully fearless assertion of a defense, if they were liable to be visited on the instant with writs from the defeated party."

In *Andrews v. Lembeck*, 46 Ohio St. 38, the court said: "The question is one which profoundly concerns the free and unhampered administration of justice in the courts. That suitors should feel free and safe at all times to attend, within any jurisdiction outside of their own, upon judicial proceedings in which they are concerned, and which require their presence, without incurring the liability of being picked up and held to answer some other adverse judicial proceeding against them, is so far a rule of public policy, that it has received almost universal recognition wherever the common law is known and administered."

In *Linton v. Cooper*, 54 Neb. 438, Norval, J., writing the opinion, said: "Public policy, the due administration of justice, and the protection of parties and witnesses demand that nonresident suitors and witnesses alike be protected from the service of civil process while necessarily in attendance upon the court. This privilege or immunity extends to the parties and witnesses not only while coming to, returning from, and in actual attendance upon, the court for the purpose of trial, but for a reasonable time after the hearing to prepare for departure. This is the settled doctrine of this and other courts."

Bearing in mind that it is a judicial proceeding, namely, an indictment found or an affidavit filed with a magistrate charging a person with having committed a crime, that, alone, can call into action the interstate extradition laws; that such extradition laws are grounded on great public policy, and "of such policy as it relates to a matter of supreme importance—the due administration of justice;" that these laws cannot function without the appointment of an accredited agent of the state seeking the return of a fugitive from justice and the presence of such agent in the asylum state, and considering that such agent might be deterred from performing his duty by refusing to go

into such state if he could be harrassed and embarrassed by being served with civil process therein upon a cause of action that arose prior to his entry into the latter state, we search in vain for a reason why the rule of exemption announced by the law, in favor of suitors and witnesses, does not apply, with all its force, to such accredited agent of a sister state. And to these reasons why the rule of exemption should apply in the present case must be added those other reasons which the founders of the federal Constitution considered so necessary to the preservation of peace and harmony between the several states, that section 2, of article 4, relating to interstate extradition, was made a part of that mighty document. When we consider the crimes of the present time, one of the most stupendous of which was committed under the shadows of the magnificent building where the sessions of this court are held, and further consider the facilities which the automobile and aeroplane lend to the criminal in making his escape to other states, the wisdom of the law and the necessity for its unhampered administration were never more manifest.

Justice Brewer, *In the Matter of Strauss,* 197 U. S. 324, sounded a warning. He said: "It may be true, as counsel urge, that persons are sometimes wrongfully extradited, particularly in cases like the present; that a creditor may wantonly swear to an affidavit charging a debtor with obtaining goods under false pretenses. But it is also true that a prosecuting officer may either wantonly or ignorantly file an information charging a like offense. But who would doubt that an information, where that is the statutory pleading for purposes of trial, is sufficient to justify an extradition? Such possibilities as these cannot be guarded against. While courts will always endeavor to see that no such attempted wrong is successful, on the other hand care must be taken that the process of extradition be not so burdened as to make it practically valueless."

An interesting and instructive case and one which in principle applies to the present case is that entitled *In re Titus,* first reported in 8 Chicago Legal News, 284. Ben-

edict, United States District Judge for the eastern district of New York, in writing the opinion, said:

"The petitioner, H. B. Titus, presents his petition for a writ of habeas corpus directed to the sheriff of the county of Kings, to the end that he may be discharged from the custody of such sheriff. The facts upon which the petitioner bases his demand for a discharge are as follows:

"On the 7th day of November, the governor of the state of Arkansas commissioned the petitioner to present to the governor of the state of New York the requisition of the governor of Arkansas for the surrender of a fugitive from justice from the state of Arkansas, named Augustine R. McDonald, together with a duly authenticated copy of an indictment found against the said McDonald by the grand jury of Ashley county, Arkansas. In pursuance of his commission and the instructions of the governor of the state of Arkansas, the petitioner as such agent presented said requisition, together with said authenticated indictment to the governor of the state of New York, who thereupon issued to the sheriff of the county of Kings, his mandate directing the arrest of McDonald, and his delivery to the petitioner, the agent of the state of Arkansas, duly commissioned and authorized to receive said fugitive, in accordance with the laws of the United States in such case made and provided. The sheriff of Kings county, on receipt of the mandate of the governor, arrested McDonald for the purpose of delivering him to the petitioner in accordance with the terms of the mandate, but before such delivery was made the fugitive was released from the custody of the sheriff upon habeas corpus issued by a justice of the supreme court of the state of New York. After being so released McDonald brought an action for malicious prosecution against the petitioner, and obtained from the supreme court of the state an order for his arrest, in pursuance whereof he is now held in custody by the sheriff of Kings county. Being so detained in custody, he presents his petition to this court, setting forth the above facts, and claims his discharge at the hands of this court upon the ground that he is detained in custody by reason

of acts committed by him in pursuance of the laws of the United States, and which are justified by such laws. Notice of the application having been given to the attorneys for McDonald, at whose suit the petitioner is imprisoned, they have appeared and, in opposition to the petition, deny the jurisdiction of this court to issue the writ of habeas corpus, upon the ground that the acts of the petitioner, which were the foundation of the action against him, are not acts done in pursuance of any law of the United States, and the further ground that the indictment presented to the governor of the state of New York, and upon which he issued his mandate to the sheriff, does not charge any crime of which the grand jury of Ashley county, Arkansas, could take cognizance; whence it is contended that all the proceedings toward the surrender of McDonald were void, and afford no justification for the petitioner, and no foundation for the interposition of this court. By the Constitution of the United States the whole subject of interstate extradition is remitted to the cognizance of the general government. * * * The act of 1793, now section 5278 of the Revised Statutes of the United States, provides the method by which such extradition is to be accomplished. That statute authorizes the executive authority of any state from which a fugitive from justice may have fled, to demand his return of the executive authority of the state to which such person has fled, upon producing to such executive a copy of an indictment found, or an affidavit made before a magistrate of the state, charging the person demanded with having committed treason, felony, or other crime, such indictment or affidavit to be certified as authentic by the governor or chief magistrate of the state from which the person so charged has fled. Upon receipt of the requisition and certified indictment, the executive authority of the state to which such person has fled, is authorized to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making the demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear.

"The petition and accompanying documents disclose plainly that the only acts charged upon the petitioner, and because of which he is arrested, are acts performed by him as the agent appointed by the executive of the state of Arkansas, in pursuance of the commission issued to him by such governor, which acts are those prescribed by act of 1793, as above stated.

"The case of the petitioner, therefore, is that of a ministerial officer acting within the scope of an authority conferred upon him by the governor of a state by virtue of the provisions of the act of 1793. * * *

"A further question presented by the petition has been discussed upon this motion, and may here be decided. It arises out of the matter charged in the indictment which accompanied the requisition of the governor of Arkansas, and discloses the judicial proceeding in Arkansas upon which the surrender of the fugitive was demanded.

"The contention upon the indictment is that it is an indictment found by the grand jury of Ashley county, Arkansas, and undertakes to charge McDonald with a crime not cognizable by any court of the state of Arkansas, the charge being subordination of perjury committed within such state in procuring one Martin to commit wilful perjury within said state before a United States commissioner in a deposition taken by such commissioner to be used in an action then pending between said McDonald and the United States.

"This indictment, it is said, is void, because it charges no crime within the jurisdiction of a grand jury of the state of Arkansas, and renders all the proceedings taken in regard to the surrender of the fugitive void; whence, it is concluded that the acts performed by the petitioner cannot be held to be acts done in pursuance of a law of the United States.

"But I cannot accede to this view. If it be true that it is competent for this court to look into the indictment transmitted by the governor of Arkansas and authenticated by him, and if this court can be called upon to determine whether a crime has been charged therein in the

manner required by the laws of the state of Arkansas, and whether as matter of law subordination of perjury committed within the state of Arkansas can by the laws of the state of Arkansas be made an offense against the laws of that state, when the perjury is committed before a United States commissioner in a deposition taken to be used in a court of the United States; still it cannot be that the petitioner, who is simply a messenger of the governor of the state of Arkansas, and who is not alleged to have done otherwise than is required by his commission, was bound to look into the indictment and required at his peril to determine whether it charged a crime within the meaning of the laws of the United States. The petitioner did not arrest the fugitive nor demand his arrest. The arrest was made by direction of the governor of the state of New York upon the demand of the governor of Arkansas. And if there can be said to have been anything done by the petitioner in respect to the arrest of the fugitive which could render him liable in an action for malicious prosecution, his acts are plainly ministerial, and he is justified therefor by the directions of the governor.

"The jurisdiction of the executive of the state over the subject-matter is clear, and the petitioner has done no more than is prescribed to be done by the laws of the United States, acting under the direction of the executive, who by the same law was authorized to give such direction. No personal liability was therefore incurred.

"Nor is the case changed by the allegation that the motives actuating the petitioner were malicious. So long as the acts done were within the scope of the authority conferred upon him, and justified by the laws of the United States, it matters not what feelings the petitioner entertained toward the fugitive, nor what result he hoped would follow from the action taken by the governor of the state.

"My determination therefore is, that the petitioner is entitled to his writ of habeas corpus as prayed for."

Plaintiff charges that the complaint which brought about his arrest and imprisonment is defective, and that it is only a general attempt to follow the language of the statute in charging the offense.

The complaint is sufficient and charges a crime within the meaning of section 2, art. IV of the Constitution of the United States. In *Pierce v. Creecy,* 210 U. S. 387, it is said: "The position of the appellant is that his detention in custody is unlawful, because the indictment which is its only excuse, is not a charge of crime within the meaning of the provision of the Constitution regulating interstate extradition. * * * The precise and only question to be determined is whether the indictment constituted such a charge. * * * Counsel for the petitioner disclaim the purpose of attacking the indictment as a criminal pleading, appreciating correctly that the point here is not whether the indictment is good enough, over seasonable challenge, to bring the accused to the bar for trial. Counsel concede that they cannot successfully attack the indictment except by showing that it does not charge a crime. The distinction between these two kinds of attack, though narrow, is clear. But it will not do to disclaim the right to attack the indictment as a criminal pleading and then proceed to deny that it constitutes a charge of crime for reasons that are apt only to destroy its validity as a criminal pleading. There must be objections which reach deeper into the indictment than these which would be good against it in the court where it is pending. We are unable to adopt the test suggested by counsel, that an objection, good if taken on arrest of judgment, would be sufficient to show that the indictment is not a charge of crime. Not to speak of the uncertainty of such a test, in view of the varying practice in the different states, there is nothing in principle or authority which supports it. Of course, such a test would be utterly inapplicable to cases of a charge of crime by affidavit, which was held to be within the Constitution. *In the Matter of Strauss,* 197 U. S. 324. The only safe rule is to abandon entirely the standard to which the indictment must conform, judged as a criminal pleading, and consider only whether it shows satisfactorily that the fugitive has been in fact, however inartificially, charged with crime in the state from which he has fled. * * * Congress, in aid of the execution of

the constitutional provision, has enacted a law (section 5278, Rev. St.), directing that the charge shall be made either by 'an indictment found' or 'an affidavit made before a magistrate;' and, as we have seen, this court has held that such an affidavit is sufficient, saying (197 U. S. 331), 'doubtless the word "charged" was used in its broad signification to cover any proceeding which a state might see fit to adopt, by which a formal accusation was made against an alleged criminal.' But it is obvious that an objection which, if well founded, would destroy the sufficiency of the indictment, as a criminal pleading, might conceivably go far enough to destroy also its sufficiency as a charge of crime. Are then the objections made to the indictment of that nature? Let it be assumed that these are all well taken. Let it be assumed, without decision, that the false statements contained in the affidavit were statements of opinion; that the assignments of the falsity were bad, because no facts necessarily inconsistent with them were alleged; that the certainty required in criminal pleading was not observed; and that the time alleged antedates the indictment by more than the period of the statute of limitations. Nevertheless, the indictment alleges that on a day named the petitioner deliberately and wilfully made, under the sanctions of an oath, legally administered, a voluntary false statement and declaration in writing, to wit, the affidavit, and that the affidavit was not required by law or made in the course of a judicial proceeding. The indictment, whether good or bad, as a pleading unmistakably describes every element of the crime of false swearing, as it is defined in the Texas Penal Code. * * * This court, in the cases already cited, has said, somewhat vaguely, but with as much precision as the subject admits, that the indictment, in order to constitute a sufficient charge of crime to warrant interstate extradition, need show no more than that the accused was substantially charged with crime. This indictment meets and surpasses that standard, and is enough. If more were required it would impose upon the courts, in the trial of writs of habeas corpus, the duty of a critical examina-

tion of the laws of the state with whose jurisprudence and criminal procedure they can have only a general acquaintance. Such a duty would be an intolerable burden, certain to lead to errors in decisions, irritable to the just pride of the states and fruitful of miscarriages of justice. The duty ought not to be assumed unless it is plainly required by the Constitution, and, in our opinion, there is nothing in the letter or the spirit of that instrument which requires or permits its performance."

It follows from what has been said that error was not committed by the trial court in sustaining the special appearance of the defendant.

AFFIRMED.

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CHRIS J. KIENKE, APPELLANT, V. CHRIS KIRSCH ET AL., APPELLEES.

FILED OCTOBER 1, 1931. No. 27740.

1. **Statutory Provision.** Every director of a commercial state bank, other than cooperative banks, having a capital of $50,000 or less, must be the owner of at least 4 per cent. of its capital stock in his own name and right. Comp. St. 1929, sec. 8-121.
2. **Banks and Banking: OWNERSHIP OF STOCK: ESTOPPEL.** One who knowingly permits a certificate for shares of the capital stock of a commercial bank to stand in his name, for the fraudulent purpose of making it appear that he is thereby qualified, under the law, to become a director of such bank, and by virtue of such apparent ownership does become and act as such director, in violation of law, will not be heard to say that he was not the owner of said shares of stock in his own right, during the period he so served as such director.

APPEAL from the district court for Keya Paha county: ROBERT R. DICKSON, JUDGE. *Reversed.*

*Ross Amspoker* and *J. J. Harrington,* for appellant.

*Sterling F. Mutz, contra.*

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

HORTH, District Judge.

This is an action to recover a balance due upon a promissory note, bearing date May 6, 1918, due five years after date and executed by the defendants Chris Kirsch and George J. Kirsch, father and son, to the plaintiff, the note representing the purchase price of 61 shares of the capital stock of the Burton State Bank, of Burton, Nebraska, a commercial banking corporation, having paid-up capital of $10,000. The note is in the words and figures following:

"$9,867.36. Burton, Nebr. May 6, 1918.

"Five years after date, for value received, I, we, or either of us, promise to pay to the order of C. J. Kienke Ninety Eight Hundred Sixty Seven and 36/100 Dollars with interest at the rate of 8 per cent. per annum, payable semi-annually from date until paid. We, the makers, sureties, indorsers and guarantors of this note hereby severally waive presentment for payment, notice of nonpayment, protest and notice of protest, and diligence of bringing suit against any party thereto, and consent that time of payment may be extended without notice thereof to any of the makers, sureties, indorsers or guarantors of this note. And I, ————, being a married woman, do execute this note with especial reference to, upon the faith and credit of, and with the intention to charge my individual property or separate estate for its payment.

"P. O. Burton, Nebr. Negotiable and payable at the Burton State Bank, Burton, Nebr.

"(Signed) Geo. J. Kirsch,
"Chris Kirsch."

It appears from the indorsements on the back of the note that the semi-annual interest payments due upon the indebtedness represented by the note were paid on or about their due dates up to and including the payment due November 6, 1928, and that two payments were made on the principal of the note, one for $867.36 on November 12, 1923, and one for $1,000 on January 1, 1925.

The defendant George J. Kirsch made no appearance in the action and judgment by default was entered against

him for the amount due on the note. The defendant Chris Kirsch filed his separate answer, and for his defenses to plaintiff's petition pleaded: First, that the plaintiff's cause of action was barred by the statute of limitations; second, that he was surety only upon the note sued on, and that the plaintiff "claims" to have extended the time of payment on said note to the maker George J. Kirsch without the knowledge, consent or acquiescence of the answering defendant; and, third, that plaintiff did not, prior to May 8, 1929, present the note to him for payment, or demand payment thereof from the answering defendant, and gave the answering defendant no notice of nonpayment or notice of protest and did not protest said note for nonpayment, and that the provisions in said note waiving presentment for payment, notice of nonpayment and protest and notice of protest were all barred by the statute of limitations on the 5th day of May, 1928. Plaintiff's reply to this answer denies each and every allegation therein contained, except such allegations as specifically admit the truthfulness of the allegations contained in the plaintiff's petition.

A jury was waived and the cause tried to the court. The court found generally in favor of the defendant Chris Kirsch and rendered judgment dismissing plaintiff's action as to him, and from such judgment plaintiff appeals.

It appears from the undisputed testimony and from the stipulations of the parties that on the 6th day of May, 1918, the plaintiff was the owner of 61 shares of the capital stock of the Burton State Bank, of Burton, Nebraska; that on said date plaintiff sold said shares of stock for the sum of $9,867.36; that in payment therefor the defendants executed and delivered to the plaintiff the promissory note sued on; that on the following day 21 shares of said stock were transferred on the books of the bank to the defendant George J. Kirsch and 40 shares thereof were transferred on the books of the bank to the defendant Chris Kirsch, and the same remained in his name until May 2, 1928, when 20 shares thereof were transferred to the defendant George J. Kirsch and the remaining 20 shares reissued in the name of the defendant Chris Kirsch

and remained in his name until the bank was finally closed under insolvency proceedings in December, 1929; that continuously from May 7, 1918, until the bank was finally closed in December, 1929, the defendant Chris Kirsch was a director and president of the bank; that on numerous occasions during said period the defendant Chris Kirsch signed his name in the record book of said bank to the minutes of the meetings of stockholders and of the board of directors of said Burton State Bank, and in such minutes it is recited that the said Chris Kirsch was present as a stockholder or director; that at such meetings the loans, discounts, other assets, checking accounts, time deposits, overdrafts and cash in hand were listed, added and found correct, when as a matter of fact, as shown by the testimony of said Chris Kirsch and his son George J. Kirsch, the former was not present at any of such meetings and never participated in an examination of the affairs of the bank; that payments of both principal and interest were made, upon the note sued on, on the dates and in the amounts shown by the indorsements on the back thereof, and that, with one possible exception, such payments were made from the undivided profit or "dividend" account of said Burton State Bank.

The defendant Chris Kirsch, to establish his defenses, testified that he never owned any of the shares of the capital stock of said Burton State Bank; that he never purchased any of said stock from the plaintiff, and that he never participated in the affairs of said bank; that he signed the note sued on simply as surety for the defendant George J. Kirsch, and that he permitted the stock to stand in his name, and allowed his name to be used as a director and as president of said bank, so that his son George could get the bank to going—"I was wanting him to get started." The defendant Chris Kirsch also called the defendant George J. Kirsch as a witness in his behalf, and George J. Kirsch testified that he purchased the 61 shares of stock from the plaintiff, and that "the legal requirements were that we must have a board of directors; and so a part of the stock was put in his (Chris Kirsch's)

name so as to make up a board of directors." And he further testified: "About the time we were required to make a report or hold our meetings I wrote up the minutes there at the first opportunity I would have, and then I would have them sign up the minutes of the meetings at the first opportunity, and they would sign them up and not even read them over. That was about the way it was handled. That was done in order to make the records required under the banking laws."

During all of the eleven years and more that the defendant Chris Kirsch was a director of said bank the laws of Nebraska provided:

"Every director of a commercial bank, other than cooperative banks, having a capital of fifty thousand dollars or less, must be the owner of at least four per cent. of the paid-up capital stock in his own name and right." Comp. St. 1929, sec. 8-121.

"The board of directors shall hold at least two regular meetings each year, and at such meetings a thorough examination of the books, records, funds and securities held by the bank shall be made and recorded in detail upon its record book, and a certified copy thereof shall be forwarded to the department of trade and commerce within ten days." Comp. St. 1929, sec. 8-138.

"Any person who shall * * * knowingly subscribe * * * false papers, with the intent to deceive any person or persons authorized to examine into the affairs of any such corporation * * * shall be deemed guilty of a felony." Comp. St. 1929, sec. 8-133.

The statutes of Nebraska provide, and this court has held, that the banking business, carried on in pursuance to a state charter, is quasi-public, and for the protection of the public, and in its interest, it is subject to reasonable regulation by the state. Comp. St. 1929, sec. 8-114; *Citizens State Bank v. Strayer*, 114 Neb. 567.

In *Gibbons v. Anderson*, 80 Fed. 345, quoted with approval in *Gerner v. Mosher*, 58 Neb. 135, 155, it is said:

"Banks themselves are prone to state, and hold out to the public, who compose their boards of directors. The

idea is not to be tolerated that they serve as merely gilded ornaments of the institution, to enhance its attractiveness, or that their reputations should be used as a lure to customers. What the public suppose, and have the right to suppose, is that those men have been selected by reason of their high character for integrity, their sound judgment, and their capacity for conducting the affairs of the bank safely and securely."

In *Seale v. Baker,* 70 Tex. 283, quoted with approval in *Gerner v. Mosher, supra,* it is said:

"Directors of banking corporations occupy one of the most important and responsible of all business relations to the general public. By accepting the position and holding themselves out to the public as such they assume that they will supervise and give direction to the affairs of the corporation. * * * It is the duty of directors to know the condition of the corporation whose affairs they voluntarily assume to control, and they are presumed to know that which it is their duty to know, and which they have the means of knowing."

The position of president, as well as that of director of a bank, is one of trust. The public welfare is so intimately connected with the welfare of the banking institutions of the country that the strictest fidelity to that trust is required.

The acts of the defendants, as shown by their own testimony, disclose a wilful intention on their part to thrust aside both the letter and the spirit of our state banking law, to deceive the department of trade and commerce, and, in defiance of law and with a reckless disregard of the rights of others, to engage in a course of conduct relative to the affairs of the Burton State Bank, the inevitable result of which is the ruination of the bank and disaster to others, and, in such a case, it is the duty of the court to determine the character of the acts of the defendants even though their illegality has not been raised by the pleadings.

So, under the facts in the present case, to permit the defendant Chris Kirsch to say that he was not the owner

of the shares of the capital stock of the Burton State Bank which stood in his name for more than eleven years, and by virtue of his apparent ownership of which he acted as a director and as president of said bank for more than eleven years, and without the ownership of which in his own right he could not have lawfully acted as such director, would be "to award a premium for negligence in the performance of important and almost sacred duties voluntarily assumed, and to license fraud and deception of the most flagrant and pernicious character." *Seale v. Baker, supra.* It would be against public policy and subversive to the welfare of the state to permit the defendant to plead or prove his own fraudulent, if not criminal, acts, which alone, under the present record, could defeat a recovery in this action. Where a party employs legal instruments of an obligatory character, for fraudulent and deceitful purposes, it is sound law, as well as pure justice, to leave him bound who has bound himself, and, in the determination of this case, the defendant Chris Kirsch will not be heard to say that he was not the owner in his own right of the shares of the capital stock of the Burton State Bank standing in his name, and by virtue of which he acted as a director of the bank over a period of more than eleven years.

From the foregoing it follows that the defendants Chris Kirsch and George J. Kirsch are both principals upon the note in suit; that both made the payments of principal and interest indorsed thereon, and that the trial court erred in rendering judgment in favor of the defendant Chris Kirsch, in dismissing plaintiff's action, and in dissolving the attachment.

Because of the errors herein pointed out, the judgment of the district court is reversed and the cause is remanded for further proceedings.

REVERSED.

# IN RE ESTATE OF GEORGE BAINBRIDGE. ELIZABETH GILLHAM ET AL., APPELLANTS, V. RHODA I. OTLEY, APPELLEE.

FILED OCTOBER 9, 1931. No. 27787.

Wills: CONTEST: UNDUE INFLUENCE. Undue influence cannot be established by merely showing opportunity for its exercise.

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

*Charles E. Matson* and *Richard O. Johnson*, for appellants.

*Leonard A. Flansburg, H. N. Mattley* and *W. T. Stevens, contra.*

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

PER CURIAM.

This action involves the question of whether a certain instrument is the last will and testament of George Bainbridge, deceased. Bainbridge departed this life, leaving a written instrument purporting to be his last will. He left surviving him four children. His wife predeceased him. The proceeding originated in the county court, and an appeal was taken to the district court, where the cause was tried to the court and jury, resulting in a verdict and judgment thereon finding the instrument to be the last will of the decedent and admitting the same to probate. Contestants appealed.

Mr. Bainbridge had accumulated a considerable fortune, largely in real estate. A few years before his death he conveyed the major portion of this real estate to his children, giving to each approximately an equal amount. By his will, executed two or three years before his death, he devised and bequeathed all the property he then possessed to one daughter, to the exclusion of the other children. It appears that previous to the making of the will he had executed a deed conveying to this daughter all the land that he retained. Two or three years before his death his

health failed, and the favored daughter came into his home, took charge thereof, and cared for him until his death. Some time subsequent to the last conveyance of real estate to the favored daughter, the contestants, being the three children who were given nothing under the will, instituted proceedings to have their father placed under guardianship. In that action Bainbridge, deceased, was a witness and testified concerning the making of the deed, and his reasons therefor, the fact of his making the will and the reasons therefor. Mr. Bainbridge departed this life before a final judgment had been entered in the guardianship proceeding. His will was contested upon the grounds that it was not properly executed; that testator was incompetent; and that the will was procured by undue influence. The only question submitted by the trial court to the jury was whether the testator possessed testamentary capacity. While there was some conflict in the evidence upon that question, it overwhelmingly preponderated in favor of his competency, and the jury so found. The trial court refused to submit to the jury the question of undue influence, and this is the principal ground for contestants' complaint.

From an examination of the record, we are unable to find any competent evidence that undue influence was exercised in procuring the making of the will. The most that may be said is that there was opportunity for such influence to be exercised; but mere opportunity is insufficient. We are of the opinion that the trial court properly refused to submit that issue to the jury.

No error has been found in the record. Judgment

AFFIRMED.

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JAKE SWARTZ ET AL. V. STATE OF NEBRASKA.

FILED OCTOBER 9, 1931. No. 27840.

1. Criminal Law: TRIAL: SEGREGATION OF WITNESSES. Error cannot be predicated on the failure of the trial court to keep witnesses segregated until all have testified, where no showing of prejudice to the complaining party appears.

2. **Shooting with Intent to Kill**: INTENT. Intent is an essential element in the crime of shooting with intent to kill and proof of such intent is indispensable to sustain a conviction.
3. ———: ———. Where such specific intent is an essential element of the crime, such intent is inferable from the facts and circumstances, inclusive of the act of shooting.
4. **Sentence** reduced under authority of section 29-2308, Comp. St. 1929.

ERROR to the district court for Red Willow county: CHARLES E. ELDRED, JUDGE. *Affirmed: Sentence reduced.*

*Scott & Scott*, for plaintiffs in error.

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

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

GOSS, C. J.

Jake Swartz and Dick Swartz complain that they were erroneously convicted and sentenced on the charge of shooting Harold Swartz with intent to kill.

They argue that the court erred in allowing the state to bring into the presence and view of the jury, over their objection, certain bloodstained garments that were worn by Harold Swartz when he was shot. The clothing was identified and testimony was received concerning it during the presentation of the state's case in chief. When offered in evidence just before the state rested, it was objected to on behalf of defendants as immaterial and not tending to prove or disprove any of the issues. The objection was sustained by the court without argument or comment. The record shows no undue display of these garments and we find no prejudice against the defendants in respect thereto.

Defendants assert error in that the court did not order the witnesses to remain segregated after they had testified. Before the trial began the defendants invoked "the rule for the exclusion of witnesses." The proceedings show merely that the court said "Sustained." What directions the court gave the witnesses and the sheriff at

the time appears at the conclusion of the testimony of the first two witnesses for the state, when counsel for defendants stated he had been informed that, after witnesses had testified, they were allowed to mingle with other witnesses who had not testified and to relate the nature of their testimony, and he asked that they be separated and not allowed to mingle. The court said: "No order was made that the sheriff should segregate the witnesses after they testified; none was asked; and no showing that the witnesses have done anything improper." There appears no ruling. The defendants excepted. Apparently the request for "exclusion of the witnesses" made before the trial began was interpreted and acted upon by the court as meaning to exclude each witness from the courtroom until after he had testified. In the absence of any showing of prejudice to the defendants, we cannot say that the court abused his discretion or that the defendants were in fact prejudiced because the court did not keep all the witnesses segregated after they testified as well as before.

The chief point stressed by defendants in their brief and oral argument is that the state failed to make specific proof of their intent to kill Harold Swartz.

Jake Swartz and Dick Swartz, father and son, lived on a farm seven miles southwest of McCook. The home of Harold Swartz, aged twenty, is seven miles southeast of Trenton, but he had been staying at Arthur Donelson's, near the Swartz home, for about ten days, shucking corn. Mrs. Donelson, his aunt, is his father's sister. The defendants are his uncle and cousin. There was evidence that Jake Swartz was about six feet three inches tall, and weighed about 240 pounds; that Dick Swartz, aged 23, was six feet one and a half inches tall, and weighed about 180 pounds; and that Harold Swartz is about five feet three inches tall, and weighed about 130 pounds.

On the forenoon of November 21, 1930, about 10 o'clock, Harold took a 22 caliber repeating rifle and went hunting. His expedition took him upon the farm of Jake Swartz. The latter testified that he saw Harold hunting there and spoke to him, whereupon Harold reviled him, and

he ordered Harold to get off the place and stay off. Harold testified that on this hunt in the morning he did not at any time see Jake Swartz. On this morning trip Harold went over to the section line on the west side of Jake's land. Thence he went north and visited the lands and homes of others north of the east and west road. He went past Jake's house, which faces this road from the south, and visited a home east of Jake's farm. Thence he went south upon the farm and down to the creek, where he said he found the track of a coon on the snow and followed it along the creek. Shortly after this an altercation took place, participated in by Jake, Dick, and Harold, around which this case centers. Harold testified that, while he was following this track, a shot was fired at him from the east and a bullet went past him; he saw Dick had a gun leveled at him; Dick fired another shot at him and he began to run. Jake Swartz and another cousin, George Swartz, were also there on the east side of the creek, and the witness was about 600 feet away when Dick shot; the witness intended to run down around the bend in the creek and go to Donelson's, but Dick headed him off and he ran southwest; Dick, who had a shotgun, overtook him, and the witness, fearing he might be shot in the back, stopped and turned; Dick stuck the shotgun against his stomach and Harold knocked it away and it went off; Dick hit him on the head with his fist and then knocked him down by hitting him on the head with the stock end of the shotgun and struck him several times with it while he was down; as he was down Dick tried to get hold of the barrel of Harold's gun and it went off; and after that he was dizzy and everything was dark; Jake came up about this time and shot Harold.

The wooden stock of the shotgun was shattered and broken almost completely in two at the point of the handgrip. When Harold was examined by a surgeon in McCook later in the day, the surgeon testified to a wound made on his head by some instrument; that the blow was at the time developing a paralysis on that side of his head; and to a gunshot wound appearing to have been made by a

22 caliber bullet, entering the chest just below the collar bone, with the point of exit about four inches to the right of the median line in the back; it passed through the apex of the right lung and through the shoulder blade.

Both Jake and Dick testify to quite a different state of facts. Their testimony indicates that Harold was the aggressor, that he shot Dick in the chest and arm, and when Jake then called to him to put down his gun he turned and shot Jake in the thigh or hip, and then fired two more shots at Jake, but missed him and loaded his gun again. Jake testified as to events at this point: "By that time I made up my mind to put the boy out of commission, and I aimed to shoot him in the shoulder."

Without further extending the recital of the evidence, it suffices to say that the defendants made out a strong case of self-defense, which was carefully submitted to the jury in the court's instructions. It was a question of fact peculiarly in the province of the jury to decide whether the defendants or Harold Swartz told the truth as to what occurred at the time of the shooting affray.

Jake having testified that it was not his intention to kill Harold but merely to prevent him from doing further harm, the defense argues that, not only has the intent not been shown by the state, but that it has been disproved by the defense.

It seems that in cases like this, where intent is an essential element of a crime, proof of such intent is indispensable to support a conviction. *Botsch v. State,* 43 Neb. 501; *Ward v. State,* 58 Neb. 719; *Clary v. State,* 61 Neb. 688; *Garrett v. State,* 110 Neb. 118; 16 C. J. 81. While the foregoing authorities state this to be the rule they also state: "It (the intent) may be gathered or drawn from all the evidence, facts, and circumstances of the case, inclusive of the act, and is a matter of fact for the consideration and decision of the jury." *Ward v. State, supra.* "The intent with which an act is done is inferable from the act itself, and from the facts and circumstances surrounding it." *Clary v. State, supra.* "But it is sufficient in such cases to prove facts from which the specific in-

tent may be inferred." 16 C. J. 81. "It has often been held that, while the specific intent is essential, its existence may be inferred from the circumstances, under the usual rule that every sane man is presumed to intend the usual and probable consequences of his acts." 16 C. J. 116.

So, we are of the opinion the intent was sufficiently proved and no error was made by the court in submitting that question to the jury. Nor do we think the verdict is opposed to physical facts shown to exist, nor in flat contradiction of recognized physical laws, as argued on behalf of defendants.

We have covered most of the questions argued. Other errors are assigned and some of them are briefly mentioned in the argument. We have examined the transcript and evidence carefully and find no reversible error.

Considering all the circumstances in the case, we are of the opinion that the sentence of seven years is excessive. It is our judgment that the ends of the law and the good of society will be served by reducing the sentence to three years, which is hereby done, under the authority of section 29-2308, Comp. St. 1929. As thus modified, the judgment of the district court is affirmed.

AFFIRMED: SENTENCE REDUCED.

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## FRONTIER COUNTY, APPELLANT, V. LINCOLN COUNTY, APPELLEE.

FILED OCTOBER 9, 1931. No 27766.

1. Paupers: LIABILITY BETWEEN COUNTIES. Liability of one county to another county for expenses paid by the former in caring for a pauper whose residence is in the latter county is statutory.
2. ———: ———: RIGHT TO ENFORCE. The right to enforce liability of one county to another county for the expenses of caring for a pauper requires compliance with statutory terms and conditions.
3. ———: ———: ACTION TO ENFORCE: PLEADING. In an action by one county against another county for the expenses of caring for a pauper, every fact essential to a recovery under the statute creating that remedy should be stated in the petition for the authorized relief.

4. Pleading: DEMURRER. A demurrer to a petition does not admit mere conclusions of law pleaded by the petitioner.
5. ———: ———: NEW REMEDY. Where particular facts constituting notice are necessary to a cause of action for relief under a new remedy created by statute, a petition for such relief is demurrable, if it omits any essential fact.

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

*F. J. Schroeder,* for appellant.

*C. S. Beck, contra.*

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

ROSE, J.

This is a proceeding by Frontier county, plaintiff, to recover from Lincoln county, defendant, $194 on a claim for expenses alleged to have been incurred and paid by plaintiff in caring for Mary Skinner Ball, a pauper found in Frontier county, but having her residence in Lincoln county. The claim was presented to the county board of Lincoln county and rejected. Plaintiff appealed to the district court and there filed a petition for the amount claimed. Defendant interposed a demurrer attacking the petition on the ground that it did not state facts sufficient to constitute a cause of action against defendant. The demurrer was sustained. Plaintiff declined to plead further and the proceeding was dismissed. Plaintiff appealed.

Liability of one county to another county for expenses paid by the former in caring for a pauper whose residence is in the latter county is statutory. Comp. St. 1929, secs. 68-111, 68-112. See *Otoe County v. Lancaster County,* 78 Neb. 517. The right to enforce the liability requires compliance with statutory terms and conditions. Every fact essential to a recovery under the statute should be stated in the petition for the authorized relief. Referring to the county making claim for expenses paid for the support of a pauper, the statute provides:

"It shall be the duty of the clerk of the county board to send a notice by mail to the clerk of the county board of the county in which such pauper resided, as before stated, that such person has become chargeable as a pauper, and requesting the authorities of said county to remove such pauper forthwith, and to pay the expense accrued in taking care of him or her." Comp. St. 1929, sec. 68-112.

In the petition the plea relating to notice is in this form:

"The county commissioners of Lincoln county, Nebraska, were duly notified of her condition and of her being found in Frontier county, Nebraska, and were requested by the county commissioners of Frontier county, Nebraska, to provide for her as they should do under the law, but that they have neglected and refused to do so."

The words "duly notified" and the allegations in which they are used in the petition do not state the particular facts constituting the notice required by statute. When testing the sufficiency of the petition in ruling on the demurrer, the trial court properly held that the term "duly notified," in the connection used, was a conclusion of law, rather than a complete statement of facts conforming to statutory requirements. The demurrer did not admit the mere conclusion that notice was given. Where particular facts constituting notice are necessary to a cause of action for relief under a new remedy created by statute, a petition for such relief is demurrable, if it omits any essential fact. Plaintiff declined to amend its petition when timely opportunity to do so was afforded. The judgment below is free from error.

AFFIRMED.

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ANNA L. SMITH, APPELLANT, V. JOHN RAUBACH ET AL., ADMINISTRATORS, ET AL., APPELLEES.

ANNA L. SMITH, APPELLEE, V. JOHN RAUBACH ET AL., ADMINISTRATORS, ET AL., APPELLANTS: KNOX COUNTY BANK ET AL., APPELLEES.

FILED OCTOBER 9, 1931. NOS. 27806, 27808.

**Specific Performance:** PAROL CONTRACT FOR DEVISE AND BEQUEST:

PROOF. In an action against the heirs-at-law and personal representatives of a deceased person, to enforce specific performance of a parol contract to devise and bequeath specific realty and a share of the estate of decedent, the evidence to establish such contract must be clear, convincing and satisfactory.

APPEAL from the district court for Madison county: CHARLES H. STEWART, JUDGE. *Reversed and dismissed.*

*Webb Rice,* for appellant.

*Shurtleff & Spillman, contra.*

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

GOOD, J.

These two appeals are from the same judgment but by different parties. The action from which the appeals were taken was, in part, one to compel completion of performance of an alleged oral contract and, in part, for specific performance of the same contract. The alleged contract was between the plaintiff and Adolph Svoboda, now deceased. Defendants are the heirs-at-law of Svoboda and the administrators of his estate, together with other parties to the commercial paper involved in this action.

Plaintiff alleged that in June, 1925, Svoboda "proposed to plaintiff that she should look after his home for him by keeping it in order and doing his scrubbing and laundry work, and that she further furnish him meals at her house as he might require them, and that she generally look out for his welfare and care for him and nurse him if necessary until the time of his death, and that in return he would convey to plaintiff his residence heretofore described and further give or bequeath to plaintiff sufficient of his personal estate to care for her during the remainder of her lifetime. In this connection plaintiff avers that the exact amount of personalty promised to her by said Svoboda was not stated but that he did offer her and promise her on sundry occasions during the remainder of the year 1925, and thereafter, the exact dates plaintiff being now

unable to state, that he would give her enough so 'she would be well taken care of,' that he would 'leave her enough to keep her for the rest of her life,' that he would 'leave her more than half of his estate,' that he would 'leave her all of his estate,' and plaintiff avers that said Svoboda stated and represented to her that he was possessed of personal property of the value of from $25,000 to $30,000 and that said statements were true. Plaintiff avers that by said statements she was led to believe and did believe that said Svoboda was offering her his residence and not less than $12,500 additional of personalty and probably much more and so believing she accepted said offers of said Adolph Svoboda and proceeded to furnish his meals for him as he desired them which was about half of the time, and to look after and scrub and cleanse his dwelling and to do his laundry work for him and to care for his garden and to mow his lawn and to see that he was cleaned and bathed if occasion required which became more and more frequent and during the last year of his life required almost daily attention on the part of plaintiff because of weaknesses of advanced age on the part of said Svoboda, by reason of which many of his personal habits became those of a small child."

Plaintiff further averred that on September 15, 1928, Svoboda, in fulfilment of his promise, gave and delivered to plaintiff a promissory note and five certificates of deposit, in all of which Svoboda was designated as payee; that the face of the promissory note was $1,500, and that the aggregate amount of the certificates was $13,772; that Svoboda neglected to assign or indorse the promissory note and the certificates of deposit. Plaintiff prayed that the court order said certificates and note to be duly assigned to her and for a decree requiring the conveyance to plaintiff of Svoboda's residence property.

The banks issuing the certificates of deposit and the makers of the promissory note were made parties, and each answered, admitting the indebtedness and a willingness to pay the obligations to whomsoever might be determined to be lawfully entitled thereto. The children of Mr. Svoboda

and his administrators denied the making of the oral contract and averred that Svoboda was mentally incompetent to make the contract, and denied that the certificates of deposit and promissory note were delivered by Svoboda to the plaintiff.

The trial court found for plaintiff on the question that such a contract had been entered into; found and determined that $6,500 was sufficient to keep her for the remainder of her life; and found specifically that the certificates of deposit and note were not delivered to plaintiff by Svoboda with the intention of conveying title to her. From the judgments entered upon the findings, plaintiff perfected an appeal, and the children of Svoboda and the administrators of his estate have also perfected a separate appeal.

This court has on numerous occasions held that contracts of the character of that involved in this appeal will be upheld and enforced if they are established by evidence that is clear, convincing and satisfactory. Among the many authorities so holding are the following: *Labs v. Labs,* 92 Neb. 378; *Overlander v. Ware,* 102 Neb. 216; *Powers v. Norton,* 103 Neb. 761; *Remaly v. Sweet,* 106 Neb. 327; *McEntarffer v. Payne,* 107 Neb. 169; *Young v. Gillen,* 108 Neb. 311; *Hajek v. Hajek,* 108 Neb. 503. The principal question involved herein is: Does the evidence meet these requirements? The record is voluminous, and only a summary of the facts can be set forth herein.

Adolph Svoboda was of Bohemian birth. He had lived in Knox county for a great many years and had acquired and accumulated considerable holdings of land and money. He was twice married. By his first marriage there were eleven children, two of whom died in childhood or infancy, and nine survived him. His first wife died in 1915. Some time thereafter he contracted another matrimonial alliance, which was terminated in divorce proceedings. From the record it appears that practically all of his holdings of land and personal property were acquired by the assistance of his first wife and their children; that the children worked upon the farms as soon as they were able and con-

tinued to do so until they had attained the age of 17 years, or upwards; that they were required to work in the fields until after cornpicking in the autumn, and to quit school as soon as spring work on the farm began. Apparently, none of the children acquired any education reaching beyond the fifth grade. It appears that Svoboda was saving, economical, almost penurious; that to his children, who are all now grown, he gave nothing of any consequence save to one son, to whom he gave 280 acres of land, upon condition that the son would pay to him annually during the remainder of his life the sum of $400, and he also sold to the son 200 acres more at the price at which he had purchased, and which was perhaps much less than its actual value at the time that he sold to the favored son.

Some time in 1925 Svoboda purchased a small home in the city of Norfolk, consisting of a lot and a four-room cottage, without any modern conveniences therein. This house was adjacent to that owned by plaintiff. It appears that, at the time, plaintiff was keeping some boarders, and that, within a few weeks after Svoboda moved into his new home, he took some meals at plaintiff's house. Plaintiff's son testified that, within two or three weeks after he came there, Svoboda proposed to his mother that she furnish him meals as he should need them, and care for him and look after his home; that his mother at first did not accept because she was contemplating moving to Ohio, to care for an invalid sister, but that a few days later the subject was renewed between Svoboda and plaintiff and that he made the offer to give to plaintiff his home property and sufficient of his estate to take care of her for life, if she would undertake to furnish him his meals and look after him and care for his home. To some extent the wife of this son corroborated him. However, her testimony did not go to the same extent; nor was it in full corroboration of the testimony of her husband. There was evidence on behalf of plaintiff that she furnished meals to Mr. Svoboda in her home and carried meals to him when he was ill; that she cared for him personally; did his laundry work and cleaned and cared for his home.

One witness on behalf of plaintiff testified on cross-examination that she heard a conversation between Svoboda and the plaintiff wherein he objected to paying her $1 a day for the service she was rendering, saying that it was too much; that she heard a like conversation between them on two or three different occasions. This was testimony given by plaintiff's own witness. There was further evidence, on behalf of plaintiff, of many witnesses who had heard Mr. Svoboda state, in effect, that plaintiff was giving him good care; that he intended to give her the property where he lived, and to leave her sufficient so that she would not have to work; that she would be taken care of in her old age, and like statements. None of these statements referred to any contract or agreement between Mr. Svoboda and the plaintiff. On the other hand, there was evidence that the man who sold the home to Mr. Svoboda lived in the house with him for nearly a year thereafter; that Svoboda "batched" and got his own meals. Another of plaintiff's witnesses testified that Mr. Svoboda bought milk of him. Another witness for plaintiff, a grocer, testified to the fact that Mr. Svoboda purchased groceries of him from time to time. There was evidence from other witnesses that Mr. Svoboda was in the hospital on three different occasions, on two of which he was there for three weeks or thereabouts, and another for a somewhat shorter period; that at other times, between 1925 and his death, which occurred September 16, 1928, he spent considerable time with his sons and daughters in their homes some distance from Norfolk. On some of these occasions, according to the testimony, he was absent from his Norfolk home for two or three months, or possibly longer. There was evidence that his sons and sons-in-law furnished him with vegetables and meat from time to time, and that some of them, when visiting him, found the old gentleman getting his own meals. There was testimony by a number of witnesses that on different occasions Mr. Svoboda had stated that plaintiff was paid up to a certain date, or that he desired a bill changed so that he could pay her for the services she had rendered up to the particular week-end. Pos-

sibly some of this evidence may have been incompetent to prove payment, but we think it was competent as tending to show a circumstance inconsistent with the charge that he had entered into a previous contract and was to pay her at the end of his life with a large proportion of his property.

It is also shown in the record that in September, 1928, when Svoboda was upon his deathbed he requested plaintiff to write a letter to some of his children, asking them to come and take him to the hospital where he could have proper care and treatment. Plaintiff wrote this letter for him apparently on the 12th of September. Mr. Svoboda died on the morning of the 16th. The letter was not mailed by her until the day of his death, and possibly not until after his death. It is further disclosed that on the evening preceding his death plaintiff sent for a doctor; that the doctor came and Mr. Svoboda inquired of him whether he was going to get well. The doctor, after examining him, informed him, in effect, that the chances were that he would not recover, and stated that if he had any business to transact it should be attended to, and that if he had any relatives they should be notified. The doctor testified that Svoboda said he wanted to give his home property to the plaintiff; that the doctor informed him it would be necessary for him to make a deed, or a will, and suggested that he have some one draw a will for him. An attorney was sent for; he arrived about 11 o'clock that night and prepared a form of will, but it was not signed. The attorney testified that Mr. Svoboda refused to sign it and said: "That woman (referring to plaintiff) has had enough." There was other testimony that Mr. Svoboda said he was too tired and weak to sign the will and asked to be left alone, but stated that it was his last will and testament. There was evidence that on the same evening, and before the attorney arrived, Svoboda asked for the plaintiff and that she came to his room; that he requested her to take out from under his pillow a sweater, or jacket, and that from a pocket therein was taken a manila wrapper, and that Svoboda handed this to the plaintiff. There

was some dispute in the testimony as to just what he said at the time. There was evidence to the effect that he said for her to keep it and not let any one get it. The record discloses that plaintiff took the envelope and shortly afterwards went to her home. She and her son testified that the wrapper was opened and that it contained the five certificates of deposit, together with the promissory note heretofore mentioned. Plaintiff and her son both testified that the certificates of deposit were pinned together; that, in addition thereto, there was a slip of paper on which were written the name and address of the plaintiff, and signed with the signature of Svoboda. On the day preceding his death Mr. Svoboda had sent for his banker and had him examine into a wrapper, somewhat similar to and perhaps the same one, containing certificates of deposit. He had two or three of these taken out and asked the banker to send them to the banks issuing them, for renewal and for some change in the name of the payee. The banker testified that at that time the certificates of deposit were not pinned together, and that there was no writing contained therein. On the day of, or within a day or so following, the death there was a conversation between the plaintiff and some of the relatives of Svoboda, in which she was asked about the certificates of deposit, and she denied having seen or knowing anything about them. On redirect examination plaintiff stated that she said she *had not seen them in Svoboda's house,* but she refrained from disclosing the fact that she had received or knew anything about them.

From the outline of the evidence given herein and other evidence in the record, it appears that the making of such a liberal contract on the part of Mr. Svoboda is at variance with his life habits. Moreover, if it was made it was upon a very short acquaintance and before he could have known plaintiff very well. It seems to be highly improbable and unreasonable. The discrepancies in the testimony of plaintiff and her witnesses are such as to cause grave doubt as to the credibility of their testimony. Suffice it to say that the evidence is not satisfactory and convincing that such a contract was ever made.

We have not considered nor given any attention to the proposition as to whether Mr. Svoboda was mentally competent to make such a contract. The evidence upon that point is in irreconcilable conflict. The conclusion above reached, however, renders it unnecessary to further consider that question.

From what has been said, it follows that the judgment of the district court should be and is reversed, and the action of plaintiff dismissed. This opinion disposes of both appeals.

REVERSED AND DISMISSED.

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LINCOLN TELEPHONE & TELEGRAPH COMPANY, APPELLANT, V. T. E. SMITH, APPELLEE.

FILED OCTOBER 9, 1931. No. 27800.

1. **Master and Servant**: WORKMEN'S COMPENSATION LAW: COMPENSABLE INJURY: SUFFICIENCY OF EVIDENCE. Evidence outlined in opinion *held* sufficient to prove an accident, but insufficient to establish a compensable injury under the workmen's compensation law.
2. **Trial**: TESTIMONY OF EXPERTS. Where the testimony of experts is in conflict, the court must consider it in connection with all the other evidence in the case, as an aid in arriving at a just determination.

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

*Woods, Woods & Aitken* and *Pitzer & Tyler*, for appellant.

*Andrew P. Moran, contra.*

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

DAY, J.

This is a proceeding under the workmen's compensation law. The Lincoln Telephone & Telegraph Company, plaintiff, filed with the compensation commissioner a petition for the determination of a controversy with T. E. Smith,

former employee and defendant, over compensation for injuries. Smith had been employed by plaintiff as a janitor in the interior of the office building of plaintiff at Nebraska City. He claimed that, while there performing duties of his employment, he fell down a stairway, December 7, 1929, and suffered injuries resulting in permanent disability. There was a hearing before the compensation commissioner, who made findings that Smith was totally disabled as a result of the accident; that, following his injury, plaintiff paid him his regular wages for 13 weeks and thereafter $11.48 a week until May 31, 1930; that he is entitled to compensation of $11.48 a week until May 31, 1930; that he is entitled to compensation of $11.48 a week from June 1, 1930, during total disability. From an order requiring payments according to the finding of the compensation commissioner, plaintiff appealed to the district court, where the same compensation was awarded. From the judgment of the district court, plaintiff appealed to the supreme court.

On appeal, plaintiff contends that Smith did not have an accident, that he was not injured, and that in any event he is not now disabled. On the issue of an accident there is little room for controversy. Direct evidence and circumstances not in dispute make the preponderance of the evidence clear. Smith was in the employ of plaintiff from June 3, 1929, until December 7, 1929. On the latter date, while performing duties of his employment as janitor, he was mopping the second floor at the top of a stairway in plaintiff's telephone building at Nebraska City. A night operator testified in effect that she heard a bucket falling down the stairs and immediately found Smith "in a heap" on the landing below, apparently unconscious. Other employees carried him up the stairs to a lounge in a reception room. Plaintiff's local physician was called and made an examination. As directed by him, Smith was carried to an ambulance and taken in it to a hospital where a more thorough examination aided by X-rays was made. The same physician put Smith's back in a cast. The patient remained in the hospital until December 30, 1929. Pur-

suant to directions of the local physician and plaintiff's physicians in Lincoln, the cast was replaced by a brace. Plaintiff paid the hospital expenses, the fees of the physicians, Smith's wages for 13 weeks and thereafter $11.48 a week until June 1, 1930. Evidence of the facts outlined is a sufficient proof of an accident within the meaning of the workmen's compensation law. The statement and views heretofore expressed are not original with the writer, but are adopted as his own and full responsibility accepted for them.

The nature and extent of a compensable injury, if any, presents a more difficult problem. Plaintiff resisted the allowance of compensation on the additional grounds, in substance, that Smith, when found on the landing of the stairway, feigned unconsciousness and injury to his back and resulting pain; that he was and is a malingerer, pretending illness and inability to work; that there was no compensable injury to his back; that his spine is normal except for the effect of a moderate degree of osteoarthiritis in 1925, due to inflammation, and not to any accident, but forming new bone in the fourth lumbar vertebra, there being no material change since then; that any present weakness of the spine is due to lack of exercise, to malingering, to unnecessary medical attention, and to the continued use of a brace; that hospital care and treatment by physicians in the employ of plaintiff were precautionary measures prompted by Smith's unwarranted complaints of injury and the difficulty of ascertaining the exact nature of peculiar injuries to the spine.

Plaintiff adduced evidence in support of all these defenses. There is testimony tending to prove that Smith, during the evening of December 6, 1929, was told that his work as janitor was unsatisfactory and would have to be improved, and that this warning was offensively resented. The evidence of physical injury and the extent thereof is not sufficient to establish defendant's disability. Smith himself does not testify to any symptoms indicating such disability. He describes the hospitalization, the medical treatment given him, and states that at the time of the

hearing he was unable to work. The expert witnesses who examined him all agree that in arriving at their opinion they would be influenced by the history of the case and the statement of the defendant as to physical facts. But the defendant does not testify as to any pain, or any other fact, which would tend to prove disability. The testimony of the defendant himself is insufficient to support a finding of disability.

Expert witnesses who treated Smith, after plaintiff declined to provide further medical services, and who made physical examinations and studied X-ray pictures, testified that in their opinion there was a degeneration or fracture of the fourth lumbar vertebra; that by their direction Smith was still wearing a brace at the time of the trial, November 13, 1930. There is, however, testimony of a large number of witnesses that the condition disclosed by the X-ray, upon which the defendant's witnesses based their opinion as to disability, was present in 1925. At that time he made a lump sum settlement with a former employer on the basis of a 25 per cent. disability. It is undisputed that Smith worked without difficulty at hard labor for a long period after making settlement for that injury. The X-ray pictures indicate that the condition of the fourth lumbar vertebra is now practically the same. Therefore, the condition of the fourth lumbar vertebra as shown by the pictures does not present physical disability subsequent to June 1, 1930.

The experts for the defendant based their conclusions almost, if not entirely, upon the X-ray pictures, and the fact that he showed a definite evidence of limitation of motion, which involved the muscles of the back. Upon the question of limitation of motion, the evidence of the experts is in direct conflict. In such a case, the court obviously cannot accept both of the conflicting versions of expert medical testimony. Such testimony must be considered in connection with all the other evidence in the case, as an aid to the court in arriving at a just determination. *Christoffersen v. Weir*, 110 Neb. 390. The better view of the evidence in this case is that the defendant,

at the time of the trial, had no disability as a result of the accident in 1929. In reaching this conclusion, we are impressed with the fact that in 1926 defendant received compensation for 25 per cent. permanent disability based upon almost identical symptoms, and that thereafter he did the hardest kind of labor; that, if there is any disability shown by the X-ray, it was present at that time and has already been compensated.

The judgment of the trial court is reversed and the case dismissed.

REVERSED AND DISMISSED.

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AGNES WALDEN, APPELLANT, V. ARCHIE WALDEN, APPELLEE.

FILED OCTOBER 9, 1931. No. 27745.

**Case Followed.** The question at issue in this case is determined by the decision of this court in *Collins v. Hoag & Rollins, Inc.*, p. 716, *post*.

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

*Thomas & Vail* and *John Tongue*, for appellant.

*J. H. Grosvenor, Elmer E. Ross* and *Donald F. Sampson, contra.*

*Cranny & Moore, amici curiæ.*

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

PAINE, J.

An action originally brought for separate maintenance was changed to an action for divorce. The defendant denied that he was ever married to the plaintiff.

In a memorandum opinion filed by the trial judge he said: "The real issue herein is: Was there a valid marriage between the plaintiff and defendant? Plaintiff seeks divorce, but concedely there could be no divorce if there were no marriage. The evidence amply sustains a marriage between the parties according to the common law."

And the trial court held, because of the passage of chapter 40, Laws 1923, and particularly with reference to section 42-104, Comp. St. 1929, that the marriage was not solemnized as therein required, and dismissed the plaintiff's action for a divorce and relief.

It appears from the briefs filed in the case that upon the question of the validity of a common-law marriage rests the determination of the case. This court has just held in *Collins v. Hoag & Rollins, Inc., supra,* that a common-law marriage is still valid in Nebraska.

Under the ruling in that case and for the reasons therein set out, the judgment of the district court is reversed and the cause remanded for such further proceedings as may be necessary to determine the issues therein.

REVERSED.

GOSS, C. J., concurs in the result.

ROSE and GOOD, JJ., dissent.

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ELVIRA COLLINS, APPELLEE, V. HOAG & ROLLINS, INC., APPELLANT.

FILED OCTOBER 9, 1931. No. 27906.

1. Marriage: COMMON-LAW MARRIAGE: PROOF. A common-law marriage may be proved by showing the express consent of the parties thereto. It is the holding forth to the world by the manner of daily life, by conduct, demeanor and habits, that the man and woman who live together have agreed to take each other in marriage and to stand in the mutual relation of husband and wife.
2. ———: ———: PRESUMPTION. A man and woman so living together and being so received into society and by their friends and relatives as having and being entitled to that status, the law will, in favor of morality and decency and to the end that their children shall not be bastards, presume that they have been legally married.
3. ———: STATUTORY PROVISION. The clause reading, "and no marriage hereafter contracted shall be recognized as valid," as found in section 42-104, Comp. St. 1929, refers only to marriages for which a license must be procured, and which are required to be solemnized exactly as set out therein.

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

*Dressler & Neely,* for appellant.

*Cranny & Moore* and *O'Sullivan & Southard, contra.*

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

PAINE, J.

Hoag & Rollins, Inc., appellant, was engaged in constructing the Leavenworth street sewer in Omaha. In January, 1930, an employee, Napoleon Collins, fell 60 feet by the breaking of a steel elevator cable, from which accident he died.

The district court held that Elvira Collins, appellee, was his common-law wife and was entitled to compensation at $15 a week for a period of 350 weeks. The appellant appeals from the judgment of the district court.

Among the errors relied upon for reversal are, as follows: That the evidence is insufficient to support the finding of the trial court that the appellee was the common-law wife of the deceased; that the trial court erred in holding section 42-104, Comp. St. 1929, unconstitutional and void for the reason that it contains a provision adding a fifth class of void marriages to the four classes enumerated in section 42-103, Comp. St. 1929, and makes no mention of section 42-103; that the trial court erred in holding that section 42-104, Comp. St. 1929, is unconstitutional and void for the reason that it is contradictory of section 42-114, Comp. St. 1929, and adds a fifth class of void marriages to those mentioned in section 42-103 and makes no mention of section 42-114.

Was the evidence sufficient to support the finding of the trial court that the plaintiff was the common-law wife of the deceased? A large part of the testimony found in the 175 pages of the bill of exceptions is upon this point and we will review it briefly.

The plaintiff testified that Napoleon Collins was her husband, and that he died January 15, 1930, from injuries

sustained while in the employ of Hoag & Rollins, Inc., in digging a sewer at Seventh and Pierce streets. His skull was fractured, his right hip was broken, his leg broken in two places, one arm was broken, and the ball of one eye was cut, and he died two days after the accident at St. Catherine's Hospital. Collins was earning $42 a week as a common laborer at the time of his death. Plaintiff said that they started living together about July 7, 1929. Her answer to question No. 31 was as follows: "Well, Mr. Collins and I had been going together for some time and he was living on the south side and he came to me and told me that he needed a wife and that I needed a husband, that if I would be his wife he would take me for a wife and support me as such in every way that he could and that we should live together as man and wife."

Plaintiff agreed to the plan and Collins moved into her home, and they lived together as husband and wife until his death at 1213½ South Fourteenth street, Omaha. Mr. Collins paid all the expenses of keeping up the house, they slept together, and Collins held plaintiff out and introduced her as his wife. They both belonged to St. John's Baptist church, and Collins always held plaintiff out as his wife to every one at church. At the grocery stores where they traded they got his checks cashed; Collins worked nights and therefore the plaintiff would do the trading and cash the checks herself. Mr. Collins once had an injured hand and plaintiff went with him to Dr. Redfield's office to get his hand dressed. The doctor's secretary filled out a card and asked, "I suppose this is your wife with you?" and Collins answered, "Yes." The plaintiff and Collins went to the Browning Style Shop to buy a coat. Mr. Harris, the manager, asked, "A coat for yourself?" and Collins said, "No, for my wife."

Plaintiff admitted on cross-examination that she was going to marry a Mr. Terry and the marriage license had been obtained, and Collins told her not to do that, he wanted a wife and was a single man and was more able to support her than Terry, who had a family of five children and could hardly support them, and that if she would give

Mr. Terry up and take him he would do a husband's part by her, which he did. Plaintiff paid part of the funeral expenses for Collins and the balance was paid by the Washington Fidelity Company, in which company Collins had a policy of life insurance. The daughter of plaintiff, Marietta, lived with her and Collins during the time they lived together from July until January, when he met his death.

William Howard testified that he lived at 1309 Pierce street and Napoleon and Elvira Collins lived across the alley back of him. Witness had been at their house and Napoleon Collins introduced Elvira to him as his wife. Napoleon ate and slept there and Elvira Collins did all the housework.

Mrs. Ella Golden lived at 1215 South Fourteenth street in the latter part of 1929, and knew Napoleon and Elvira Collins. They lived in the same yard, the house of witness fronting on Fourteenth street and Collins' house fronting on the alley, and she was over there two or three times every day. Witness had heard Napoleon Collins introduce Elvira as his wife. They held themselves out to the world as husband and wife. This witness belonged to the True Holiness church and was asked question No. 721, as follows: "Well, will you tell the court what you said to the Collinses and what they said to you about the proposition of going through the church ceremony?" Answer: "Well, I says, after he told me, he introduced me, he says, 'Come on, Mammy,'—they all call me Mammy—'I want you to meet my wife.' I went on in the house, and I didn't think for one minute that he had moved, and I looked, I seen his things all there. I says, 'You are?' I says, 'That is wonderful.' He says, 'Meet my wife, Mrs. Collins.' And I says, 'Sure enough?' And she says, 'Yes, we are married; we just talked it over this morning; we are married now.' I says, 'That is wonderful.' And so they went on, and everybody thought he was introducing his wife, Mrs. Collins. I says to him—it was along, oh, I guess, went right after Thanksgiving, pretty close to Christmas, I says to him, 'Wouldn't it be nice for a Christmas present to go through a church ceremony,' I says, 'then you would be

right up to date with the church.' He says, 'Why, it isn't necessary; we are already married and we don't need to do that.' I said, 'That would make you be up with the church,' I says, 'You see, I am married.' He says, 'I am married, too.' I says, 'But I went through the performance.' He says, 'Maybe we will some time, I don't know for sure, but we are already married,' he says, 'That is my wife; I can't do any more for her after I go through that ceremony than I can now.' So we just let it go at that. He said he was already married and wasn't no need of going through."

Dewey A. Campbell lives at 1433 North Twenty-first street, Omaha, and is in the retail coal business at that address. He first met Napoleon Collins some time in July, 1929, at a social affair at the St. John's Baptist church, and Mrs. Collins introduced him as her husband. Witness was at their home a number of times after that. On December 29, 1929, he was there for dinner and Collins told him about the wonderful wife he had and how much he thought of her. He referred to Mrs. Elvira Collins. Collins came out to his church at 2608 Franklin street and he heard him introduce her as his wife to the pastor, Rev. Campbell, saying, "Mr. Campbell, meet my wife, Mrs. Collins," and also heard him introduce her to a couple of the deacons and quite a few others as his wife.

1, 2. The district judge held that the evidence was sufficient to constitute common-law marriage, and this court agrees with him.

The Russell Sage Foundation published a book entitled, "Marriage Laws and Decisions of the United States," and in the introduction to this book it sets out that no solemnization by the church was necessary to the validity of a marriage according to the common law. If the parties agreed in words of the present tense to become husband and wife a marriage was thereby constituted and was valid for many purposes. If the parties agreed to become husband and wife in the future and followed this by cohabitation a marriage was created. Ecclesiastical courts in Europe could compel such parties so married

to go through a marriage ceremony by a priest, but this procedure has never been a part of the American law. In more than half of the states such marriages have been accepted by the courts as valid, in the absence of a statute specifically declaring the nullity of such marriages.

The Russel Sage Foundation also published a book in 1929 entitled, "Marriage and the State," and from the introduction to this book we find that the term "marriage license" had its origin in early English ecclesiastical practice, in accordance with which a bishop's license released candidates for marriage from the obligation of publishing their bans in church, but gradually the regulation of such matters came to be transferred from ecclesiastical courts to the state itself.

In many continental countries the religious ceremony is supplementary to the obligatory civil ceremony, and this continues to this day. In England and the United States the device was adopted of having a marriage license obtainable under the civil law. However, in England such license is not required for a marriage solemnized under the auspices of the church of England. In four New England states the license is called a certificate of intention, and authorizes the marriage ceremony.

"A common-law marriage is a marriage not solemnized in any particular form but based on a mutual agreement, between persons legally capable of making a marriage contract, to enter into the relation of husband and wife. The state is given no part in this arrangement, has no record of it, and no opportunity beforehand to pass upon the qualifications of the parties to it." Marriage and the State, p. 26, note.

Common-law marriages "are unlicensed, unrecorded, and uncounted, but recognized as legal." Marriage and the State, p. 29.

In the Nebraska case of *Olson v. Peterson*, 33 Neb. 358, the prosecutrix in a bastardy case testified that she was not married and the case was reversed because the defendant was not allowed to cross-examine her in regard to a common-law marriage with another man. However,

Judge Marshall gave two instructions touching common-law marriage which are in point. The last half of the sixth instruction reads as follows: "Marriage, as distinguished from the agreement to marry, and from the act of becoming married, is the civil status, condition, or relation of one man and one woman united in law for life, for the discharge to each other, and the community, of the duties legally incumbent on those whose association is founded on the distinction of sex. Marriage does not mean a mere temporary agreement to dwell together for a time for the gratification of sexual or lustful desires, but it is essential that the contract be entered into with a view to its continuance through life, and then be followed by celebration and cohabitation, with the apparent object of continuing such cohabitation through life."

And the seventh instruction reads: "The jury are instructed that if from the evidence in this case they believe that the plaintiff, Ella Peterson, and one Andrew Anderson in good faith entered into a contract to become husband and wife, and in good faith and in pursuance of that contract cohabited, that is, dwelt together as husband and wife, and so held themselves out to those with whom they associated, and that they, in good faith to each other and the community, entered upon the discharge of the duties legally incumbent on those holding to each other the relation of husband and wife, then the jury should find that the plaintiff is a married woman. On the other hand, if the jury from the evidence believe that the plaintiff and said Andrew Anderson merely lived together without any contract to marry, or for the mere purpose of gratifying their sexual desires, or for any temporary purpose, then, although they may have slept together, and called each other husband and wife, such living together, standing alone, would not in any legal sense constitute a marriage, and in that event she would not be considered a married woman."

Judge Norval of this court, in passing on the correctness of these two instructions, said: "These instructions were rightfully given, as in our opinion they fairly express the law governing the facts and are applicable to the testimony in the case."

Other Nebraska cases holding to the same effect are *Gibson v. Gibson,* 24 Neb. 394; *Haggin v. Haggin,* 35 Neb. 375.

In *University of Michigan v. McGuckin,* 64 Neb. 300, where the parties first lived together while each had a spouse living, but after divorces were obtained lived together for many years, and raised a family of five children, our court held that an express verbal agreement was not necessary in all cases, but that such consent might be expressed by conduct as effectively as by words.

This decision was in line with the generally accepted rule of the authorities to the effect that, if the parties desire marriage and do all they can to render their union matrimonial, their continuance thereof after a disability is removed will in law make them husband and wife from the moment that such disability no longer exists. This often occurs when parties living in common-law marriage in a jurisdiction where such marriages are not recognized remove to a state where such a marriage is recognized as legal and continue to live as before. 18 R. C. L. 436, sec. 64.

In *Coad v. Coad,* 87 Neb. 290, it was disclosed that the defendant furnished money for household expenses for plaintiff and her mother, and while the parties lived together as man and wife they agreed to keep their common-law marriage a secret. The district court dismissed the case, but this court granted a divorce, basing it largely upon a number of letters written by the defendant, it being held that they were the letters of a husband to a wife, rather than that of a libertine to a mistress.

It has been held repeatedly that secrecy, unexplained, tends to negative common-law marriage, yet it is not essentially fatal to the claim. *Hulett v. Carey,* 66 Minn. 327, 61 Am. St. Rep. 419, 34 L. R. A. 384.

"Where the facts show that the mutual intention of a man and woman was to consummate marriage, and that they cohabited as man and wife, holding themselves out to the public and to neighbors as such at all times, a common-law marriage is established." *Smith v. Blunt,* 84 Okla. 225.

This court has by many decisions firmly established the

validity of common-law marriages in Nebraska. Not that this court has ever encouraged such marriages, but to the end that innocent children born in such wedlock should not be stamped as bastards, but should be legitimate.

In *Reynoldson v. Reynoldson,* 96 Neb. 270, Charles Reynoldson began an action for divorce in Boone county against his wife, Vivian, on the ground that when she married him she was the common-law wife of James S. Boyer. Evidence disclosed that while in jail at McCook she and Boyer entered into a marriage contract and afterwards occupied the same cell and afterwards lived together in Kearney, Lexington and Gothenburg. This court found that she was not competent to enter into the marriage relation with Reynoldson as she was the common-law wife of Boyer at the time, and held: "The contract requisite to the creation of the marriage relation need not be expressed in any special manner, or by any prescribed form of words, but may be sufficiently evidenced by any clear and unambiguous language or conduct."

In *Bailey v. State,* 36 Neb. 808, the parties lived together from 1866 to 1887, when he deserted her and lived in adultery with another woman, and while the jury found him guilty, this court reversed the judgment and sentence of the lower court. The second paragraph of the syllabus, which has been quoted many times, reads as follows: "Marriage is a civil contract requiring in all cases for its validity only the consent of parties capable of contracting. The fact of marriage may be proved by the testimony of one of the parties."

This decision was followed by *Eaton v. Eaton,* 66 Neb. 676, the fourth paragraph of the syllabus reading: "In this state the only essential of a valid marriage is the free consent of competent parties to live together in the marriage relation."

Such decisions appear to have read into our law the word "only" following the words "to which" in the following section of our present law, to wit: "In law, marriage is considered a civil contract, to which the consent of the parties capable of contracting is essential." Comp. St. 1929, sec. 42-101.

Section 42-103, Comp. St. 1929, reads as follows: "Marriages are void: First. When one party is a white person and the other is possessed of one-eighth or more negro, Japanese or Chinese blood; Second. When either party has a husband or wife living at the time of marriage; Third. When either party is insane or an idiot at the time of marriage. The term 'idiot' shall include all persons who from whatever cause are mentally incompetent to enter into the marriage relation. Fourth. When the parties stand in relation to each other of parents and children, grandparents and grandchildren, brother and sister of half as well as whole blood, first cousins when of whole blood, uncle and niece, aunt and nephew; and this subdivision extends to illegitimate as well as legitimate children and relatives."

A common-law marriage may be proved by showing the express consent of the parties thereto. It is the holding forth to the world by the manner of daily life, by conduct, demeanor and habits, that the man and woman who live together have agreed to take each other in marriage and to stand in the mutual relation of husband and wife.

A man and woman so living together and being so received into society and by their friends and relatives as having and being entitled to that status, the law will, in favor of morality and decency and to the end that their children shall not be bastards, presume that they have been legally married. 18 R. C. L. 428, sec. 57.

3. In examining the amendments as found in chapter 40, Laws 1923, we have been aided by a certified copy of Senate File 92 as originally introduced, and in this the secretary of state shows that the section which is now section 42-104, Comp. St. 1929, had an additional sentence after the word "marriages" in the ninth line thereof, which was, "Common-law marriages hereafter contracted shall be null and void," but before this bill passed the legislature this sentence was deleted. It was therefore clearly the intention of the legislature not to make common-law marriages null and void by the amendments of 1923, or it would have left in the line which was in the original

bill and would have clearly carried out that intention.

The amendments as found in chapter 40, Laws 1923, in our opinion, were for the purpose of strengthening the laws relating to solemnization of marriages, and the clause which has been referred to in the argument and briefs as found in section 42-104, Comp. St. 1929, reading as follows, "and no marriage hereafter contracted shall be recognized as valid unless such license has been previously obtained, and unless such marriage is solemnized by a person authorized by law to solemnize marriages," clearly refers to marriages which are to be so solemnized, and if we imply the word "such" after the first word "no" above set out, and would understand the legislature to mean "no such marriage," in our opinion this would clearly show the purpose of the amendments. If this was not true it would make void section 42-114, Comp. St. 1929, which has provided since 1913 that want of jurisdiction or lack of authority in a justice or minister shall not make a marriage void. It would also affect the validity of section 42-115, Comp. St. 1929, providing that a marriage according to the customs of any religious society, duly recorded in the minutes or book of such society, shall upon being transmitted to the county judge make such marriage legal. And it would in the third place make section 42-101, Comp. St. 1929, meaningless, and also set aside the decisions of our courts thereunder holding that marriage is a civil contract to which only the consent of the parties capable of contracting thereto is essential.

The new act of 1923 did not set out these sections nor amend them nor repeal them, and therefore in our opinion the amendments of 1923 provided definite and positive requirements for marriages which were to be solemnized in accordance therewith, but did not affect other forms of marriage as herein set out, and as the legislature struck out the line which was found in the original bill introduced in reference to common-law marriages, it is our holding that such marriages are legal if they meet the requirements of section 42-102, Comp. St. 1929, and the many decisions of this court relating thereto.

We have cited to us in this connection 36 Cyc. 1144, giving the rules for the construction of statutes, and quoting: "7. * * * Every statute is to be construed with reference to the general system of laws of which it forms a part, and must therefore be interpreted in the light of the customary or unwritten law, of other statutes on the same subject, and of the decisions of the courts."

Also 36 Cyc. 1146: "d. * * * All statutes are presumed to be enacted by the legislature with full knowledge of the existing condition of the law and with reference to it. They are therefore to be construed as a part of the general and uniform system of jurisprudence, and their meaning and effect is to be determined in connection, not only with the common law and the Constitution, but also in connection with other statutes on the same subject. * * * Where two statutes are in apparent conflict, they should be so construed, if reasonably possible, as to allow both to stand and to give force and effect to each."

In accordance with the above, the judgment of the district court for Douglas county is

AFFIRMED.

GOSS, C. J., concurs in the result.

ROSE and GOOD, JJ., dissent.

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GEORGE HELIN, APPELLEE, V. OSCAR J. EGGER, APPELLANT.

FILED OCTOBER 16, 1931. No. 27842.

**Damages.** In an action for damages to an automobile, where the automobile cannot be placed in substantially as good condition as it was before the injury, the measure of damages is the difference between its reasonable market value immediately before and immediately after the accident.

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

*George Healey*, for appellant.

*L. R. Doyle, contra.*

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

PER CURIAM.

This is an action in negligence to collect for damages to a comparatively new Ford delivery truck belonging to the appellee, which was injured in a collision with a Graham 1927 ton truck filled with a load of about 40 filled milk cans. The collision occurred about 11:00 a. m., November 9, 1929, in Lincoln, on a rainy day when the pavement was slippery, at the intersection of Sixteenth and Sumner streets, neither of which was an arterial highway.

At the trial the jury returned a verdict in favor of the appellee for the sum of $448. Objections are presented to instruction No. 6, given by the trial court upon the measure of damages, which reads as follows:

"If you find from the evidence in favor of the plaintiff, you will arrive at the amount of his recovery by subtracting the fair market value of his truck immediately after the accident from the fair market value of the same immediately before the accident, together with damage for the loss of use of his truck. And if you find for the defendant on his cross-petition for damage to his truck, you should arrive at the amount of his damage in the same way, that is to say, by subtracting the value of said truck immediately after the accident from the value thereof immediately before. And if the party to whom you grant a recovery, if to either, was guilty of any negligence proximately contributing to the accident, you will decrease his recovery proportionately thereto, as heretofore instructed."

Many cases are cited to this court to show error in this instruction for allowing the jury to return $48 damages for the use of the truck, being the amount of rental paid for the use of another truck for two weeks while this truck was being repaired sufficiently to be used again, but it could not be restored to substantially its original condition, and among the cases cited is the case of *Langham v. Chicago, R. I. & P. R. Co.*, 201 Ia. 897, in which the Iowa court sets out the general rules of law which govern such matters, as follows:

"When the automobile is totally destroyed, the measure of damages is its reasonable market value immediately before its destruction.

"Where the injury to the car can be repaired, so that, when repaired, it will be in as good condition as it was before the injury, then the measure of damages is the reasonable cost of repair plus the reasonable value of the use of the car while being repaired, with ordinary diligence, not exceeding the value of the car before the injury.

"When the car cannot, by repair, be placed in as good condition as it was in before the injury, then the measure of damages is the difference between its reasonable market value immediately before and immediately after the accident."

In the case at bar the damages may be set out as follows: All four wheels were broken, the transmission case was smashed, the body was smashed and broken, the door glass was broken out, and the paint scratched off.

This court holds that in this case under the evidence the car was demolished to that extent that it could not be placed in as good condition as it was before the injury, although by expending the sum of $260 it was put in condition to render some service. The petition alleged, and the evidence sustained the allegation, that the fair and reasonable value of the automobile was $650 before the collision, and that the value of said car after the collision was $250, and the jury found that the difference in value was $400, as alleged in the petition.

As this brings the measure of damages in this case to be governed by the third rule above set out, it does not permit an addition to that amount of $48 for the rent or use of another car. It is therefore directed that if the appellee will file a remittitur of $48 within 30 days the judgment of the lower court will be affirmed, but that in case the remittitur is not so filed the case will be reversed in accordance with this opinion.

AFFIRMED ON CONDITION.

JOSEPH SESTO, APPELLEE, V. CITY OF OMAHA, APPELLANT.

FILED OCTOBER 16, 1931. No. 27853.

1. Appeal: FINDING: CONFLICT OF EVIDENCE. A finding of the trial court in a law action on conflicting evidence has the force of a verdict, and will not be disturbed on appeal.
2. Contracts: CONSTRUCTION BY PARTIES. Where parties, with a knowledge of the terms, have given an ambiguous contract a practical construction by their conduct, the court will ordinarily place the same construction upon it.

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

*John F. Moriarty, Harry B. Fleharty, Thomas J. O'Brien* and *Bernard J. Boyle,* for appellant.

*Paul J. Garrotto, contra.*

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

PER CURIAM.

This is an action brought by one Sesto, a sewer contractor, to recover from the city of Omaha for lumber used to brace the ditch during the period of construction, which was left in the excavation permanently according to the contractor's allegation, under the direction of the city engineer. The city of Omaha appeals from a judgment in favor of the claimant.

One question presented by the case relates solely to a question of fact as to whether or not the city engineer by his authorized representative, the city sewer engineer, ordered the contractor to leave the lumber in the ditch. Upon this question the evidence is in conflict. The finding of the trial court, a jury having been waived, based upon abundantly sufficient evidence to support it, will not be disturbed on appeal.

In the other question presented by the city, it seeks a construction of several paragraphs of the contract. It is seriously and energetically urged that the contract provides that extra work in connection with the construction shall be done, when the engineer especially directs such

work in writing. We are of the opinion that the use of some lumber is anticipated and specific provision made for it in another paragraph. However, this case is determined upon the principle that, where a contract is so ambiguous as to require construction, and the parties, with a knowledge of its terms, themselves have given it a practical construction by their conduct thereunder, such construction is entitled to great weight as a certain indication of their true intent and, although not controlling, courts will generally enforce such construction. *Cady v. Travelers Ins. Co.*, 93 Neb. 634; *Hale v. Sheehan*, 52 Neb. 184; *Jobst v. Hayden Bros.*, 84 Neb. 735; *State v. Board of County Commissioners of Cass County*, 60 Neb. 566. In this case the city recognized that the contractor was entitled to pay for some lumber, although not ordered in writing. In recognition thereof, it paid him for 2,976 feet which Sesto mistakenly thought at the time of payment was for all the lumber, instead of the 29,786.67 feet, stipulated by the parties as having been left in the ditch. In this action he is met for the first time with a refusal to pay because the order was not in writing. The parties had thus placed a practical construction upon the contract, which should be followed by the court.

The finding and judgment of the trial court is

AFFIRMED.

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FRANK HARMER V. STATE OF NEBRASKA.

FILED OCTOBER 16, 1931. No. 27871.

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

*D. W. Livingston* and *W. A. Robertson*, 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.

PER CURIAM.

Frank Harmer was charged with stealing three hogs valued at $60. The information was based on section 28-523, Comp. St. 1929. The jury found defendant guilty. He was sentenced to imprisonment in the penitentiary for an indeterminate period of one to three years.

Before pleading not guilty in the district court, defendant filed a plea in abatement, the essence of which is that the preliminary hearing in the county court did not establish the guilt of the defendant, did not establish probable cause, and that he, through his counsel, was not permitted to make further proof of his innocence by cross-examination of the state's witnesses. The state demurred to this plea and its demurrer was sustained.

The evidence presented on the preliminary hearing was preserved. It was sufficient to show probable cause under section 29-506, Comp. St. 1929. See *Jahnke v. State*, 68 Neb. 154; *State v. Sievers*, 102 Neb. 611. As to the refusal of the magistrate to allow further cross-examination of the state's witnesses, while it would have seemed the fair and proper thing to do, yet the questions indicate that it was not strictly cross-examination on any specific testimony given by the witnesses, but that defendant sought to elicit new and further evidence. In the reception of evidence a committing magistrate is not strictly governed by the technical rules applicable on a final trial. 16 C. J. 325. Moreover, defendant could have made these witnesses his own when it came his turn to present evidence in opposition. He failed to do so. The district court did not err in sustaining the demurrer to the plea in abatement.

In his opening statement to the jury the county attorney stated more than he was able to prove. It was pertinent and he tried to prove it, but it was excluded. The record does not show that he acted in bad faith. This does not constitute prejudicial error. 16 C. J. 889, 890.

The chief question in this case is whether the evidence sustains the verdict and judgment. Jensen and Hunterman, from whom the hogs were alleged to have been stolen, had 100 hogs. They had marked these with two rings in

the nose and a V-shaped cut in the outer middle of the right ear. About June 7, 1927, they counted their hogs and found only 97. They were in the habit of counting them about once a week, but counted them this day because Jensen and a hired man had found in their cornfield, when cultivating corn that day, three envelopes and inclosures addressed to the defendant. These letters had been received in the mails. Two were postmarked June 2, 1927, and one June 3, 1927. Nearby they found the tracks of a man and a hog. They ran these tracks back to their feed lot. Later they went to defendant's farm, about four miles away, and found one of the hogs. The rings had been removed from its nose and the earmark had recently been operated on so as to cut off much of the lower part of the V. Defendant did not claim the hog. There was evidence that this hog was not well received by defendant's hogs and that they treated him as an interloper. The other hogs were not found. Defendant's explanation of the finding of his letters in the cornfield was that he never locked the doors of his house and had discovered, about June 10, that some one had stolen his hat and his coat containing these letters. The circumstances made a case for the jury.

Other errors are asserted by defendant, but we find no prejudicial error in the record. The judgment of the district court is

AFFIRMED.

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WALTER L. GRAHAM, APPELLANT, V. SARAH A. ANDERSON ET AL., APPELLEES.

FILED OCTOBER 16, 1931. No. 27841.

1. Contracts: BUILDING CONTRACT: BREACH: MEASURE OF DAMAGES. Where a building contractor, in violation of his contract, constructs for a stipulated consideration a building which is defective in materials or workmanship, the measure of his recovery in an action against the owner is the agreed price, less the damages resulting from the failure to comply fully with the contract.
2. ———: ———: ———: REMEDIABLE DEFECTS: MEASURE OF DAMAGES. Where defects in a building constructed under a

building contract are remediable without material injury to, or reconstruction of, any substantial portion of the building, the damage which the owner is entitled to recover is the expense of making the work conform to contractual requirements.

3. ———: ———: ———: IRREMEDIABLE DEFECTS: MEASURE OF DAMAGES. Where a contractor's violations of a building contract result in defects which cannot be remedied without reconstruction of, or material injury to, a substantial portion of the building, the measure of the owner's damages is the difference between its value when constructed and what its value would have been if built according to contract.

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

*Sterling F. Mutz* and *Edward C. Fisher*, for appellant.

*John J. Ledwith, H. N. Mattley, George I. Craven* and *J. Jay Marx, contra.*

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

ROSE, J.

This is a suit in equity to foreclose a mechanic's lien. Walter L. Graham, plaintiff, entered into a written contract with Sarah A. Anderson, defendant, to construct for her a dwelling-house on a farm near College View. The contract price for the construction of the completed building according to specifications was $3,250. Defendant agreed to pay $1,625 when the house was sheathed and roofed and $1,625 when completed. The first instalment was paid. Defendant resided in California and sent to her tenants on the farm a draft for $1,625 to pay the last instalment when due. The tenants refused to deliver the draft to plaintiff and he filed a mechanic's lien for $1,625 against the improved premises. Foreclosure of this lien is the relief sought. In the petition plaintiff alleged substantial performance of the contract on his part and failure of defendant to pay the second instalment.

In an answer and a cross-petition defendant alleged in substance that plaintiff, in violation of the contract, failed to complete the house according to specifications and that he also breached his agreement to protect her from liens

for materials and labor. Particular instances in which plaintiff is alleged to have departed from specifications in material respects are pleaded at length in the cross-petition, which contains a prayer for cancelation of plaintiff's lien, for a dismissal of the suit, and for $750 in damages. A reply to the answer and cross-petition of defendant contained a general denial.

R. G. Hart, a subcontractor, pleaded an unsatisfied mechanic's lien for $135.20 and prayed for a foreclosure thereof. The validity of Hart's lien was challenged by a reply to his petition.

Upon a trial of the cause the district court, after having viewed the premises, found that defendant was damaged by plaintiff in the sum of $485 on account of defective materials and unskilful workmanship; that there was due Hart for materials and labor a balance of $91.02; that the sum of these two items, or $576.02, should be deducted from the claim of plaintiff for $1,625, leaving due him a balance of $1,048.98. From a decree foreclosing the lien of plaintiff to the extent of $1,048.98 only, he appealed.

Under the building contract plaintiff constructed a dwelling-house, but the evidence shows conclusively that, in some essential particulars relating to materials and workmanship, he did not comply with specifications. Defendant did not accept the building with its defects or waive full performance on the part of the contractor. In this situation the measure of plaintiff's recovery is the agreed price, less the damages resulting from the failure to fully comply with the contract. See annotations and cases cited in 23 A. L. R. 1435. What measure of damages for defects should be adopted is the controlling question presented by the appeal. There is a generally accepted rule applicable to building contracts that, where defects in materials, construction or workmanship are remediable without materially injuring or reconstructing any substantial portion of the building, the damage which the owner is entitled to recover is the expense of making the work conform to contractual requirements. See 23 A. L. R. 1436; 65 A. L. R. 1298. This rule has been recognized in

*Library Board v. Ohlsen,* 110 Neb. 146. The principle stated is now invoked by plaintiff, who argues that he substantially performed his contract; that the evidence fails to prove that the necessary expense of remedying defects exceeded $185; that consequently the damages allowed by the district court are excessive and erroneous.

There is, however, another generally accepted rule to the effect that, where a contractor's violations of a building contract result in defects which cannot be remedied without reconstruction of, or material injury to, a substantial portion of the building, the measure of the owner's damages is the difference between its value when constructed and what its value would have been if built according to contract. Cases so holding are collected in 23 A. L. R. 1438. This is in harmony with the view expressed in *Lincoln Stone & Supply Co. v. Ludwig,* 94 Neb. 722. There is no conflict between the two lines of decisions. Each rule is enforceable under any state of facts to which it applies.

In the case at bar the building contract required plaintiff to comply with the following specification:

"There is to be a girder consisting of three 2 by 10 spiked together tightly. The girder runs from the front of the house to the rear wall and is supported by three 6 by 6 posts."

A proper deduction from the evidence is that plaintiff, instead of furnishing the girder specified, deliberately used 2 by 8 planks. The girder is a substantial part of the structure. It supports floors and the building itself. To make the defective construction conform to the specific requirement of the contract would require temporary shoring in place of a girder, removal of the defective girder, substitution of a new one and the necessary skilled labor. Such a change would obviously endanger work already completed. Defendant was entitled to performance. Plaintiff was not at liberty to substitute his own judgment for the material specification quoted. The record disclosed other departures from requirements of the contract. The case properly falls within the rule that the measure of the owner's damages is the difference between the value of the

building when constructed and what its value would have been if built according to contract. On this theory of the case the evidence tends to prove more damages than the trial court allowed. Defendant did not appeal, however, and her credits for $485 and for $91.02 will not be disturbed; Hart's lien being free from error.

In the judgment below the costs are taxed to plaintiff and this is challenged as inequitable. The claim of plaintiff was excessive. Sarah A. Anderson, defendant, demanded too much. Both unnecessarily incumbered the record. Each was entitled to substantial relief, which was granted. It seems equitable under the circumstances to require each to pay half the costs in each court and to that extent the judgment below is modified. Otherwise it is sustained.

AFFIRMED EXCEPT AS TO COSTS.

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## IN RE ESTATE OF MONROE BOLTON.
## SARAH S. BOLTON, EXECUTRIX, ET AL., APPELLEES, V. CLARENCE G. BLISS, RECEIVER, ET AL., APPELLANTS.

FILED OCTOBER 16, 1931. No. 27763.

1. **Executors and Administrators.** A contingent claim against an estate, mentioned in section 30-701, Comp. St. 1929, is one where the liability depends upon some future event, which may or may not happen, and which therefore makes it wholly uncertain whether there ever will be a liability. In the case of a contingent claim, the contingency does not relate simply to the amount which may be recovered, but to the uncertainty whether any amount will ever become due.
2. **Appeal: UNAVAILABLE ERRORS.** An appeal from a decision, however erroneous, should not be allowed to prevail, which does not affect the substantial rights of an appellant and will avail him naught.
3. **Executors and Administrators: CONTINGENT CLAIMS: ORDER IMPOUNDING ASSETS: APPEAL.** A receiver of a state bank who has filed a contingent claim against an estate of a deceased stockholder cannot appeal from an order in his favor impounding assets to pay such contingent claim in case same should become absolute.

4. ———: ———: APPEAL. Contingent claims cannot be allowed by the county court before they have become absolute. One who has filed such contingent claim cannot appeal from an order granting him all the relief to which he is entitled under the law.

APPEAL from the district court for Fillmore county: ROBERT M. PROUDFIT, JUDGE. *Affirmed.*

*Waring & Waring,* for appellants.

*C. C. Cartney* and *Perry, Van Pelt & Marti, contra.*

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

PAINE, J.

Contingent claims for possible stockholders' liability in four failed banks were filed in the county court of Fillmore county against the estate of Monroe Bolton. The county court approved the executor's final report, but, because of said contingent claims, directed them to hold property aggregating in value $70,176.33 until further order of the court. From this order the four contingent claimants appealed to the district court and the executors filed a motion to dismiss the appeal. The district court thereupon entered an order finding that no final order had been made by the county court from which the contingent claimants had a right to appeal, and dismissed the appeal. The receivers of the four banks bring the case to this court as appellants. The executrix and the executor are the appellees.

The following facts set out in the pleadings will assist in making the controversy clear. Monroe Bolton, deceased, in his last will, made at Geneva, Nebraska, August 28, 1926, named his wife, Sarah S. Bolton, executrix, and Ernest L. Smith, the husband of his daughter Eva, as executor. In his will he devised certain tracts of real estate to his wife, other real estate to his son Ralph, and still other real estate to his daughter Lora. He gave to each of his three children $5,000 in cash and gave the life estate in the remainder of his property to his wife and at her death it was to pass to his three children.

Monroe Bolton died September 23, 1927, and on October 25, 1927, letters of administration were issued. The inventory disclosed real estate of the approximate value of $25,000, certificates of deposit and shares of stock in corporations of the value of $89,367.94, and notes and accounts to the amount of $21,576.60, but the value of 314 2/3 shares of stock in six state banks in Nebraska was listed as unknown.

The receiver of the Citizens State Bank of Geneva filed a contingent claim against said estate, setting out that the decedent at the time of his death owned 40 shares of the capital stock of said bank and that said estate might at some future time be liable to the receiver of said bank in the sum of $4,000 thereon. The receiver of the Strang State Bank filed a similar contingent claim, based upon 33 shares of stock in that bank, of face value of $3,300, which decedent owned at the time of his death; and the receiver of the State Bank of Minatare filed a similar claim for $9,833.33, based upon 98 1/3 shares of stock which decedent owned in that bank; and the receiver of the State Bank of Nelson filed a contingent claim for $2,333.33, based upon 23 1/3 shares of stock which decedent owned in that bank at the time of his death; making the four contingent claims in said four banks amount to $19,466.66, being based on the ownership by the decedent of 194 2/3 shares of stock in said four banks.

Omitting references to a judgment of $10,000 of the Geneva State Bank allowed upon two notes of $5,000 each, which claim is not involved in this appeal, the final portion of the order entered by the county court upon January 22, 1930, upon the final report and petition for discharge of the executors reads as follows: "It is therefore ordered, adjudged and decreed by the court that said executors be and they are hereby discharged as to all matters except said four contingent claims; * * * that said executors shall continue to furnish bond in the amount of $20,000 until finally and fully discharged. It is further ordered that upon said executors presenting to this court receipts or other proof * * * that the contingent claims

have been satisfied, or that the said contingent claims have been successfully defeated by litigation, said excutors are discharged as to said contingent claims, it being specifically ordered and adjudged that said executors are continued in office for no purpose except * * * to litigate or discharge said contingent claims.

"It is further ordered and decreed that the executors in said estate are hereby directed to hold intact the properties:

| | |
|---|---|
| Magee's Inc. par and actual value | $15,600.00 |
| Union Lumber Company of Ruskin, Nebraska, par and actual value | 9,500.00 |
| M. Bolton Lumber Company, Geneva, Nebraska, actual value | 30,000.00 |
| Balance on deposit Citizens State Bank | 4,608.99 |
| Cash on hand | 10,467.34 |
| Aggregating | $70,176.33 |

and to keep the Bolton Lumber Company yards properly insured.

"It is further ordered, adjudged and decreed that all claims against said estate of whatever nature, other than said four contingent claims above described, * * * are hereby forever barred against said estate; that any party interested in this estate desiring to appeal from any order herein shall give bond within the time required by law in the sum of $500."

It is stated in the briefs that upon January 25, 1930, which was three days after the entry of the order barring all claims except the four contingent claims, the receiver of the Exchange Bank of Ong filed a contingent claim for 100 shares of stock owned therein by the deceased, but such receiver is not an appellant herein. Unfortunately the clerk in making up the transcript did not show the dates of the filing of the instruments.

The receivers of the four banks having contingent claims duly filed appealed to the district court, and at the May, 1930, term thereof, at a session held September 5, 1930, the district court, upon the hearing upon the motion of

the attorneys for the executors to dismiss the appeal, ordered "that unless appellants file pleadings setting forth their claims within fifteen days from this date, said appeal be dismissed; that if appellants file such claims within such time, the appellee have ten days thereafter in which to plead thereto."

At the October, 1930, term of the district court an order was entered reading in part as follows: "This cause came on to be heard upon the motion to vacate the order of dismissal entered by this court on the 5th day of September, 1930, and the court, having heard the arguments of counsel, and being fully advised in the premises, finds that the record shows on its face that no final order was made in the county court of Fillmore county, Nebraska, from which the Citizens State Bank of Geneva, the Strang State Bank, the State Bank of Nelson or the State Bank of Minatare, have a right of appeal, and the said motion to vacate is hereby denied, and the appeal is dismissed."

Appellees insist that appellants did not comply with the law which requires that they file their petitions within 50 days from the rendition of the judgment in the lower court, nor did they plead within the rule day fixed by the district court, and that such court was clearly within its discretionary power in dismissing their appeals, and that the dismissal took place at the May term of court and was not appealed from at that term.

1. Section 30-701, Comp. St. 1929, provides: "If any person shall be liable as security for the deceased, *or have any other contingent claim against his estate* which cannot be proved as a debt, the same may be presented, with the proper proof, to the county court, which, if satisfied that such claim is a legal demand against said estate, may order the executor or administrator to retain in his hands sufficient to pay such contingent claim, when the same shall become absolute."

Section 30-702 provides: "If such contingent claim shall become absolute, and shall be presented to the county court * * * at any time within two years from the time limited for other creditors to present their claims, it may be allowed upon due proof, as in case of other claims."

Section 30-703 provides: "If such contingent claim shall be allowed, * * * the creditors shall be entitled to receive payment to the same extent as other creditors, *if the estate retained by the executor or administrator shall be sufficient for that purpose.*"

Section 30-705 sets out that, when the claim shall be presented within one year from the time when it shall accrue, and the executor shall not have sufficient to pay the whole of said claim, the creditor shall have the right to recover such part as the executor has not assets to pay, against the heirs, devisees, or legatees who shall have received sufficient real or personal property from the estate.

A contingent claim is one that is now wholly uncertain as to whether there will ever be a liability. *Grand Lodge, I. O. O. F., v. Troutman,* 80 Kan. 441.

A contingent claim against an estate may be defined as one where the liability depends upon some future event, which may or may not happen, and which therefore makes it wholly uncertain whether there ever will be a liability. In the case of a contingent claim, the contingency does not relate simply to the amount which may be recovered, but to the uncertainty whether any amount will ever become due. *Franklin v. Parks,* 77 Okla. 280; *Stichter v. Cox,* 52 Neb. 532.

2. Section 30-1601, Comp. St. 1929, allows appeal from the county court to the district court from any final order "by any person against whom any such order, judgment or decree may be made or who may be affected thereby."

The appellees cite *Burlington & M. R. R. Co. v. Martin,* 47 Neb. 56, holding: "A petition in error will be dismissed where it is prosecuted by one who has no interest in the controversy, and against whom no judgment has been entered." Also, *Cowherd v. Kitchen,* 57 Neb. 426, which says in the text: "But these appellants were not prejudiced by the order of discharge, and it is elementary that one cannot appeal from a decision, however erroneous, which does not affect his substantial rights." In *Swallow v. Eureka Mfg. Co.,* 89 Neb. 467, also cited by the appellees, we find this statement: "An examination of the decree

appealed from discloses that no judgment of any kind was rendered against them, and therefore it would seem that there was nothing in the decree from which they could appeal. * * * Therefore it seems clear that no substantial right of any of the remaining appellants is in any way affected by the judgment of which they now complain." In *Sturtevant Co. v. Bohn Sash & Door Co.*, 59 Neb. 82, it is said: "One not prejudiced by a judgment cannot obtain a review thereof."

The order entered is certainly not *against* the appellants, but in their favor, directing the executors to retain some $70,000 worth of property to pay such contingent claims as might possibly become absolute at some future time.

In *In re Estate of Wilson*, 98 Neb. 852, the argument was made that, as notice had been given of final settlement of the estate, the order made at such hearing must be final in all particulars, but this court said that the effect of the order must be determined by the order itself, and, as the administrator was not discharged and further reports would be necessary, held it was not a final adjudication of the accounts of the administrator.

In *In re Estate of Hansen*, 117 Neb. 551, Chief Justice Goss held that an order of the county court approving items of an account will not be regarded as final if it does not at the same time discharge the executor. In the case on trial the order reads: "It being specifically ordered and adjudged that said executors are continued in office for no purpose except * * * to litigate or discharge said contingent claims." Certainly, as to the appellants herein, other reports were to follow, and after these contingent claims were settled, in case they became absolute, other reports would disclose how the remainder of the $70,000 of assets were distributed.

The case of *Hazlett v. Estate of Blakely*, 70 Neb. 613, involved the collection of a stock liability for ten shares of stock by the receiver of the American Bank of Beatrice. No contingent claim was filed in the county court, but in the district court a judgment was entered in an independ-

ent case for $1,000, which matter had been contested in that court by the administratrix, who immediately, without notice to the receiver, procured approval of her final report and her discharge as administratrix in the county court. "It will be observed," said Commissioner Albert, in rendering the opinion in this court, "that a portion of the relief sought by the plaintiff was the vacation of a decree of final settlement and an order discharging the administratrix. But we do not think such relief is essential to the ultimate relief sought, namely, the examination and allowance of the claim against the estate. The law appears to be that the formal discharge contained in the decree on final accounting applies only as to the accounts of the parties up to that period. The trust of an administrator * * * is a continuing one, and a decree of final accounting does not destroy the relation of such officer, but only discharges him from liability for the past."

In *Francisco v. Wingfield*, 161 Mo. 542, it was held that an executrix continued in office and remained clothed with the duties of the office and subject to the control of the probate court until a decree was entered discharging her, as it appeared that when the probate court approved her final settlement the decree expressly provided that the estate should remain open for the purpose of selling the real estate in accordance with the terms of the will. See note, 8 A. L. R. 185.

"Ordinarily a party cannot appeal from a judgment granting him the relief demanded by his pleadings. A wrong reason for a correct conclusion of the trial court is generally immaterial on appeal." *Bragonier v. Stevenson*, 104 Neb. 578.

3. In this case the record before us consists of a transcript of certain pleadings and orders, but no bill of exceptions is attached of any of the evidence which may have been considered by the district judge in ruling upon the case. *In re Estate of Lauderback*, 106 Neb. 461, holds: "In the absence of a bill of exceptions preserving the evidence, this court will presume that the district court correctly determined every issue of fact presented by the pleadings."

The receivers of the four state banks are attempting to appeal from an order of the county court approving a final report filed by the executors. It is strenuously contended by appellees that a party cannot prosecute an appeal from an order when he is not prejudiced thereby. In the same order to which they are objecting it provided that the executorship should be continued for the purpose of handling their four claims when the same became absolute, and which claims cannot in any event exceed $19,466.66, and the county court required a bond of $20,000 to be kept in effect and required property of a fair value of over $70,000 to be impounded to guarantee the payment of whatever claims finally became absolute.

Appellees contend that a party who cannot possibly under the law receive more relief than he secured in the lower court has no right of appeal, and a pertinent inquiry would be: Could the district court make any order more favorable to the appellants than the county court has made? We think not.

In *Cowherd v. Kitchen*, 57 Neb. 426, the last paragraph of the syllabus says: "One cannot prosecute an appeal from an order discharging an executor where he is not prejudiced by the decision."

In 2 Woerner, American Law of Administration (3d ed.) 1052, the author says: "As a general proposition, the liability of a stockholder in an insolvent corporation is not released by his death, and, the necessary legal requirements being observed, his estate is in general liable to the same extent as if he were living. And if the remedy cannot be enforced against an estate, as where liability does not arise until after distribution to legatees or distributees, they are liable to the extent received by them."

*Brownell v. Anderson*, 117 Neb. 652, is quite in point. In that case deceased owned 20 shares of stock in the First Bank of Nickerson, and an order barring all claims was entered six months before the receiver was appointed for the bank, but as soon as he was appointed he filed a contingent claim and asked that the final discharge of the executor be deferred or that he retain from distribution suffi-

cient assets to meet this claim. This contingent claim was filed at the earliest opportunity, but it did not vest the county court with exclusive jurisdiction over the claim, nor did it deprive the district court from proceeding with a suit in equity by a creditor for the benefit of all creditors, or by the receiver, against all the stockholders, and held that it was the duty of the county court to direct the executor to retain in his hands sufficient of the assets to pay the contingent claim. A similar holding is found in *Rogers v. Selleck,* 117 Neb. 569.

4. It is clear that no substantial rights of the appellants are in any way affected by the decision of which they complain.

It is contended that these contingent claims have been *allowed* by the county court. We do not so understand it. Section 30-701, Comp. St. 1929, says: "If any person shall be liable as security for the deceased, or have any other contingent claim against his estate *which cannot be proved as a debt,*" then the county court may order the executor to retain sufficient funds to pay such contingent claims when they shall become absolute. The county court could not at that time allow the claims, but directed everything to be done which could be done for them under the law. The district court could have made no more favorable order and did right in dismissing their attempted appeal.

AFFIRMED.

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NATIONAL COOPERATIVE HAIL ASSOCIATION, APPELLANT, V. DORAN BROTHERS ET AL., APPELLEES.

FILED OCTOBER 23, 1931. No. 27872.

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

*Bernard Stone,* for appellant.

*William P. Nolan, contra.*

Heard before ROSE, GOOD and DAY, JJ., and MESSMORE and NISLEY, District Judges.

PER CURIAM.

This was an action brought to recover upon a note in the sum of $130.20. The defendant filed an answer admitting that they owed the plaintiff $117.20, and by way of counterclaim alleged that they were entitled to recover the sum of $420 upon a hail insurance contract issued by the plaintiff. The trial court entered a default judgment in favor of defendant and against the plaintiff in the sum of $327.80. A motion for new trial was filed on the ground that there were irregularities in the proceedings of the court and a violation by the prevailing party of an agreement with the plaintiff for a continuance. The motion for a new trial was overruled and the plaintiff appeals.

The facts as shown by the bill of exceptions show that there were negotiations pending between the attorney for defendant and the attorney for the plaintiff which had for their purpose a settlement of the controversy. While these negotiations were pending, the case was set for trial. However, the parties agreed that the cause would be continued for various reasons. Subsequent to this agreement, the attorney for defendants on the day set for trial proceeded to take a default judgment against the plaintiff. The facts are not disputed as there is no counter showing to the affidavits filed by the plaintiff. While it is generally true that courts will not enforce the agreements of attorneys or parties made out of court in regard to the trial or postponement of the trial of a cause, nevertheless one party to such an agreement ought not to be permitted to benefit by the violation of it; especially is this true in the case at bar, where it is undisputed that the agreement existed for a continuance. The defendants in this case and their attorney were present in court on the day set, with their witnesses, ready to go to trial. It was brought to the attention of the attorney for the plaintiff, whose office is more than 15 miles away, and he tried to get in touch with the trial judge by telephone, but was informed he was already taking evidence in this case. He left word with the clerk of the court that he was on his way to the court, but upon arrival at 10:40 a. m. he found that a de-

fault judgment had been entered against him and that the court had adjourned and the trial judge had left the county seat.

The appellees rely upon section 20-1148, Comp. St. 1929, which provides that applications for a continuance should be made by a written motion, filed in the proceedings, setting forth the reasons. However, there are situations which may arise in the trial of a cause, such as in the instant case where the parties have agreed to a continuance, although subject to the approval of the court, where the court ought to grant some consideration to the situation of the parties. It appeals to this court as unconscionable that an attorney should make an agreement to continue a case from a certain day and then be permitted to appear in court and take a default against his adversary. The defendants are bound by the agreement of their attorney. *Anderson v. Walsh,* 109 Neb. 759.

In this case, there is the additional circumstance that, while this case was being tried, the attorney for the plaintiff was on his way to court. While it appears from the record that the trial court was justified in proceeding with the trial of the case, because no application for a continuance had been filed, nevertheless, when this matter was presented upon the motion for new trial and it was established that the parties had agreed to a continuance and one party relying upon it had been overreached by the other, overruling the motion for a new trial was an abuse of that sound legal discretion mentioned in section 20-1148, Comp. St. 1929.

The judgment of the district court is reversed and the cause remanded for new trial.

REVERSED.

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HOWARD VERNON, APPELLANT, V. A. W. MILLER, SUPERINTENDENT OF REFORMATORY FOR BOYS, APPELLEE.

FILED OCTOBER 23, 1931. No. 27893.

**Criminal Law:** SENTENCE. A paroled prisoner, whose parole has been revoked, will not be relieved from serving the unexpired term of

his sentence for the reason that, during the parole, he was convicted of a second felony and served his sentence therefor.

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

*J. A. Hayward,* for appellant.

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

Heard before ROSE, GOOD and DAY, JJ., and MESSMORE and NISLEY, District Judges.

PER CURIAM.

This is a habeas corpus proceeding. The petitioner alleged that he was unlawfully deprived of his liberty and unlawfully kept and detained in the state reformatory, and sought his discharge from that institution. Relief was denied by the district court. Petitioner has appealed.

From the record it appears that, on a plea of guilty to the offense of breaking and entering, petitioner was sentenced to the reformatory for a term of from one to ten years. After serving a part of this sentence he was paroled. While on parole he was convicted of the offense of larceny as bailee, and was sentenced to the penitentiary for a term of 18 months. His parole on the first sentence was revoked. The sentence for the second felony has expired. Petitioner was then remanded to the reformatory to complete the unexpired term of his first sentence.

Petitioner contends that the serving of the term in the penitentiary absolves him from liability to serve the unexpired portion of his sentence to the reformatory. The same question was before this court in *Mercer v. Fenton,* 120 Neb. 191. It was there held:

"Where a sentence for a second offense sets the commencement of imprisonment prior to the completion of a prior sentence by a different court, under which the convict is paroled at the time of the commission of the second offense, it is erroneous, and may be corrected by a proper proceeding.

"Such an erroneous sentence, from which error is not

prosecuted, does not nullify a prior sentence by another court for a different crime."

Petitioner's second sentence shcuild have commenced at the expiration of the first sentence. When the second sentence was imposed he was liable to serve the unexpired part of the first, plus the entire term of the second, sentence. It would seem to be immaterial which sentence was first served. The length of penal service would be the same, whether one or the other was first served.

On the authority of *Mercer v. Fenton, supra,* the judgment of the district court is

AFFIRMED.

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SAM MADDEN V. STATE OF NEBRASKA.

FILED OCTOBER 23, 1931. No. 28004.

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

*Halligan, Beatty & Halligan* and *Milton C. Murphy,* for plaintiff in error.

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

Heard before GOSS, C. J., DEAN, EBERLY and PAINE, JJ., and BLACKLEDGE, District Judge.

PER CURIAM.

Sam Madden was convicted and sentenced on a charge of burglary. He assigns numerous errors.

He was charged with breaking and entering the office of an ice and coal company and stealing therefrom $200 on November 16, 1930. There was evidence that on that night the safe of this company was burglarized of $360 in checks and $420 in currency and silver. One of the checks was a Union Pacific check for $182.61, drawn in favor of an engineer. The window of the building had been pried open. The safe had been opened by using a jimmy of some sort, after the combination and door had been reduced to a state where the door could be pried open.

The evidence proves a burglary. Madden argues that it is insufficient to convict him of the crime. One of the state's witnesses testified that the week before Thanksgiving Madden and another called on him at a hospital where he was a patient. They wanted to get the use of his truck. He refused. Later they called again, still wanting the truck. On this latter call, Madden, who was sitting on the bed, showed witness a roll of bills and two checks, one of which witness saw. He testified: "It was a Union Pacific check and was for about $182, I think."

Two iron bars were testified to and were received in evidence. They were found in a hole under the floor in one of the rooms occupied by defendant at the time of the burglary. They were found not long after the burglary and soon after defendant had moved out of the apartment. A witness had tested one of the bars on the window as well as on the safe to see if it could have been used in the burglary. He testified that one of the bars fitted into the dent made in prying open the window; the bar had red marks on it and the window was painted the same color; "The bottom groove on the bar where it is battered corresponds with the bottom one on the inside of the safe door; * * * In between the outer safe door and the inside of the safe the bar mark corresponds, the same width as this bar."

Another witness testified that about a week after the burglary Madden came to her house about 10 o'clock at night and asked admittance, stating he was nearly frozen and had "been hiding out two nights away from them damn cops."

These and other circumstances were sufficient to submit to the jury and to justify the verdict of these triers of the facts. The credibility of all witnesses is for the jury.

Defendant also complains because his witness, a locksmith, was not permitted to answer the question, "Could that safe have been pried open in the first instance with these bars?" The evidence shows the combination was first rendered ineffective to keep the doors bolted and that some bar was then used to pry the doors open. It is evi-

dent the bars could not have pried open the safe "in the first instance" and there was no proof by the state that they had been used until after the doors had been put out of commission save as the bars might be used as levers to open them. Also the defendant's witness had made comparisons of the bars and the marks on the safe and it was for the jury rather than the locksmith witness to reach a conclusion as to whether the bars could have pried open the safe.

It is complained because, in an instruction to the jury that verbal statements or admissions should be received with caution, the court failed to precede the word "caution" with the word "great." The instruction carefully stated the reasons for caution in considering such statements. In all the circumstances of this case, we do not think the failure to use the adjective was prejudicially erroneous.

Various other errors are assigned. We have examined them and do not find that the legal rights of the defendant were prejudiced. The defendant had a fair trial and is concluded by the verdict of the jury. The judgment of the district court is

AFFIRMED.

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WILLIAM SONNEMAN, APPELLEE, V. BURFORD J. ATKINSON, APPELLANT.

FILED OCTOBER 23, 1931. No. 27880.

1. **Husband and Wife:** ALIENATION OF AFFECTIONS. In an action by a husband for damages for alienation of the affections of his wife, the defendant can be held responsible only for that loss of consortium of which his acts were the controlling cause.
2. **Appeal:** INSTRUCTIONS. "Where instructions to the jury are requested and refused, but the instructions given by the court on its own motion had the same effect as those refused, error does not result therefrom." *Payne v. Clark*, 117 Neb. 238.
3. ———. "Argument of counsel based on matters not in evidence will not be reviewed if made in reply to similar argument of adverse counsel." *Nebraska Savings & Exchange Bank v. Brewster*, 59 Neb. 535.

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

*O. E. Bozarth* and *Beeler, Crosby & Baskins,* for appellant.

*George N. Gibbs, William E. Shuman* and *Halligan, Beatty & Halligan, contra.*

Heard before GOSS, C. J., DEAN, EBERLY and PAINE, JJ., and BLACKLEDGE, District Judge.

GOSS, C. J.

Plaintiff sued defendant for damages for alienating the affections of plaintiff's wife. The jury returned a verdict for $20,000. Plaintiff remitted the excess over $15,000 and the court entered judgment for the latter sum. Defendant appealed.

William Sonneman, 23, and Artie Duckworth, 18, were married in North Platte on December 23, 1916. They had two children, a son, born February 24, 1920, and a daughter, born July 5, 1922. Until May 19, 1927, they lived together on rented farms in Lincoln county. In March of that year they had moved to a farm owned by defendant, who had several thousand acres contiguous to the house in which plaintiff and his family lived. He spent much time there looking after his interests. While there he boarded with the Sonnemans. He was married and knew plaintiff and wife were married. There was evidence from which the jury might infer that his attitude toward plaintiff's wife was not entirely Platonic and that it was not repulsive to her. It should be said, however, that both of them deny any wrongdoing, and the wife, particularly, accounted for plaintiff's conclusions by testifying to his unreasonable suspicion of her and his unfounded jealousy of other men. Events occurring later in the season probably had more to do in bringing about the verdict of the jury.

On May 19, 1927, Mrs. Sonneman left for Iowa with her two children to visit her sisters. Her husband bought the tickets and put his family on the train. She had sold her chickens for $27 and he had borrowed $30 from Atkinson

to provide money for the trip. He testified that he kissed her good-bye. She says he tried to kiss her but she dodged him. She did not intend to return to him and says she so advised him before she left. He testified he was willing she should go on the trip; that she had not informed him she did not intend to return and he understood she was to stay only until about harvest time. She remained in Iowa about five weeks and then went to Omaha with her children, where for some weeks, beginning on June 23 or 24, 1927, she and her children lived in a so-called "apartment" at 212 North 25th street. They occupied two rooms in a story and basement duplex house of eight rooms, owned by one Altman, who lived in the other duplex and conducted a grocery store nearby. The furniture had belonged to a Mrs. Atherton who was a lessee of the duplex. The sale of the furniture for $250 was negotiated on June 23, 1927, by a real estate broker to one Buckley, who came to the office of the broker in company with the defendant and with plaintiff's wife, who was introduced as Mrs. Duckworth. Buckley lived in Omaha and had been a long-time friend of defendant. He died before the trial and his testimony does not appear. About September 28, 1927, when the house was given up by the parties involved in this action, the furniture was sold and conveyed for a consideration of $200, as shown by a written agreement between Artie Duckworth, described as the owner, and her purchaser. While plaintiff's wife and children occupied rooms at this place, she was known to the other tenants as their landlady. The rent for the whole house was paid by her and the three other occupants of apartments or rooms paid their rent to her. At the beginning and through much of the time while plaintiff's wife lived there in the summer and early fall of 1927, defendant lived there. At the outset the narrowness of the world was exemplified by the discovery that a man and wife who had lived in North Platte occupied one of the apartments. The man had long known defendant, who, meeting him in the house and being recognized, informed him the young woman was his daughter, whose husband was of no account, and he had

bought the place for her, so that he could stay there when he came down to sell his cattle. As soon as this came to her attention, Mrs. Sonneman stated she was Mrs. Duckworth and as such she was known about the place. Witnesses testified to acts of affection between the two while at this place. Plaintiff did not know his wife and children had left Iowa and had gone to Omaha. The facts that both were legally married to other spouses, that they were not father and daughter and were not related at all, that they were surreptitious in their plan of living, and all the circumstances not necessary or desirable to relate here, sufficiently justified the conclusion of the jury that the defendant had designedly alienated the affections of plaintiff's wife. The jury being the triers of fact, we cannot disturb the judgment unless prejudicial error occurred in the trial court.

The court admitted in evidence a decree of divorce, dated December 15, 1928, in a suit between Artie Sonneman and William Sonneman, for the purpose only, as he stated, of showing that the parties were married and are now divorced. See the proviso making such a decree competent evidence. Comp. St. 1929, sec. 20-1203.

The first alleged error by the court is that he failed to give an instruction requested by defendant on the subject of mitigation of damages. It was to the effect that any unhappiness between the plaintiff and his wife, not induced by defendant, should be considered in mitigation or in reducing the amount of damages. There was a paragraph of the tendered request telling the jury what evidence would be received in such a case. It had been followed in receiving the evidence but was not proper in an instruction. The court did not err in refusing to incorporate that mere rule of evidence in an instruction to the jury. The court in his own instructions to the jury clearly told them in various forms that the defendant could be held liable in damages only where his acts were the controlling cause of the plaintiff's loss of the consortium of his wife; that if such loss was brought about either by the acts of plaintiff or by the voluntary act of the wife and

in either case without the occurrence of conduct on the part of defendant designed to cause such loss, then the acts of the defendant could not be the controlling cause; and that the defendant can be held responsible only for that loss of consortium of which his acts were the controlling cause. *Dunbier v. Mengedoht,* 119 Neb. 706. In another instruction, consortium was defined, and in another, stating the damages if the jury found for the plaintiff, the jury were carefully limited to such damages as they found from the evidence would fairly compensate plaintiff for that loss of consortium of which the acts or words of defendant were the controlling cause. They were warned not to allow any damages by way of punishment.

"Where instructions to the jury are requested and refused, but the instructions given by the court on its own motion had the same effect as those refused, error does not result therefrom." *Payne v. Clark,* 117 Neb. 238.

We are of the opinion that the instructions as given by the court embodied the principles applicable to the issues and the evidence received as to damages, including any mitigation thereof by reason of things not induced by defendant.

Appellant assigns errors because other instructions were requested and refused and because of instructions given by the court on its own motion. The issues of fact and of law were simple and were minor compared with the feeling evidently apparent on the trial, as often happens in cases of this character. The court appears to have allowed all admissible evidence to be introduced on both sides and to have instructed the jury fairly and fully on the real issues. Without discussing these assignments at length, as would be necessary to reach the conclusions at which we have arrived, we content ourselves by saying that they present no prejudicial error.

The jury were charged with misconduct, but it does not appear in what way it prejudiced the defendant. Counsel for plaintiff are also charged with misconduct in respect of their arguments to the jury. Both parties had able, vigorous and apparently zealous advocates. In the tempera-

ture reached near the climax of the trial they went about as far as permissible. The court seems to have held them as nearly to the proper standards of conduct as could have been done in the circumstances. The record of the argument indicates that he treated them impartially, and we do not see that defendant was prejudiced by, or is in a position to complain of, what occurred in the argument to the jury.

It appears from a ruling of the trial court that much of the complaint arises from the fact that the objectionable remarks were evidently made in answer to the argument of the complaining party who was guilty of the first offense in that regard. "Argument of counsel based on matters not in evidence will not be reviewed if made in reply to similar argument of adverse counsel." *Nebraska Savings & Exchange Bank v. Brewster,* 59 Neb. 535. See *Stratton v. Dole,* 45 Neb. 472.

Appellant argues that the judgment is excessive, and cites *Phelps v. Bergers,* 92 Neb. 851, in which the trial court reduced a verdict of $16,666.67 to $10,000, and this court reversed the $10,000 judgment because it was not supported by the evidence. The facts are materially different. While the judgment in the case at bar is large, yet the jury, believing the evidence on behalf of plaintiff, were justified in assessing the damages at a very substantial sum. We will not say that the judgment is excessive in the circumstances found by the jury to be true.

The judgment of the district court is

AFFIRMED.

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## HERBERT H. COCKERAM V. STATE OF NEBRASKA.

FILED OCTOBER 23, 1931. No. 28038.

1. **Criminal Law:** CONTINUANCE. In a criminal prosecution a motion for a continuance is addressed to the sound discretion of the trial court, and the ruling thereon is not reversible on review, unless the record discloses an abuse of such discretion.
2. ———: VERDICT: EVIDENCE OF ACCOMPLICE. "A conviction may rest on the uncorroborated evidence of an accomplice, when, con-

sidered with all the testimony, it satisfies the jury beyond a reasonable doubt of the guilt of the accused." *Lamb v. State*, 40 Neb. 312.

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

*Bartos, Bartos & Placek* and *E. J. Steinacher*, for plaintiff in error.

*C. A. Sorensen, Attorney General*, and *Homer L. Kyle, 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 Fillmore county, Herbert H. Cockeram, defendant, was convicted of feloniously breaking and entering a store building owned by W. R. Dorrance at Fairmont. For that felony he was sentenced to serve a term of five years in the penitentiary. As plaintiff in error defendant presents for review the record of his conviction.

It is first contended that the trial court erred to the prejudice of defendant in overruling a motion by him for a continuance. Under this head he insists he was forced into the trial without sufficient time to prepare for his defense or to procure the attendance of material witnesses. The record does not affirmatively show prejudicial error in these respects. The attorney for defendant at the preliminary examination conducted the defense at the trial in the district court and was acquainted in advance with the accusation and with the nature of the state's evidence. The defense was ably presented and there was testimony on every feature of it. There were affidavits in support of the motion for a continuance but they are not in the bill of exceptions and consequently cannot be considered on review. At the request of defendant a subpœna for the absent persons whose testimony he desired was issued, but the return of the sheriff shows they were not found after diligent search. Thereafter there is nothing to show they

could have been found after further delay and search. The motion was addressed to the sound discretion of the trial court, and the ruling thereon is not reversible on review, unless the record discloses an abuse of such discretion. *Ringer v. State*, 114 Neb. 404. A critical examination of the entire record fails to show an abuse of discretion in this respect. The assignment of error is therefore overruled.

It is earnestly insisted that the evidence is insufficient to support the verdict. Evidence of guilt consists largely of the testimony of two accomplices who testified that defendant opened the Dorrance store during the night of December 15, 1930, that they entered with him, that he carried off money, and that all took merchandise. The two accomplices testified also to a previous plan and to an intent of all three to commit the burglary and gave details of the felonious acts committed pursuant thereto. Dorrance testified without contradiction to facts showing that a burglary was committed at the time and place charged in the information. If the accomplices told the truth defendant is guilty, though he contradicted them in every material respect, testified he was at home in bed at the time of the burglary, and was corroborated in his alibi by the members of his family and by another witness. The accomplices testified also that defendant entered the store by unlocking with a key the south front door. Dorrance testified in effect that on leaving the store at night he locked that door from the inside, left the key in the lock and went out at another door. From this defendant infers that it was physically impossible, while the key was in the lock on the inside, to turn the bolt with a key on the outside. Dorrance explained, however, that the south door in front was not always locked by him. The jury were at liberty to find that in this respect he testified to his custom. The credibility of the witnesses was a question for the jury, and they believed the story of the accomplices, which is not incredible or unbelievable or physically impossible. A critical examination of the record from every standpoint results in the conclusion that the evidence is sufficient to sustain the verdict.

The giving and refusing of instructions relating to the testimony of an accomplice are criticized but do not contain error prejudicial to defendant. All assignments of error have been examined without finding a substantial reason for reversing the judgment below.

AFFIRMED.

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BANK OF DAKOTA COUNTY, APPELLANT, V. LOUIS PEDERSEN, APPELLEE.

FILED OCTOBER 23, 1931. No. 27874.

1. **Set-Off.** In an action by a bank to recover on a promissory note, where the bank was under the control of the department of trade and commerce but was not then in the hands of a receiver, the maker of the note is entitled to have the amount of his deposit in such bank allowed as a payment against the note.
2. ———. A defendant is not entitled to have a certificate of deposit set off against the amount of a promissory note where such certificate of deposit was purchased by the defendant after the institution of an action by a bank to recover on the note.

APPEAL from the district court for Dakota county: MARK J. RYAN, JUDGE. *Affirmed in part, and in part reversed and remanded, with directions.*

*Sidney T. Frum*, for appellant.

*George W. Leamer, contra.*

Heard before GOSS, C. J., DEAN, EBERLY and PAINE, JJ., and BLACKLEDGE, District Judge.

DEAN, J.

This action was begun by the Bank of Dakota County to recover $2,000 on a promissory note executed in favor of the bank on January 28, 1928, by Louis Pedersen, the defendant herein. The note in suit bears interest at the rate of 8 per cent. per annum until the due date, namely, July 28, 1928, and 10 per cent. per annum thereafter until paid. The defendant admitted the execution of the note, but he pleaded that on or about April 1, 1928, he had on deposit in the bank $500 which the plaintiff refused to pay over to him on his demand therefor. Thereupon the

defendant prayed that the $500 be allowed as a set-off against the note in question. And the defendant also alleged that on October 31, 1928, he purchased a $2,000 certificate of deposit from his father-in-law, Hans Andersen, and the last above named sum should also be allowed as a payment on the note. The bank in its reply alleged that the $2,000 certificate of deposit was not sold to the defendant for a valuable consideration, and that such certificate was indorsed, "if ever," during a period in which the bank was under the control of the guaranty fund commission, and that it would be unfair to other creditors of the bank to permit a set-off to the defendant. The court, however, found against the plaintiff bank and decreed that the amount of the defendant's deposit and also his certificate of deposit should be allowed as a set-off against the note. The plaintiff bank has appealed.

April 17, 1928, the bank was taken over by the guaranty fund commission and operated as a going concern, and this action was begun October 12, 1928, to recover on the note in suit. A receiver was appointed June 4, 1929, to take charge of the bank. The case was taken under advisement by the court February 20, 1929, and a decree was entered herein on October 20, 1930. It is to be noted, however, that the action was begun before the appointment of the receiver. We have held: "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. See *Morton v. State,* 120 Neb. 575. And in an action by the bank to recover on the promissory note in suit, where the bank was under the control of the department of trade and commerce but was not then in the hands of a receiver, the defendant is entitled to have the amount of his deposit in the bank allowed as a payment against the note.

In respect of the certificate of deposit, however, it is to be noted that the action herein was commenced October 12, 1928, and the certificate of deposit was not purchased

by the defendant until October 31, 1928, or 19 days after the action was begun. We have held to the proposition that: "A claim on the part of a defendant, which he will be entitled to set off against the claim of a plaintiff against him, must be one upon which he could, at the date of the commencement of the suit, have maintained an action on his part against the plaintiff." *Simpson v. Jennings*, 15 Neb. 671; *Bank of Crab Orchard v. Myers*, 120 Neb. 84. And we have likewise held: "In the absence of equitable considerations, a defendant can only plead as a set-off a claim or judgment upon which, at the commencement of the action, he might have maintained an independent suit against the plaintiff." *Spencer v. Johnston*, 58 Neb. 44; *Armstrong v. Marr*, 120 Neb. 182. To substantially the same effect are *Tessier v. Englehart & Co.*, 18 Neb. 167; *Wilbur v. Jeep*, 37 Neb. 604; *Shabata v. Johnston*, 53 Neb. 12; *Gurske v. Kelpin*, 61 Neb. 517; and *Citizens State Bank v. Worden*, 95 Neb. 53.

We conclude that the defendant is not entitled to have the amount of his certificate of deposit set off against the amount of the promissory note where such certificate of deposit was purchased by the defendant after the institution of the present action by the bank to recover on the note.

The judgment of the district court is affirmed as to the allowance of the $500 deposit as a set-off against the promissory note, and reversed as to the allowance of the $2,000 certificate of deposit, with directions to enter judgment accordingly.

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

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JAMES P. NELSON, APPELLEE, V. SERVICE OIL COMPANY ET AL., APPELLANTS.

FILED OCTOBER 23, 1931. No. 28002.

1. **Master and Servant: WORKMEN'S COMPENSATION LAW: COMPENSATION.** In an action under the workmen's compensation act, the evidence examined and *held* to sustain the findings of the

compensation commissioner and the district court that the plaintiff herein incurred an injury to his head in the course of his employment and that he is entitled to compensation pursuant to the provisions of the workmen's compensation act.

2. ———: ———: LIMITATION OF COMPENSATION. A workman may receive, concurrently, compensation for two or more injuries arising out of and in the course of his employment, but the combined concurrent weekly payments, however, may not exceed $15 a week.

APPEAL from the district court for Franklin county: J. W. JAMES, JUDGE. *Affirmed as modified.*

*Prince & Prince,* for appellants.

*Goldman & Corenman, contra.*
*contra.*

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

DEAN, J.

This action was brought pursuant to the provisions of the workmen's compensation act. From an adverse finding made by the compensation commissioner against the defendants, namely, the Service Oil Company and the United States Fidelity & Guaranty Company, they appealed to the district court for Franklin county. The finding of the commissioner was there affirmed, with directions that the defendants pay over to James P. Nelson, the plaintiff, $10 a week beginning May 7, 1930, but not to exceed 300 weeks from October 27, 1928, for personal injuries sustained by him while in the employ of the Service Oil Company, and also $200 as attorney's fees. The defendants have appealed.

The record discloses that the plaintiff had been in the employ of the Service Oil Company for a period of five years as an oil truck driver. His average earnings approximated $130 a month. In respect of the merits the plaintiff testified that on October 27, 1928, there was a slight variation in the price for which the Service Oil Company and other oil companies were selling gasoline, and that he was therefore instructed by his employer to inter-

view the Standard Oil station attendant in respect of its fixed price in the sale of gasoline. In the course of the interview an altercation arose and, in the melee which followed, the plaintiff was struck on the side of his head by the station attendant and rendered unconscious for a brief period. The evidence is established that the plaintiff's injury, so inflicted, was such that it necessitated his absence from his employment for a period of about 10 days immediately thereafter.

From his evidence and that of his attending physician and other examining physicians, it appears that the plaintiff suffers from dizzy and fainting spells as a result of the injury, and that he has been unable to continue in his occupation as a truck driver. It is also established that the plaintiff has been subjected to three spinal punctures by his physician in an effort to relieve his condition, and that he has ever since been under the care of a physician. That the plaintiff's condition is the result of the blow he received is clearly established by the evidence. And the requisite fact appears likewise to be established that the plaintiff's injury was incurred in the course of his employment by the defendant Service Oil Company.

The record shows that the plaintiff received his regular monthly salary from his employer from October 27, 1928, the date of his injury, until March 5, 1929, and that on this latter date he sustained an injury to his right hand. For the injury to his hand, the plaintiff received $15 a week for temporary total disability up to May 6, 1930, when the order awarding him $15 a week for 140 weeks, for 80 per cent. permanent partial loss of the use of his right hand, went into effect. It may be noted, however, that no appeal has been prosecuted from this latter finding by the compensation commissioner. The award for the injury to plaintiff's right hand, in the sum of $15 a week, became operative on the same date that the $10 award for the injury to his head became effective.

In *O'Brien v. Albrecht Co.*, 206 Mich. 101, an award of compensation was reversed where the plaintiff, at the time of a second injury, was receiving compensation from a former employer for partial disability incurred in work-

ing at the same occupation. The court observed that "since the total compensation received by plaintiff for total disability is in excess of the amount authorized by the workmen's compensation act, whether paid by one employer or two," the award should be reversed. And under the apparent strictness of the rule, it has been very generally held that but one sum of money and one period of "compensation" may be awarded an injured employee. *Marhoffer v. Marhoffer,* 220 N. Y. 543; *Hoffman v. Chatham E. L., H. & P. Co.,* 249 N. Y. 433. See, also, *Dunn v. Eaton,* 233 Ky. 699; *Fredenburg v. Empire United Rys.,* 154 N. Y. Supp. 351. In 28 R. C. L. 821, sec. 107, this observation appears: "The compensation to be awarded is not measured by the degree of the injury, but rather by the degree of the incapacity which is caused by the injury."

While the workmen's compensation act contains no specific provision prohibiting the payment of more than one award of compensation during the same period for injuries incurred by an employee on different occasions, the act does limit the amount of compensation for total disability to $15 a week. In the present case, the plaintiff will be receiving $25 a week under the terms of the two awards of compensation. We conclude that it was not within the contemplation of the legislature to provide for more than $15 a week as compensation for temporary total disability in cases similar to the present proceeding. A workman may receive, concurrently, compensation for two or more injuries arising out of and in the course of his employment, but the combined concurrent weekly payments, however, may not exceed $15 a week.

In view of the record before us, the judgment of the district court awarding the plaintiff compensation in the sum of $10 a week, beginning May 7, 1930, but not to exceed 300 weeks from October 27, 1928, must be modified. At the expiration of the award of $15 a week for a period of 140 weeks from May 6, 1930, for the hand injury, the plaintiff is entitled to receive the sum of $10 a week for 82 weeks. The judgment is, however, affirmed in respect of the allowance of the attorney's fees.

AFFIRMED AS MODIFIED.

ANGELO PAPPAS, APPELLANT, V. YANT CONSTRUCTION COMPANY, APPELLEE.

FILED OCTOBER 23, 1931. No. 28028.

1. **Master and Servant:** WORKMEN'S COMPENSATION LAW: COMPENSABLE INJURIES. Workmen's compensation law provides compensation for such injuries only as arise out of and in the course of workmen's employment.
2. ———: ———: ———. The clause, "Personal injuries arising out of and in the course of employment," covers only workmen "while engaged in, on or about the premises where their duties are being performed, or where their service requires their presence as a part of such service at the time of the injury, and during the hours of service as such workmen." Comp. St. 1929, sec. 48-152, subd. c.
3. ———: ———: ———. Under facts outlined in opinion, *held* that the workman's injury did not arise out of and in the course of his employment.

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

*Willis G. Sears* and *Max Fromkin*, for appellant.

*Dressler & Neely, contra.*

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

GOOD, J.

This action arose under the workmen's compensation law. In the trial court, judgment went in favor of defendant, the employer. Plaintiff has appealed.

The record discloses that the defendant was engaged in paving a highway a few miles south of Nebraska City. Its machinery and equipment for mixing the paving material were in Nebraska City. After being mixed, the paving material was hauled in trucks to the place where it was to be used. Defendant employed a number of its own trucks in this undertaking and hired drivers at a stated hourly wage. Defendant also hired a considerable number of men who owned their trucks. These men furnished fuel and oil for and kept their trucks in repair at their own expense. Plaintiff was one of this number. It was

the custom for these independent truck owners to report at the mixing plant at a designated hour in the morning. Those first to arrive were the first to load and drive away. These men were paid 20 cents per load mile for each load hauled.

On the night of June 24, 1930, there was a heavy rainfall which continued until the morning of the 25th. On that morning plaintiff and other truck owners reported at the mixing station, and were informed that because of the muddy roads there would be no hauling that forenoon; that they should report after lunch. After lunch plaintiff reported, but was again informed that on account of the muddy roads there would be no hauling done that day. During the afternoon of that day, plaintiff, while attempting to make a repair upon his own truck, received an injury to his eye, for which he seeks compensation in this action. There is a sharp conflict in the testimony as to whether he received the injury while on the premises of the defendant or at his home about one mile distant. The preponderance of the evidence shows that plaintiff was injured while working on his truck at his home. The trial court held that the relation of master and servant existed between the parties to the action, but that plaintiff's injury did not arise out of and in the course of his employment, and therefore was not compensable.

For reversal of the judgment, plaintiff cites and relies on *Tragas v. Cudahy Packing Co.*, 110 Neb. 329, and *Speas v. Boone County*, 119 Neb. 58, together with decisions from other jurisdictions. In the *Tragas* case the employee was working for the defendant in its plant, where it was necessary for him to use a sharp chisel to clean pans. At the plant of the defendant, at the noon hour, he attempted to sharpen the chisel upon a grindstone and was injured. The chisel and grindstone both belonged to the defendant. The sharpening of the chisel was necessary in connection with the work to be performed in the afternoon. This court held that the injury arose out of and in the course of the employment.

In *Speas v. Boone County, supra,* the workman was en-

gaged in dragging a highway. He had worked during the forenoon, and, being opposite his home when the noon hour arrived, he stopped there for lunch. He unhitched and watered his horses, and, while going into the barn to tie them, he was kicked and received an injury. It was there held by a divided court that his injury arose out of and in the course of his employment.

At first blush, it may seem that the facts in the instant case bring it within the rule announced in these decisions, but a close analysis will, we think, make it apparent that there is a clear distinction between the cited cases and the one under consideration. In each of those cases the employee had worked half of the day on which he was injured, was expecting and intended to continue his work after the lunch hour, and what the workman did, in each case, was necessary for the performance of his afternoon work. The injury in each of those cases occurred at the noon hour and during the day of the employment. In the instant case, plaintiff was not at work for defendant on the day his injury was received. He did nothing upon that day that would entitle him to any wage. True, he had reported for work on the morning of the 25th of June and again after lunch, but each time he was informed that there would be no hauling for the succeeding half day. The weight of the evidence shows that he returned to his home with his truck, and that some time later he was attempting to make the repair when he received the injury of which he complains. During the forenoon of the 25th and during that afternoon the time was defendant's time; he could employ it in any way he saw fit. He might use his truck for any other purpose or for any other employer, had he so desired. He was not under the control or direction of defendant. The work he undertook was for himself and for his own benefit.

In this connection, it is proper to call attention to the fact that the legislature has defined many of the terms used in the workmen's compensation law. Subdivision c, sec. 48-152, Comp. St. 1929, is as follows: "Without otherwise affecting either the meaning or interpretation of the

abridged clause, 'Personal injuries arising out of and in the course of employment,' it is hereby declared: Not to cover workmen except while engaged in, on or about the premises where their duties are being performed, or where their service requires their presence as a part of such service at the time of the injury, and during the hours of service as such workmen."

In the instant case, the injury was not received while plaintiff was engaged in, on or about the premises where his duties were to be performed, or where his service required his presence as a part of such service; nor was his injury received during the hours of such service as such workman. Under the plain wording of the statute, plaintiff's injury cannot be held to have arisen out of and in the course of his employment.

Our attention has been called to decisions from other jurisdictions which seem to hold a contrary view, but, so far as we are informed, or as disclosed by the opinions, there was in existence in those jurisdictions no statute defining the term "arising out of and in the course of employment," as does the law of this state.

The conclusion reached renders unnecessary the discussion of other questions. The judgment of the district court is right and is

AFFIRMED.

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EVA E. COOK, APPELLEE, V. EARL M. MOATS, APPELLANT.

FILED OCTOBER 23, 1931. No. 27904.

1. Appeal: PLEADING: AMENDMENT. It is within the sound discretion of the trial court to permit the pleadings to be amended at the opening of the trial. The opposing party having set out no grounds for a continuance on account thereof, and no prejudice being shown, such ruling did not constitute error.
2. Malpractice: EVIDENCE. In a malpractice suit against an osteopathic physician, testimony may be received of physicians of another school of practice, where the diagnosis in question is recognized as the same in both schools of medicine.
3. Malpractice may consist in a lack of skill or care in making the diagnosis as well as in the treatment of the ailment.

4. Appeal: FINDINGS. A finding of fact by the trial court, in a law action, sitting without a jury, has the same force and effect as the verdict of a jury.

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

*Maher & Carrigan* and *Sampson & Dillon*, for appellant.

*O'Hanlon & O'Hanlon, contra.*

Heard before GOSS, C. J., DEAN, EBERLY and PAINE, JJ., and BLACKLEDGE, District Judge.

PAINE, J.

Eva E. Cook, plaintiff and appellee, brought an action in Washington county, Nebraska, against Earl M. Moats, defendant and appellant, for the recovery of damages for alleged malpractice. The defendant has been a regularly licensed and practicing osteopathic physician in the city of Blair, Nebraska, for about twelve years. The case proceeded to trial to the court, each party having waived a jury, and at the close thereof the court entered judgment in favor of the plaintiff and against the defendant in the sum of $3,000 and costs. Motion for new trial was overruled, and the appellant brings the case to this court.

The appellee had been a clerk in the post-office at Blair for more than 15 years, and had been a widow for 24 years, and her salary at the time of the injury was $2,100 a year. Having had a pain in her right leg and hip for some time, she began treating with the appellant in February, 1930, after telling him in a general way of her condition, and took an average of two or three treatments each week up to May 6, 1930, upon which date, in giving her a treatment and bending her knee firmly up toward the body, pressing his weight upon it and twisting the same, the femur was fractured.

Some time before this she had one of her breasts removed for cancer, and the X-ray photographs taken after the fracture show that she had a well-developed carcinoma of the femur or large bone of the leg which weakened it to at least 50 per cent. of its usual strength, according to

one witness, at the time it was broken by the manipulations of the defendant.

The appellant had been treating her for rheumatism or arthritis of the hip joint, and had told the patient she had adhesions in her back, which he had endeavored to break away. His treatments in bending her knee up toward the body had caused her great pain, and after some treatments she had been compelled to remain at home and was unable to work the next day or two. Complaint is made of this kind of treatment.

Dr. George B. Laughlin, who testified on behalf of the defendant, said he was president of the American School of Osteopathy at Kirksville, Missouri, and had been connected with the school for 30 years, and in connection with the school conducted the Laughlin Hospital, where he made a specialty of orthopedic surgery, and where he used X-ray from its first introduction. In his testimony he said the use of the Johnson therapeutic lamp was proper, and in outlining the proper treatment for such a case under osteopathy he said: "There is this principle in the treatment of any type of arthritis, due to the fact that there is inflammation in the joint we never use extreme violence, we do not use enough force to hurt the patient. The thing we usually depend upon to determine the amount of force we should use is the reaction from the treatment—immediate reaction. If there is pain, we cease. We do not carry manipulative treatment in any case of arthritis to the point that produces pain; but any treatment that we give to the joint which produces no pain, like this light treatment, or careful manipulative treatment—passive motion— we consider good treatment."

1. The appellant sets out a number of errors relied upon for reversal, and insists that the court erred in permitting the plaintiff to amend her petition after the trial commenced by adding an alleged new and different cause of action; that the court also erred in receiving testimony by witnesses who belong to a different school of medicine than the appellant, to the effect that he had made a wrong diagnosis of the appellee's condition, and that the finding

and judgment of the district court were not sustained by sufficient evidence, nor by the law.

This court has held in a number of cases that it is within the discretion of the trial court to permit the amendment of pleadings on the trial, and if the opposing party does not ask for a continuance and no prejudice is shown it is not error. *Patterson v. Steele*, 93 Neb. 209; *Blakeslee v. Van der Slice*, 94 Neb. 153; *Rawlins v. Myers*, 96 Neb. 819.

2. Objection is made by the defendant to the testimony of witnesses of another school of practice than osteopathy; but it has been held that a physician of one school may testify as to the correctness of the diagnosis of a case which one of another school treated, as a dislocation of the hip joint, where the diagnosis is the same in all schools of medicine, or where a condition exists which should be recognized by any physician. *Grainger v. Still*, 187 Mo. 197, 70 L. R. A. 49; 21 R. C. L. 383, sec. 28. And it is clear in this case that a physician of any school, upon learning that an entire breast had been removed for lumps, would suspect the same might be caused by cancer, and would know that cancer might develop in the bones of such a patient, and, if it did, that such bones would be weakened and could not bear the pressure of twisting and manipulation that it might be possible to employ in the case of another patient.

In suit for malpractice against allopathic physician, testimony of osteopathic physician was not inadmissible because witness belonged to different school, since a physician's treatment is to be tested by the general doctrine of his own school. *Swanson v. Hood*, 99 Wash. 506.

3. To make a skilful and careful diagnosis of the trouble from which the patient is suffering is one of the fundamental duties of a physician, and if he fails in that regard as well as in the application of improper treatment, and damages result therefrom, he must answer therefor. *Frankel v. Wolper*, 169 N. Y. Supp. 15; *Mullinax v. Hord*, 174 N. Car. 607; *Bonnet v. Foote*, 47 Colo. 282, 28 L. R. A. n. s. 136; 21 R. C. L. 387, sec. 33; *Stohlman v. Davis*, 117 Neb. 178.

"Malpractice may consist in a lack of skill or care in diagnosis as well as in treatment." *Kuechler v. Volgmann*, 180 Wis. 238, 31 A. L. R. 826.

This case was tried to the court without a jury, and the court believed the testimony of the plaintiff, supported by all the other evidence, facts and circumstances, entitled her to a judgment.

4. A finding of fact by the trial court, in a law action, sitting without a jury, has the same force and effect as the verdict of a jury. *Poessenecker v. Weatherby*, 16 Neb. 94.

This court has examined the record in the case and finds that the evidence amply supports the judgment rendered in the case, and the same is hereby

AFFIRMED.

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E. H. BENNER, APPELLANT, V. COUNTY BOARD OF DOUGLAS COUNTY ET AL., APPELLEES.

FILED OCTOBER 29, 1931. No. 27895.

**Municipal Corporations: TAXATION: POWERS.** The terms of "An act to provide for the payment of judgments recovered against municipal corporations," passed and approved in 1867 (sections 77-1809 to 77-1813, Comp. St. 1929), construed with related provisions of the Omaha charter, and *held* that, in the absence of constitutional inhibition, power is conferred thereby upon the proper corporate authorities to levy taxes upon the taxable property of a city of the metropolitan class to pay a judgment rendered against such corporation, though the maximum amount of taxes authorized by section 14-514, Comp. St. 1929, to be assessed for municipal purposes generally has been imposed.

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

*B. N. Robertson*, for appellant.

*Henry J. Beal, John W. Yeager, John F. Moriarty, Thomas J. O'Brien* and *Harry B. Fleharty, contra.*

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

PER CURIAM.

The matter involved in this controversy may be thus stated: When the amount of revenue to be derived from the maximum levy for general municipal purposes, made in conformity with section 14-514, Comp. St. 1929, is insufficient to enable a city of the metropolitan class to pay its necessary current expenses and also to pay outstanding judgments against it, then duly made and entered, may the proper authorities thereof cause an additional levy of twenty-five hundredths of a mill, which would yield approximately $78,000, to pay such outstanding judgments, and for no other purpose?

The court is of the unanimous opinion that the question is properly answered in the affirmative.

In 1867 the territorial legislature passed an act entitled "An act to provide for the payment of judgments recovered against municipal corporations." Laws (Ter.) 1867, p. 13. Its terms have never been modified nor repealed by subsequent legislation, and it is now carried as sections 77-1809 to 77-1813, Comp. St. 1929.

As to the terms of this statute with reference to this act, this court is committed to the view that "It is an established rule of construction that a subsequent statute treating of a subject in general terms and not expressly contradicting the provisions of a prior act shall not be construed as intended to affect the more particular and positive provisions of a prior act, if any other reasonable construction can be adopted." *Jackson v. Washington County*, 34 Neb. 680.

By the provisions of such enactment, in the absence of constitutional inhibition, power is conferred to levy taxes upon the taxable property of a city of the metropolitan class to pay a judgment rendered against such corporation, even though the maximum amount of taxes authorized by section 14-514, Comp. St. 1929, to be assessed for general corporation purposes has been imposed. *Dawson County v. Clark*, 58 Neb. 756.

Sections 77-1809 to 77-1813, Comp. St. 1929, are not in terms repealed by the Omaha charter. Indeed in the latter

it is expressly provided: "Each city of the Metropolitan class * * * shall have power: * * * Fifth. To exercise such other and further powers as may be conferred by law." Comp. St. 1929, sec. 14-101.

The rule of construction as to the several sections of the statute herein referred to is: "Statutes *in pari materia* should be construed together, and, if possible, effect be given to all of their provisions." *Dawson County v. Clark*, 58 Neb. 756. See, also, *Jackson v. Washington County*, 34 Neb. 680.

It follows that the action of the trial court in sustaining the right of the municipal authorities to make the controverted levy of twenty-five hundredths of a mill is correct, and it is

AFFIRMED.

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EDWARD C. WRIGHT, APPELLANT, V. MIKE SCHRAM, APPELLEE.

FILED OCTOBER 29, 1931. No. 27881.

1. **Pleading**: DEMURRER: STATUTE OF FRAUDS. A pleading affirmatively disclosing reliance by the pleader upon an oral contract for the sale and purchase of personalty exceeding $500 in value is demurrable, if it does not state facts taking the contract out of the statute of frauds.
2. **Statute of Frauds**: PAROL CONTRACT: DELIVERY. A mere oral agreement by the seller of a chattel to retain possession of it for the buyer does not constitute sufficient delivery and acceptance within the meaning of the statute of frauds.
3. **Pleading**: DEMURRER. A demurrer to a pleading admits facts well pleaded therein, but not mere conclusions of law.

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

*Frost, Nimtz & Cheff* and *Charles F. Bongardt*, for appellant.

*Nickerson & Nickerson, contra.*

Heard before ROSE, GOOD and DAY, JJ., and MESSMORE and NISLEY, District Judges.

ROSE, J.

This is an action to recover $320 in damages on a claim that defendant withheld from the possession of plaintiff 2,000 bushels of corn which the latter purchased from the former for $1,520. Defendant demurred to the petition. The demurrer was sustained. Plaintiff refused to plead further and the action was dismissed. Plaintiff appealed.

The petition was challenged by the demurrer on the grounds that it did not state facts sufficient to constitute a cause of action and that the transaction pleaded was a verbal contract for corn exceeding $500 in value and unenforceable under the statute of frauds, a provision of which follows:

"A contract to sell or a sale of any goods or choses in action of the value of five hundred dollars or upwards shall not be enforceable by action unless the buyer shall accept part of the goods or choses in action so contracted to be sold or sold, and actually receive the same, or give something in earnest to bind the contract or in part payment, or unless some note or memorandum in writing of the contract or sale be signed by the party to be charged or his agent in that behalf." Comp. St. 1929, sec. 69-404.

In substance the petition alleges that plaintiff was the owner of 2,000 bushels of corn August 15, 1930; that defendant sold the corn to plaintiff August 5, 1930, for $1,520, "under a verbal agreement wherein the said defendant consented to the immediate resale of said goods by the plaintiff to any person or persons whomsoever, and agreed to place plaintiff in possession of said corn on or before the 15th day of August, 1930, and wherein the plaintiff agreed to pay the said defendant the said price at the time the said possession was given;" that plaintiff, with the knowledge and consent of defendant, sold the corn to a third person August 5, 1930; that defendant was plaintiff's bailee of the corn from August 5, 1930, until August 15, 1930; that plaintiff demanded of defendant delivery and possession of the corn, which were refused; that the value of the corn August 15, 1930, was $1,840; that defendant wrongfully detained possession of the corn from plaintiff to his damage in the sum of $320.

On appeal plaintiff argues that the facts pleaded in the petition are sufficient to show his ownership; to estop defendant from pleading the statute of frauds; to show receipt and acceptance taking the case out of the statute of frauds. These points do not seem to be well taken. A pleading affirmatively disclosing reliance by the pleader upon an oral contract for the sale and purchase of chattels exceeding $500 in value is demurrable, if it does not state facts taking the case out of the statute of frauds. *Powder River Live Stock Co. v. Lamb,* 38 Neb. 339; *Smith v. Aultz,* 78 Neb. 453; *Gill v. Eagleton,* 108 Neb. 179. While the petition states that plaintiff was the owner of the corn, it also shows affirmatively the source of the alleged ownership—a verbal contract unenforceable under the statute of frauds. There was no agreement or memorandum in writing. No part of the purchase price was paid in any manner or form. Plaintiff never had actual possession of any part of the corn. There was no instrument or other token evidencing a symbolical delivery to plaintiff while the corn was in possession of defendant. A mere oral agreement by the seller of a chattel to retain possession of it for the buyer does not constitute a sufficient delivery and acceptance within the meaning of the statute of frauds. 25 R. C. L. 622, sec. 239. There was no sufficient plea of estoppel. Allegations of ownership and bailment were not facts well pleaded but mere conclusions of law, when considered with the petition as a whole. On the face of the record recovery by plaintiff was defeated by the statute of frauds. The demurrer was properly sustained.

AFFIRMED.

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JOHN D. LIVANIS, APPELLANT, V. NORTHPORT IRRIGATION DISTRICT, APPELLEE.

FILED OCTOBER 29, 1931. No. 27067.

**Contracts:** IMPUTED NEGLIGENCE. Contract between the United States and the irrigation district under the provisions of 32 U. S. St. at Large, ch. 1093, p. 388, known as the "Reclamation Act," and sections 46-197, 46-198, Comp. St. 1929, of Nebraska

construed, and *held* not to establish either the relation of a partnership; of principal and agent; of master and servant, or the like, between the parties such as will impute the negligence of the United States or its employees to the irrigation district.

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

*T. F. Neighbors, Coulter & Atkins* and *Morrow & Morrow,* for appellant.

*R. O. Canaday, contra.*

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

DAY, J.

This case is now before the court for the second time, a motion for rehearing having been allowed. For a statement of the case, reference is made to the former opinion, 120 Neb. 314.

The plaintiff alleged two causes of action. The first was brought under section 21, art. I of the Constitution, which provides: "The property of no person shall be taken or damaged for public use without just compensation therefor." This raised the identical question which was presented and decided in *Spurrier v. Mitchell Irrigation District,* 119 Neb. 401. The plaintiff cannot recover on the first cause of action and the trial court was right in entering a judgment on the pleadings adverse to the plaintiff.

The second cause of action is based upon the negligence of the defendant in the construction, maintenance and operation of the irrigation works. As will be noted by reference to the former opinion, we held that the reply admitted the allegations of the answer and attempted to plead a new cause of action, which amounted to a departure; that upon the allegations of the petition and the admissions of the answer the plaintiff was entitled to a judgment on the pleadings. It was the opinion of this court that, when the plaintiff alleged that the defendant operated irrigation works and sought to recover for negligence up-

on that theory, he could not recover upon a cause of action based upon a contract, even though this contract provided that they must ultimately pay the damage. It seemed to change the basis of recovery from an action sounding in tort to one in contract, which was in the nature of an indemnity agreement. It seems obvious that such a pleading is a departure from the original cause of action. The test of departure in a reply is whether evidence of facts alleged in it could be received under allegations of plaintiff's original pleading, or whether such evidence would contradict the facts originally alleged. Applying this test to the case at bar, the writer is still of the opinion that the reply in this case, unexplained, amounts to a departure. It has been held that where the petition for damages for death caused by the escape of electricity charges the defendant as the owner of the wires, and the reply charges it as having sold and delivered electricity to a distributor on such wires, it amounts to a departure. *Pressley v. Bloomington & Normal Ry. Co.*, 271 Ill. 622.

However, the plaintiff in his motion for a rehearing filed in this court states that the action is not based upon the contract, but that he pleaded the contract to show that it did not bar the right of the plaintiff to recover after the defendant had alleged the contract as a defense. In other words, he contends the effect of the contract upon the rights of the parties was squarely before the court so that it required construction.

The issue resolves itself into one proposition: If the setting up of the contract with the United States in the amended reply does not amount to a departure, does a proper construction of the contract and pleadings sustain the judgment of the trial court? This was the limitation by the court upon the argument upon the rehearing. Stated in another way: Is the relationship of the district and the United States under their contract, considered in connection with the federal and state statutes, such that the negligence of the United States in the construction, operation and maintenance of the irrigation works is imputable to the irrigation district?

From the four corners of the contract it appears that the United States will construct, maintain and operate the irrigation works for the benefit of the district. The district agrees to pay the United States the entire cost of such works, using its taxing power to collect the sums of money due. The cost of operation and maintenance shall be paid by the district. When, at last, the payments are made, which are due the United States, the care, operation and maintenance of the irrigation works will be transferred, not unrestricted, to the district, but "under such rules and regulations as the secretary of the interior may prescribe." The construction work to be done is such as in the opinion of the secretary may be necessary. This is not the contract of a principal with an agent, with the Northport Irrigation District in the role of principal and the United States as agent. The contention of the plaintiff that the district is operating an irrigation system through the instrumentality of the United States is untenable. The contract in positive terms negatives such a construction. The only function of the district under the contract is to collect and pay for the service of carrying water to the lands within the district and included in that expense is the cost of the construction, maintenance and operation of the works. All of the expense is to be, not such as the district may direct, but such as the United States may deem necessary. The doctrine of imputed negligence is not in vogue in this state except with respect to the relation of partnership, principal and agent, or master and servant. *Andersen v. Omaha & C. B. Street R. Co.*, 116 Neb. 489; *Hajsek v. Chicago, B. & Q. R. Co.*, 68 Neb. 539. It is obvious from the pleadings, including the contract set out in the reply, that the construction, operation and maintenance of the irrigation works was in the exclusive control of the United States, and that the negligent acts complained of were solely the acts of the United States. The relationship is neither that of principal and agent, nor of master and servant, and the negligence of the United States cannot be imputed to the district. Aside from these two relationships, there is no theory of the law whereby

the negligence of one may be imputed to another, making that other responsible for the consequent damage.

However, the contract must be construed with reference to the federal and state statutes, which are as much a part thereof as though incorporated into the body of it. The powers, duties and liabilities of the district and the United States are only such as each is authorized by statute to assume. The federal statute applicable to this case is 43 U. S. C. A., secs. 523, 524. These statutes authorize the secretary of the interior to dispose of surplus water impounded for the purpose of irrigating public lands to, among others, irrigation districts. The method of carrying out the provisions of this act is provided in that canals and ditches may be constructed. It is also provided that, when the payments required by the act are made, then the management and operation of such irrigation works shall pass to the owners of the land, to be maintained at their expense under such rules and regulations as may be acceptable to the secretary of the interior. It is further provided that the title to and the management and operation of the reservoirs and the works necessary for their protection and operation shall remain in the government until otherwise provided by congress. Surely there is nothing in the federal statutes which indicates that, in the construction, maintenance and operation of irrigation works, the United States was to become the contractor for, or the agent of, the irrigation districts formed to take advantage of its facilities for impounding and carrying water to the land. In effect, the federal statutes negative such a relationship, by the retention of title to the works; by absolute control of the construction and maintenance; and finally by providing that when the works are eventually turned over to the district it shall be under such rules and regulations as are acceptable to the secretary of the interior.

But the federal statutes, pertinent to this case, provide that the United States in its irrigation projects shall proceed in accordance with the state laws. From this premise it is argued that congress could not relieve or release irri-

gation districts from any of the obligations and liabilities imposed by the statutes of the states. We will state the substance of the state statutes, because to quote them would unreasonably extend this opinion. The contract between the United States and the district was executed February 24, 1919. Section 3466, Rev. St. 1913, was amended by section 3, ch. 69, Laws 1915, now section 46-110, Comp. St. 1929, for the purpose of authorizing irrigation districts to contract with the United States for the construction, maintenance and operation of works to carry to and distribute water on the lands of the district. Sections 46-201 to 46-205, Comp. St. 1929 (Laws 1915, ch. 205), empower irrigation districts to contract with the United States for a supply of water for the irrigation of lands in the district. Later, the legislature passed another act authorizing irrigation districts to cooperate with the United States under Act of June 17, 1902, for the purchase, extension, operation or maintenance of irrigation works. Comp. St. 1929, secs. 46-197, 46-198, Laws 1917, ch. 191. This statute is evidently the authority under which the contract in question was executed. Does this create a new type of irrigation district? Possibly not, considered as a corporate entity. But it does enable the district to contract for delivery at the land for water, without liability for negligence in the construction, operation and maintenance of the ditches of another, who is a common carrier so far as the owners of land in the district are concerned.

Another statutory obligation which it is urged devolves upon the district is to drain all subirrigated lands in the district, as provided by section 46-132, Comp. St. 1929. This is a contractual obligation imposed by statute, independent of negligence, and arises from the mutual agreement of the organizers of the district to drain each others land. This is pointed out in *State v. Farmers Irrigation District,* 116 Neb. 373. The remedy afforded by this statute is exclusive to the owners of land within the district. *Spurrier v. Mitchell Irrigation District,* 119 Neb. 401. The plaintiff in this case, as lessee of the land involved, may avail himself of this remedy.

The contract in plain unequivocal terms provides that the United States shall have full control of the construction and operation of the works. The plaintiff is not aggrieved in this respect. The records in the office of the state engineer, of which we take judicial notice, show that the owner of the land, under and through whom the plaintiff, a tenant, acquires his rights to possession and enjoyment, signed the petition for the organization of the district for the purpose of entering into this very contract. This assumes that C. F. Haggerty and Catherine Haggerty is one and the same person. Even if this is not true, nevertheless the record is that the district was organized upon the petition of a majority of the owners of the land. The statutes of the state may not create a new type of district, but they do place upon districts a different function and duty, and they do specifically authorize such a contract as the one in question. It appears from the pleadings that, as the United States and not the district had been and was at the time in absolute control of the construction, maintenance and operation of the irrigation works, the negligence, if any, was its negligence, for which the district was not liable, and that, therefore, this action was brought against the wrong party. This is not altered by the provision in the contract which contemplates that, when payment is made by the district to the United States, the works will then be turned over to the district. Until that time comes, and the district is negligent in some manner in the construction, maintenance and operation of the works, such an action as this cannot be maintained.

The relationship between the United States and the district must be determined from the contract and the statutes, both state and federal. The only obligation thus assumed by the district is to collect and pay—collect from the landowners and pay the United States. The contract requires the United States to (1) store water in the Pathfinder reservoir; (2) grant to lands in the district a perpetual water right; (3) to use its carriage right in Farmers Irrigation District canal for benefit of district; (4) to construct the necessary irrigation works to irrigate the

lands in the district; (5) to construct drainage works; and (6) to operate and maintain the system until the district complies with certain conditions; while the only obligation of the district is to collect and repay the money to the United States. This relationship has been denominated that of fiscal agent. *Malone v. El Paso County Water Improvement District* (Tex.) 20 S. W. (2d) 815. See, also, *Twin Falls Canal Co. v. American Falls Reservoir District No. 2*, 49 Fed. (2d) 632.

It is vaguely hinted by appellant that the words used in the state statute, "cooperate with," may indicate a partnership. Since we have stated in substance the provisions of the contract, it seems unnecessary to state that no such relationship exists. The cooperation indicated here is best illustrated by that ancient classic example of the cooperation between the lion and the lamb.

In conclusion, whether we consider the pleading of the contract in the reply, together with the admissions to allegations in the answer, as a departure, or consider it as a denial of the allegations of the answer, and construe the contract to determine if the negligence of the United States in the construction, operation and maintenance of the irrigation works is imputable to the district, we conclude that the judgment of the trial court should be affirmed.

AFFIRMED.

ROSE and GOOD, JJ., dissent.

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WILLIAM H. FROST, APPELLEE, V. ELMER SCHINKEL ET AL., APPELLANTS: RUDOLPH J. SUCHAN ET AL., APPELLEES.

FILED OCTOBER 29, 1931. No. 27641.

1. **Fixtures** are chattel property brought in and upon and annexed to real property but which retain their separate identity and become realty, but which may under certain circumstances become personalty again.
2. **"Fixture"** necessarily implies something having possible existence apart from realty, but which may by annexation be assimilated into realty.

3. **Fixtures.** At common law all buildings which a tenant in agriculture erected became a part of the freehold. *Elwes v. Maw* (1802), 3 East (Eng.) 38, discussed.
4. ———. Three criteria of fixtures were announced in *Teaff v. Hewitt* (1853), 1 Ohio St. 511: (1) Actual annexation to the realty; (2) appropriation to the use or purpose of that part of the realty with which it is connected; (3) the intention of the party making the annexation to make the article a permanent accession to the freehold.
5. ———. If improvement erected by tenant cannot be removed without considerable injury to the freehold, ordinarily it belongs to the owner of the fee.
6. **Landlord and Tenant:** IMPROVEMENTS. Tenant's right to remove improvements erected by him may be exercised at any time before he yields possession. Holder of chattel mortgage thereon has no greater rights than tenant.
7. ———: TRADE FIXTURES. Trade fixtures may be defined as articles annexed to the realty by a tenant for the purpose of carrying on a trade or business, not exclusively agricultural, and are ordinarily removable by him while he is in possession of the freehold, and that such trade fixtures must be taken to pieces or even wrecked to remove them from the premises does not affect the tenant's right of removal, but such removal must never cause substantial damage to the freehold.
8. **Mortgages:** TRADE FIXTURES. When an owner of real estate who has placed trade fixtures in his building gives a real estate mortgage thereon, the mortgagee is entitled to claim them as part of his security. And it is the rule that, if they are annexed after the mortgage is given, the mortgagee can hold them as against the mortgagor.
9. **Trade Fixtures:** RIGHTS OF VENDOR AND MORTGAGEE. Where the removal of chattels will not materially injure the premises, the vendor who retains title may assert his right against a prior real estate mortgage.
10. ———. A chattel mortgage, given in good faith upon a trade fixture by the owner, preserves its status as personalty unless the rights of innocent third persons will be prejudiced.
11. ———. When articles are sold on condition that the title shall not pass until they are paid for, or some other condition in reference to their ownership or use is unfulfilled, such articles do not become a part of the realty, for an agreement reserving the right of removal would in such cases be implied.
12. **Fixtures.** Parts of property which are not physically attached to the realty, but which are absolutely necessary to the operations of machinery and equipment which is physically attached,

become themselves governed by the same rules as that which is annexed to the freehold.

13. ———: INTENT. Ordinarily, it is of great importance to determine the intention of the one who attaches fixtures. Such intention is not the secret purpose of such owner, but it is that intention which should be implied from his acts. The controlling intention is that which the law deduces from all of the facts and circumstances connected with the installation of the article upon the land.

14. ———: MORTGAGE. Annexations affixed to an estate by the owner before mortgage, of such a character as are apparently calculated to be for the permanent use and enjoyment of the realty, are presumed to be intended to form a part of the realty and to pass with it by a mortgage.

15. Trade fixtures attached to the freehold by the tenant for the purpose of conducting his business therein may be removed, if without substantial injury to freehold, or sold by tenant with right of removal during his term.

APPEAL from the district court for Dodge county: LOUIS LIGHTNER, JUDGE. *Affirmed in part, and reversed in part, and remanded, with directions.*

*C. M. Skiles, George W. Wertz* and *Dolezal, Mapes & Johnson*, for appellants.

*Cook & Cook, E. S. Schiefelbein* and *Courtright, Sidner, Lee & Gunderson, contra.*

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

PAINE, J.

This is an action for injunction, brought in the district court for Dodge county by William H. Frost as plaintiff against Elmer Schinkel, the tenant and vendee, Ernest M. Nelson, vendor, Rudolph J. Suchan and the Dodge State Bank, holder of a chattel mortgage, in which the plaintiff asks that the defendants be restrained from selling, incumbering or removing 41 different fixtures, hereinafter set out, which were installed in a garage. Answers and replies were filed, and to a petition of intervention by F. D. Haldeman issues were also joined. By agreement of the parties all extraordinary remedies were dispensed with

and a trial had to the court on the merits, and a decree was entered May 31, 1930, finding that all of the machinery set out in plaintiff's petition was attached to the real estate and was a part of it and constituted fixtures, to all of which the defendants excepted and filed a motion for a new trial, setting up, among other things, misconduct, accident, surprise, and that the judgment was not sustained by sufficient evidence and was contrary to law.

The facts as disclosed in the evidence showed that Joseph C. Vosacek and his two sons-in-law, Edward Chudomelka and his brother, Frank Chudomelka, built and owned a new two-story tile and brick garage building, 60 by 140 feet, valued by some at $24,000, and also owned and conducted the general garage business therein.

That upon November 17, 1921, they gave a real estate mortgage upon this property, being described simply as lot 7, block 4, town of Dodge, Dodge county, Nebraska, in the sum of $9,000, payable three years after date, and that the same was given to Julius W. Frost. Upon failure to pay the same, petition for foreclosure was filed by the guardian for said Julius W. Frost, who had become an incompetent after the mortgage had been given him. The sheriff sold the premises to the plaintiff guardian, who bid in the property for $9,000; said sale was confirmed on December 1, 1925, and upon appeal to this court mandate was entered March 15, 1927, affirming same. Upon March 30, 1927, the guardian of his incompetent father deeded the property to the plaintiff in the case at bar.

The plaintiff, having become the owner of said lot 7, in block 4, under the sheriff's deed, claims to have taken possession of the garage and also all of the machines and equipment therein, claiming to be the owner thereof by virtue of the foreclosure of the real estate mortgage.

On September 29, 1928, a stipulation was filed by the parties to this injunction suit, agreeing that the fixtures in dispute could be sold by Schinkel, the tenant, to the intervener, F. D. Haldeman, the property to be left in the building and the $7,181.01 paid to be held in escrow by a bank at Dodge, Nebraska, to abide the final decision of this case.

William H. Frost, the plaintiff in the case, testified that he lived in Lincoln, and was in the finance business, and had made the real estate loan on the garage for his father. The front part of the garage was used for storage, accessories, office, and show-room. Most of the equipment in question was in the repair shop in the back room. The second story was used in part for storing cars and as paint shop and for other purposes.

An itemized statement attached to the petition gives a list of the 41 articles claimed by plaintiff as conveyed under the real estate mortgage, as follows: (1) One lathe, shop number 206; (2) Fox No. 10 improved lathe key seating attachment; (3) one power drill; (4) one Universal axle stand, model "F," No. 451; (5) one small vise, attached to bench; (6) one grinder, attached to bench; (7) one Yankee drill, No. 1005; (8) one brake band riveter, type A668; (9) one air compressor, belted to the line shaft; (10) one power saw, also belted to the line shaft; (11) one forge, attached to the stovepipe; (12) one suction fan or blower; (13) one 20-ton press machine, No. D06217; (14) one burning-in stand, No. 15-C; (15) one Ford motor, No. 19120013, to propel the same; (16) one U. S. automatic air compressor, No. H-34, DeLuxe; (17) one emery stand, belted to the line shaft; (18) one 5-horse electric motor, attached to the ceiling, to drive machinery; (19) one "U" track, attached to the ceiling; (20) one small ton hoist; (21) one large two to five ton hoist; (22) one 26-section radiator; (23) two 8-section radiators and one 19-section radiator; (24) one hot water heater and tank; (25) one lavatory; (26) one shower bath complete; (27) one 24-section radiator; (28) one large pressure tank; (29) two 20-section radiators, disconnected, low type; (30) one 18-section radiator, high type, also disconnected; (31) 15 or 20 pieces of gas pipe; (32) one sink located near wash rack; (33) one tank located in southeast corner of storage room; (34) one small elevator, complete, used for handling small packages or passengers; (35) one large elevator, complete, to take automobiles to second floor; (36) one Echo air machine, No.

52353; (37) one Volcker visible gas pump; (38) one self-measuring gas pump, type 577, model 25, serial No. 16987; (39) eight wall radiators in storage room; (40) one 25-section upright radiator in storage room; (41) one toilet complete, with 11-section radiator.

The plaintiff's evidence was supported by a friend who was also engaged in the loan business and testified at length. Joseph C. Vosacek, who was the first signer of the real estate mortgage but not a defendant in the case, testified that he lived in Dodge and was in the tire repair and battery business for six years before constructing the garage building; was at one time part owner of the lot and garage known as Vosacek & Chudomelka garage. After this new building was built, he had moved all his machinery and tools and appliances from the old place over to this new garage. As to the lathe, valued at $600, which the plaintiff claims as a fixture, he said it was in his old garage and there was practically no installation, only set it on the floor and then lined up the line shafting to it. It weighed about 1,400 pounds; could be moved out of the building without any injury to the building or without any injury to the lathe itself.

The Universal axle stand, the U. S. automatic air compressor, the burning-in stand, the Ford motor to propel it, and the grinder attached to the bench were not in there when he gave the mortgage and were installed after he sold out. The Yankee drill was simply attached with a thumbscrew under the bench. The line shaft was hung on brackets and the brackets bolted to 2 by 12's running cross-wise of the line shaft and those 2 by 12's screwed to cross-beams. The five-horse electric motor was attached on a platform built on 2 by 4's and the motor was bolted to these planks. He said it would not injure the building in any way to remove this motor or the line shaft. If the track the hoist ran on was removed it would leave a few holes in the joist where the spikes were taken out. All the articles claimed by plaintiff could be used in any garage. Upon cross-examination the witness was asked: "Q. Of course it wasn't put in the mortgage, that is true; but isn't

it a fact that you told Mr. Frost in the presence of Mr. Sigler and his son and Mr. Craven, an attorney of Lincoln, at your place of business in Dodge on January 4, 1930, that you had told Mr. Frost while you were talking about him loaning you this money that this machinery and the repair shop and these fixtures were part of the business and part of the garage? A. Well, they were. Q. Well, didn't you tell him that? A. I told him that it belonged to the business."

Ernest M. Nelson testified he was cashier of the Leigh State Bank and arranged a trade for the garage, his exchange contract, exhibit 10, showing that the building was valued at the time of his trade at $24,500, subject to a first mortgage of $9,000 and a second mortgage of $6,500, but the deal was later rescinded. The garage business was sold to Schinkel about April 1, 1926.

Frank Chudomelka testified on direct examination that he was interested in the garage with Mr. Vosacek and was around there when the machinery was moved in. He said the machinery could be used for various purposes. Any blacksmith or farmer could use the forge and the turning lathe could be used in any machine shop.

Rudolph J. Suchan, a defendant and appellee, lives in Omaha now and is in the real estate business. He lived at Dodge from November, 1925, to May, 1928, and was cashier of the Dodge State Bank. When Mr. Nelson sold the property to Mr. Schinkel, witness credited the money he got from stock on Chudomelka's second real estate mortgage of $6,500. He was agent to collect the rents for Mr. Nelson. He talked with Mr. Frost after he got the deed to the garage and Frost said he had bought everything, tools and machinery and building, and claimed that property, and witness said he told Frost that he had no claim to any tools, and that plaintiff claimed he wanted to get even with Mr. Nelson and that he was going to claim the machinery if nothing else. Witness said he agreed to pay $100 and Nelson paid $100 and he sent a draft for $200 to plaintiff, Frost, to settle his claim to the equipment claimed in this suit. Upon rebuttal the plaintiff positively denied all of this.

Defendant Elmer Schinkel testified on direct examination that he lived at Leigh and bought the stock of accessories, some tires and the shop equipment in the garage of Nelson. He testified that he had purchased and installed many of the 41 items of equipment in dispute. The small hoist was discarded and replaced with a new one. He does not claim the lavatory or shower bath which are in a room upstairs that was used for a training room by the wrestler, Joe Stecher. He claims that the Volcker visible gas pump is the property of the Dodge Oil Company. The gasoline pump No. 577 belongs to the Standard Oil Company. Schinkel gave a chattel mortgage for $6,000 to the Dodge State Bank upon stock, machinery, lathes, tools, etc. This mortgage was filed in Dodge county. Upon March 31, 1926, Schinkel gave Ernest M. Nelson a chattel mortgage upon the large lathe for $500.

1. This brief sketch of what the bill of exceptions contains indicates that nearly every phase of the subject of fixtures is involved. It discloses that fixtures have been attached to the building before and after the giving of a real estate mortgage; that a tenant to whom the garage was later rented added equipment to the plant which is now claimed to be of a permanent character, as well as some equipment purchased on instalment payments and under sales contract, or under rental arrangements, as gasoline tanks, and in addition thereto a bank has during a portion of the time held a chattel mortgage of $6,000 upon nearly everything now claimed to be a fixture; that, because of the sheriff's sale under the real estate mortgage of $9,000, the plaintiff claims the garage, which cost $24,000, and also each and all of the 41 items above mentioned belong to him as a part of the realty, and the trial court agreed in the main with the claims of the plaintiff.

There is a great confusion by text-writers in the definition of the term "fixtures." It is held to denote such articles of a chattel nature as, when once annexed to realty, may not be removed by the party annexing them as against the owner, and, on the other hand, some courts have held just the reverse to be the true definition, that is, chattels

which are annexed but which may be removed. *Fechet v. Drake*, 2 Ariz. 239, 12 P. 694.

A distinguished authority upon real property in a lecture to law students defines a fixture as a chattel brought in and upon and annexed to real property, which retains its separate identity and becomes realty, but which under certain circumstances may become personalty again.

2. In *Hallen v. Runder* (1834) 1 Cromp. M. & R. (Eng.) *266, *276, opinion by Baron Parke, it was held in effect that the term fixture is used more generally with reference to such inanimate things of a personal nature as have become fixed or annexed to realty, but which may be severed, disunited or removed by the party, or his personal representatives, who has so affixed them without the consent of the owner of the freehold.

"Fixture" necessarily implies something having possible existence apart from realty, but which may by annexation be assimilated into realty. *Gaspee Cab v. McGovern*, 153 A. (R. I.) 870.

Ewell on Fixtures (2d ed.) p. 1, says: "There is, perhaps, no other legal term which has been used in so many differing and often contradictory significations as the term 'fixtures.'" And adds: "The term 'fixtures,' however, seems generally to have been used with reference to articles which, in and of themselves, and irrespective of annexation, real or constructive, to land, are of a chattel nature, and which have been either actually or constructively affixed either to the soil itself, or to some structure legally constituting a part thereof."

That one may realize why courts and counsel may well be pardoned for the confusion arising in passing upon questions relating to this subject, the Iowa court declared many years ago: "Fixtures are a species of property which are the dividing line between real and personal property, and to decide on which side of the line certain property belongs is often a vexatious question." *Ottumwa Woolen Mill Co. v. Hawley* (1876) 44 Ia. 57.

Judge Lynch, in *Re Trevey*, 14 Law Times Rep. n. s. 193, says: "Perhaps there are no subjects in law more diffi-

cult to deal with than the questions raised as to fixtures. * * * The cases are legion; and each new case seems only the more to disturb any fixed or certain rule that seemed deducible from former cases." See 26 C. J. 653.

Therefore we approach the many close questions involved in the case at bar with a full realization that decisions will easily be found contrary to our holding upon each proposition that we are compelled to pass upon, for verily we are groping along in the twilight zone between things real and things personal.

3. To one who attempts to ascertain why such confusion exists, it is of great interest to trace briefly the holdings of some of the early masters of law.

If references by text-writers indicate importance, then the 29 references in Ewell on Fixtures, being more than to any other case, and its equal prominence in tables of cases of all other text-writers upon this subject, indicate that the leading case on fixtures is *Elwes v. Maw*, 3 East (Eng.) 38, 2 Smith's Leading Cas. 189. This case, decided in 1802, in the King's Bench, concerned a tenant in agriculture who lived in the county of Lincoln, England, and had leased a farm on May 12, 1779, for 21 years, and 15 years before the expiration of the lease he erected, at his own expense, for the necessary and convenient occupation of the farm, a beast house, carpenter shop, fuel house, cart house, pump house and fold-yard wall, which buildings were all of brick and mortar and tile and let down into the ground. Prior to the expiration of his lease he pulled down all of these buildings, dug up the foundations, carried away all the materials, and left the premises in the same state as when he entered upon them, and the question before the court was: Did the tenant have a right to take away these erections? In this decision Lord Ellenborough discussed all of the leading cases up to that time, including those from the Year-books. He cited the case of *Penton v. Robart*, 2 East (Eng.) 88, in which Lord Kenyon in 1801 had held that gardeners and nurserymen might plant trees and shrubs, and in the course of their trade expend thousands of pounds in the erection of greenhouses and hot-

houses to carry on their trade in the neighborhood of the metropolis of London, and that they might remove all of these things as trade fixtures before the termination of their lease. Lord Ellenborough then made the distinction between trade and agriculture, and admitted that to encourage trade and business it might be proper to be liberal in allowing tenants to remove trade fixtures, yet he held the tenant farmer strictly responsible for the value of all of the improvements he had erected and removed from the fee.

In 1829 Justice Story delivered the opinion of the United States supreme court in *Van Ness v. Pacard*, 27 U. S. 137, which is the early guide in this country upon fixtures. In this decision Justice Story discusses the case of *Elwes v. Maw, supra*, and says that the common law of England is not to be taken in all respects to be that of America, but that in this new country which was a wilderness the universal policy was to procure its cultivation and improvement and to encourage tenants to such erections as would result in developing agriculture, and therefore his log cabin, if the English rule was adopted, would cease to be his the moment it was finished. Justice Story says that the rule of common law was never inflexible and without exceptions. "It was construed most strictly between executor and heir, in favor of the latter; more liberally, between tenant for life or in tail and remainderman or reversioner, in favor of the former; and with much greater latitude, between landlord and tenant, in favor of the tenant. But an exception of a much broader cast, and whose origin may be traced almost as high as the rule itself, is of fixtures erected for the purposes of trade. Upon principles of public policy, and to encourage trade and manufactures, fixtures which were erected to carry on such business were allowed to be removed by the tenant, during his term, and were deemed personalty, for many other purposes."

In this case a carpenter had leased a lot in the city of Washington for a term of years and erected on that land a two-story building of brick or stone, and before the ex-

piration of his lease took down and removed said building from the premises. A portion of this building was used as a residence, but, as a carpenter, he had tools and two apprentices in the house and a workbench outdoors. In addition, he conducted a dairy business, assisted by members of his family, in the basement, where there was a spring, and the utensils for this trade or business were also in the building removed. It was argued that this brought him within the liberal rule for trade fixtures adopted in *Elwes v. Maw, supra.* Judge Story found that the purported carrying on of two trades was not to conceal the fact that it was used in part for a dwelling and saw no reason why the dairyman-carpenter-tenant was not entitled to carefully remove the building as a trade fixture, as he did before the termination of his lease.

4. The third leading case to be considered in the study of the law of fixtures is *Teaff v. Hewitt,* 1 Ohio St. 511, 59 Am. Dec. 634. This was founded on a bill in chancery filed in October, 1849, by James Teaff against Samuel Hewitt and his judgment creditors to enjoin detaching a steam engine and boiler and carding machines annexed to the realty in a woolen manufactory. In this case Chief Justice Bartley reviews many of the cases in England, including *Elwes v. Maw, supra,* and the case of *Lawton v. Salmon,* 1 H. Bl. 259, in which Lord Mansfield in 1782 discussed the same question as between an heir and an executor respecting salt pans and other articles connected with the salt works, but held them to pass with the realty because they were accessories to the freehold. Judge Bartley in this early Ohio case then reviews all of the important cases in this country and states that the doctrine of fixtures is involved in no inconsiderable degree of uncertainty, and that the judicial decisions, while numerous, are complex and make conflicting distinctions arising out of the peculiar circumstances or relation of the parties in each particular case. He discusses the definitions of fixtures and shows that it is an error to speak of a removable fixture, although the civil law has divided property into things movable, as chattels, and things immovable, and then tells us that fix-

tures belong to that class of property which stands upon the boundary line between these two great divisions. He points out that in England heirlooms pass with the inheritance, the same as wild animals in the fields or deer in a park or fish in a pond, which could only be fixtures by constructive attachment, and in his exhaustive review of the authorities shows that from the time of the Year-books down to the time of his decision in 1853 the authorities do not give one established criterion of universal application. He shows the great difficulty of applying these decisions when millstones in a mill or a water wheel or the Ohio rail fences of his time, which were simply set on top of the ground, were all considered as fixtures, and yet could be removed without injuring the freehold in any way, and discusses the leading Massachusetts case of *Gale v. Ward* (1817) 14 Mass. 352, 7 Am. Dec. 223, in which Chief Justice Parker held that in a woolen factory machines that were even too large to be taken out of the door, but must be unscrewed and taken to pieces, were personal property.

After carefully reviewing all of the authorities up to that time, Judge Bartley states that he has reached the conclusion that the united application of the following requisites will be found the safest criterion of a fixture: "1st. Actual annexation to the realty, or something appurtenant thereto. 2d. Appropriation to the use or purpose of that part of the realty with which it is connected. 3d. The intention of the party making the annexation, to make the article a permanent accession to the freehold—this intention being inferred from the nature of the article affixed, the relation and situation of the party making the annexation, the structure and mode of annexation, and the purpose or use for which the annexation has been made." To show that these three criteria have been adopted and accepted by courts generally, and that courts have appreciated the clarifying work of Judge Bartley in this decision, it will interest the bar to state that in Ewell on Fixtures (2d ed.), published in 1905, there is given on pages 28-30 a list of 158 decisions up to that date, in which this decision is relied upon, there being 22 decisions from

New Jersey, 16 from New York, 11 from Illinois, 6 from Texas and Oregon, 9 from Massachusetts, and in all it lists such cases from 32 states, the District of Columbia, Scotland, England, and Ontario. In this exhaustive opinion Judge Bartley held that the machinery of a woolen factory, consisting of carding machines, spinning machines and looms connected with the motive power of the engine by bands and straps, but only connected to the building by cleats, were chattel property, but that the engine and boiler were fixtures.

A trifle over a score of decisions in our own state pass upon troublesome questions in the law of fixtures. We will briefly refer to them.

In *Lanphere v. Lowe* (1873) 3 Neb. 131, a tenant leased a portion of a vacant lot in Omaha for five years and agreed to pay rent and taxes, and that no improvements which the tenant might erect could be removed if any rent or taxes remained unpaid. The tenant put a small building upon blocks and executed a chattel mortgage thereon, and upon failure to pay the loan the mortgagee attempted to remove the building, and an injunction was brought to prevent the removal thereof, which was tried before Chief Justice Lake, and an injunction granted. But upon appeal to this court it was held by Justice Gantt, Maxwell, J. concurring, that, the lease not having been recorded, the mortgagee had secured a superior lien upon the building to that of the owner for unpaid rent.

We find that in our pioneer days three cases of fixtures arose where small "dwellings," which could usually be easily moved between two wagons, were the subject-matter of heated litigation.

The first of these was the case of *Freeman v. Lynch*, 8 Neb. 192. In 1859 the locators of the town of Beatrice reserved from sale and intended to dedicate to the county a block for a courthouse, but failed to do it. In 1871 Daniel Freeman erected his home on this block and occupied it until 1874 with his family, and during his temporary absence the county treasurer levied upon the house for delinquent taxes upon other real estate owned by Freeman,

and the county board moved the residence into the street and sold it at auction. Chief Justice Maxwell in deciding the case held that this building was not personal property and could not be moved before the sale, and first adopted into our Nebraska law the three requisites of fixtures announced for the first time in the case of *Teaff v. Hewitt, supra.*

We will not cite the many times the three criteria first announced in this Ohio case have been referred to by Nebraska judges, but Judge Norval announced in *Oliver v. Lansing* (1899) 59 Neb. 219, 80 N. W. 829: "The rule there stated seems eminently sound, and will be adhered to by this court." Dean Pound set them out in full in his painstaking decision on fixtures in *Hillebrand v. Nelson,* 1 Neb. (Unof.) 783, 95 N. W. 1068.

Then followed *Dietrichs v. Lincoln & N. W. R. Co.* (1882) 13 Neb. 43, 13 N. W. 13. The material question was whether a house moved to a lot in Columbus and set on blocks was a chattel or realty. The evidence disclosed that the owner of the fee, living in New York, not only made no claim to the house, but did not know it was there at the time he sold the lot to the defendant; that the plaintiff in the replevin action had moved the house upon the lot in question a few months before under the belief that the land belonged to it, and had advertised the house for sale. The court held the house was chattel property.

In *Waters v. Reuber* (1884) 16 Neb. 99, 19 N. W. 687, it was held that, when a buyer of a lot in Aurora, Nebraska, began the erection of a dwelling upon his lot, and the former owner of the fee repudiates the sale and takes back the property, the building thereupon becomes chattel property and may be replevied by the person who built it.

5. In *Friedlander v. Ryder* (1890) 30 Neb. 783, 47 N. W. 83, we have a case in which a building erected by the tenant was in fact a substantial addition to and enlargement of an old building. It was erected under a lease which allowed the tenant to remove all buildings placed thereon during the term of the lease, and this court held that, as it could not be removed without considerable injury to the

old building, the addition belonged to the owner of the fee, as it did not come within the head of tenant's fixtures.

6. In considering when a tenant may remove his fixtures, this court, speaking through Commissioner Epperson, held in *Ogden v. Garrison* (1908) 82 Neb. 302, 117 N. W. 714, that when granaries, chicken house and blacksmith shop without foundations are erected by a tenant on a farm, he could not be restrained from moving them off the place before the termination of his lease; and in *Stevens v. Burnham* (1901) 62 Neb. 672, 87 N. W. 546, this court declared that the right of a tenant to remove a trade or agricultural fixture upon leased premises expires with the tenancy.

Commissioner Albert stated in *Fenimore v. White* (1907) 78 Neb. 520, 111 N. W. 204, that "the tenant has the right to remove the fixtures at any time before he yields possession, even though he holds over without permission of the landlord. * * * He was in possession when the temporary injunction restraining the removal of the fixtures issued. As his right to remove the fixtures was coextensive with his possession, * * * a permanent injunction forbidding the exercise of such right was properly denied."

Another removal case, *Free v. Stuart* (1894) 39 Neb. 220, 57 N. W. 991, arose over the ownership of certain greenhouses and a boiler house erected by a tenant and claimed by owner of the fee because not removed when the lease expired March 1, 1891, nor even on May 12, 1891, at which time the tenant vacated the premises. These fixtures were claimed by the holder of a chattel mortgage thereon given by the tenant during his tenancy. The trial court having decreed the foreclosure of the mortgage, a reversal was entered on the ground that the mortgagee had no greater rights than the tenant, and the fixtures could only be removed during the continuance of the tenancy.

*Grand Island Banking Co. v. Koehler* (1899) 57 Neb. 649, 78 N. W. 265, was a case in which a saloonkeeper erected a large hotel and fitted up the corner thereof with expensive built-in equipment for his saloon and then mortgaged the fee. Commissioner Ryan said: "There was a contention as to whether certain saloon fixtures were personal or real

property. We are not at all confident that we could add to public general knowledge any new or valuable information by describing the appearance or functions of what seem to be the ordinary equipments of a saloon. * * * On the evidence submitted it was found that these were parts of the real property, and we are satisfied to accept the judgment of the district court in respect thereto."

When a Franklin county farm was sold under contract and no reservations set out in the contract, it was held that corncribs, cattle sheds, hog sheds, situated upon a farm, are of the general class which a prospective buyer would have a right to assume are a part of the freehold. They are not such as to put him upon inquiry in reference thereto, even though he may know the farm is occupied by a tenant. *Roden v. Williams*, 100 Neb. 46, 158 N. W. 360, L. R. A. 1917A, 415.

To indicate the great difficulty of deciding questions relating to this subject, we find in our own reports an action over a second-hand portable engine, boiler and appliances connected therewith, which has been before this court three times, involving the question of trade fixtures. The articles in dispute were connected with a planing mill at South Omaha. Fuller was the owner of the real estate, and Silver, the tenant, gave a chattel mortgage to Brownell & Company upon these as chattels. At the expiration of the lease Fuller took possession of the premises and of the engine and boiler, and the mortgagees brought a replevin action. The first appeal is found in *Fuller v. Brownell* (1896) 48 Neb. 145, 67 N. W. 6, and was reversed because of the exclusion of testimony to prove the property had become a trade fixture. In absence of an agreement or consent of the landlord, trade fixtures cannot be removed by tenant or his mortgagee after expiration of the term. Upon its second appearance in this court, *Brownell v. Fuller* (1899) 57 Neb. 368, 77 N. W. 775, it was again reversed; and after a third trial it was again brought here, and Justice Holcomb, in (1900) 60 Neb. 558, 83 N. W. 669, reviews the evidence and the authorities and announces as a rule in Nebraska that it is a question for a jury, under

proper instructions, to decide whether the articles in dispute were trade fixtures; and as two juries had found in favor of Fuller, the owner of the lot, the case was affirmed, making the machinery a part of the fee.

From this hurried review of a few of the earlier Nebraska decisions, it is plain to be seen that fixtures are in the twilight zone between real and personal property in Nebraska, the same as they are in other states. The evidence is so sharply in dispute in this case that the appellants claim that the articles in dispute were never treated as realty by the original owners nor by the mortgagee at the time the mortgage was given on the real estate, for the property was mortgaged simply as lot 7, block 4, of the town of Dodge, and the decree, the order of confirmation, and the sheriff's deed, as well as the deed to plaintiff, each and all describe the property simply as lot 7, of block 4, town of Dodge.

The holdings of other courts have been so diverse that it is impossible to reconcile them. In *Voorhis v. Freeman,* 2 Watts & Serg. (Pa.) 116, 37 Am. Dec. 490, it was held that, whether fast or loose, all of the machinery of a manufactory which is necessary to constitute it is a part of the freehold, while it has been held that, if the removal of a boiler and an elevator did not take away or destroy any essential part of the support of the main building, they could be removed and not become a part of the real estate. See, also, *Havens v. Germania Fire Ins. Co.,* 123 Mo. 403, 27 S. W. 718, 45 Am. St. Rep. 570, 26 L. R. A. 107. In *Hanson v. Vose,* 144 Minn. 264, 175 N. W. 113, 7 A. L. R. 1573, it was held that the owner of a lease who installs gas ranges and a door bed in each flat, but thereafter forfeits his lease, will lose the ownership of such personal property, and such ownership will pass to the owner of the fee, if no rights of third parties have intervened; while the Massachusetts supreme court, in *Murphy Door Bed Co. v. New England Bond & Mortgage Co.,* 176 N. E. (Mass.) 802, held that door beds furnished to the owner of an apartment building to constitute a permanent part of the apartments constituted fixtures and were covered by a real estate

mortgage executed subsequent to the conditional sale contract under which they were sold to the owner.

7. While "fixtures" are usually thought of as personal property which have become a part of the real estate, yet a "trade fixture" is defined as personalty. In defining the term "trade fixture" we find a very concise statement in 26 C. J. 699-701, that an article may be regarded as a trade fixture if annexed for the purpose of aiding in the conduct by the tenant of a calling exercised on the leased premises, provided it is not, in some jurisdictions, exclusively agricultural in its nature. That the fixture is particularly adapted to the type of building in which it is placed does not make it irremovable.

Trade fixtures are articles annexed to the realty by a tenant for the purpose of carrying on trade, and are ordinarily removable by him during his term. Such trade fixtures are not taxable to the landlord as realty. That such a fixture must be taken to pieces or even wrecked to remove it does not exclude the right of removal. However, such removal must be made without causing substantial damage to the freehold and must be removed before the tenant relinquishes possession. 26 C. J. 699.

In *United Booking Offices v. Pittsburgh Life & Trust Co.*, 119 N. Y. Supp. 216, partitions nailed to floors and walls in an office building were held to be trade fixtures, and not a part of the realty.

Where trade fixtures placed in a building by a tenant are insured by him in a policy of insurance he will be entitled to recover thereon, even though as between him and his landlord the fixtures might be the property of the landlord. *Clark v. Svea Fire Ins. Co.*, 102 Cal. 252.

The following articles are taken from 26 C. J. 702, note, as having been held by courts to be trade fixtures: Furnaces, boilers, oil and gas well casing and machinery, electric lighting machinery, counters and shelves, flour mill machinery, laundry plant, printing presses, shafting, belts, pulleys, awnings, opera chairs, pipe organ, and a refrigerating plant in a hotel.

Courts are divided upon many trade fixtures, and one of

the most perplexing is electric fans, which may be attached so permanently as to become a part of the building or may be simply attached by an electric cord, and the holdings of the courts thereon have been gathered into a long note following the case of *Reno Electrical Works v. Ward,* 51 Nev. 291, 62 A. L. R. 247. It has been said that the installation of a pipe organ in a church or a movie theatre presents as close a question as the court may find, and the decisions have followed the rule of liberality in questions arising between landlord and tenant, where it is held to be removable, strictly a trade fixture, while between mortgagor and mortgagee it has been held to be a part of the realty. Many cases are gathered in the note following *Wurlitzer Co. v. Cohen,* 156 Md. 368, 62 A. L. R. 358. A pipe organ was held to be realty in *Rogers v. Crow,* 40 Mo. 91, 93 Am. Dec. 299.

8. There has long been a liberal interpretation of the rule that, when a tenant brings upon the leasehold what are known as trade fixtures, he is allowed to remove them with the only condition that he must not injure the freehold in making such removal. But in case trade fixtures have been placed in a building by the owner, who has given a real estate mortgage thereon, the mortgagee is entitled to claim them as part of his security. This was held as early as 1845 in *Corliss v. McLagin,* 29 Me. 115, and has been followed in England and Canada and many of the states. A variation of this situation arises when the owner of the real estate has leased trade fixtures which he has annexed to the premises or purchased the same on a conditional sales contract which has been recorded as a chattel, and in such cases it has been held that they do not become a part of the realty if they can be removed therefrom without injury. *Hill v. Sewald,* 53 Pa. St. 271, 91 Am. Dec. 209; *In re Erie Lithograph Co.,* 260 Fed. 490. Garage equipment held removable as trade fixtures in *Ray v. Young,* 160 Ia. 613, 142 N. W. 393.

On the other hand, to add to our confusion, in an old decision one of our courts held that seven years after a mortgage was executed and the mortgagor added to the

premises a boiler, a saw rig, shingle mill and planer, as they could be removed without injury to the freehold, they were not fixtures. *Choate v. Kimball,* 56 Ark. 55, 19 S. W. 108. But the great weight of authority holds, as in the case of *Wight v. Gray,* 73 Me. 297, that fixtures annexed after the execution of the real estate mortgage cannot be removed or disposed of by the mortgagor or those claiming under him without the consent of the mortgagee, and this ruling has been followed in many cases; and in the case of *Planters Bank v. Lummus Cotton Gin Co.,* 132 S. Car. 16, 41 A. L. R. 592, it was held that when such a mortgage was foreclosed the mortgagee could maintain an action on his deficiency judgment against one who had removed such fixtures from the premises.

9. In *Beatrice Creamery Co. v. Sylvester,* 65 Colo. 569, 179 P. 154, 13 A. L. R. 441, it is held that a vendor of silos who reserves the power to retake them has a superior right to the holder of the mortgage upon the real estate, and may remove them against the claim of the existing mortgagee.

In *Tifft v. Horton,* 53 N. Y. 377, the mortgagee of a boiler and an elevator was decreed priority over a prior real estate mortgage, the court saying: "The chattels have not become a part of the building; the removal of them will not take away or destroy that which is essential to the support of the main building, or other part of the real estate to which they were attached."

Where a sprinkler system was installed in a theatre building it was held that in case it was not paid for it could be removed by the contractor who installed it. *Automatic Sprinkler Co. v. Central Amusement Co.,* 189 Ia. 145, 176 N. W. 786, 13 A. L. R. 439.

In *Cosgrove v. Troescher,* 62 N. Y. App. 123, it was held that gas ranges not set in a place constructed for them but raised on four legs and connected by a chimney to the flue, are personal property as between the owner of the building and his mortgagee.

It has also been held that, when the owner of the fee who has given a mortgage thereon leases the building to a

third party and gives him the right to remove any chattels which he may attach, to be used in connection with the building, such chattels do not become a part of the realty upon foreclosure; an extreme case under this holding being *Pioneer Savings & Loan Co. v. Fuller,* 57 Minn. 60, 58 N. W. 831, where the mortgagor, pending the expiration of the year of redemption from a foreclosure sale, allowed his tenant to put in a mantel and tiling and the tenant was allowed to detach these articles if done within the year of his possession.

The rule has been declared by this court that a purchaser of land with notice of title in third persons to buildings situated thereon takes the real estate subject to the rights of such third parties in such structures. *Moore v. Moran* (1902) 64 Neb. 84, 89 N. W. 629.

As we have stated, where the owner puts in improvements the law at once raises a presumption of intention to make them a part of the land, but the same rule is not enforced as against a tenant for life or a lessee. *Tyler v. Hayward,* 235 Mich. 674, 209 N. W. 801.

Where the removal of the chattels will not materially injure the premises the vendor who retains title may assert his right against a prior real estate mortgage.

10. Senator Norris, while sitting as district judge in Dakota county for District Judge R. E. Evans, tried the case of *Edwards & Bradford Lumber Co. v. Rank* (1899) 57 Neb. 323, 77 N. W. 765, and upon appeal to this court it was held: "Where one purchases an engine with a view that it shall be placed in a flouring mill of which he is the owner, to propel the machinery therein, and he executes a chattel mortgage on such engine to secure the payment of a portion of the purchase price, he thereby evinces his intention that the engine shall retain its status as personalty, even though physically attached to the freehold by such owner, and it will be so regarded by the courts whenever the rights of innocent third persons will not be prejudiced."

The boring of a well and the piping and pump therein are held not a fixture so that payment thereof could be

enforced under a mechanic's lien. *Pillow v. Kelly,* 155 *Tenn.* 597, 296 S. W. 11.

A modification of the liberal rule in regard to tenants being allowed to remove improvements takes place in the case in which the tenant becomes insolvent, in which case the owner can prevent him from removing such improvements and apply their value upon past-due rent in spite of an agreement to the contrary. *Galbreath v. Thayer,* 147 Miss. 556, 53 A. L. R. 288. For parol exception of fixtures in conveyance see *Blake-McFall Co. v. Wilson,* 98 Or. 626, 193 P. 902, 14 A. L. R. 1275.

11. In this case the plaintiff claims the ownership in his petition to item No. 37, one Volcker visible gasoline pump, and to item No. 38, being a self-measuring gasoline pump for filling cars. Only a few cases have been published dealing with the electrical equipment and gasoline equipment in modern garages and filling stations. Gasoline pumps at a service station are held not fixtures to a building. *Service Station Equipment Co. v. Hewitt,* 282 S. W. (Tex. Civ. App.) 286. The case of *Standard Oil Co. v. Dolgin,* 95 Vt. 414, 115 A. 235, 17 A. L. R. 1218, appears to be one of the very few cases discussing gasoline tanks which have been buried in the ground. The original character of such tanks as personal property, their installation, usual for a tenant upon leasing ground, and the fact that they can usually be dug up and removed with no material injury to the freehold, has led several courts to decide that such gasoline tanks do not pass in conveyance by a warranty deed.

In *Olympia Lodge No. 1, F. & A. M. v. Keller,* 142 Wash. 93, 252 P. 121, 52 A. L. R. 795, a tenant leased a tract of ground, upon which an automobile camp and service station with trade fixtures consisting of gasoline pumps, tanks, oil containers, air compressors, toilet fixtures in the rest room, and an electric sign, were placed, but unfortunately the lease contained a provision that at the expiration of the lease the lessee agrees to quit the premises and leave all improvements thereon, which shall become the property of the party of the first part. The lease was for a term

of five years, and upon the failure of the lessee to pay the rent and taxes for the third year he attempted to remove the fixtures installed and the landlord was allowed to retain all of the fixtures. See, also, *Cohen v. General Motors Acceptance Corporation,* 152 A. (R. I.) 693.

As between prior mortgagee and conditional seller, plumbing and heating appliances wrought into and attached to realty become a part of the realty, except where otherwise provided by agreement or statute. *Greene v. Lampert,* 174 N. E. (Mass.) 669.

When articles are sold on condition that the title shall not pass until they are paid for, or some other condition in reference to their ownership or use is unfulfilled, such articles do not become a part of the realty, for an agreement reserving the right of removal would in such cases be implied. See 26 C. J. 679.

We have among the items the plaintiff claims as a fixture item No. 18, one five-horse-power electric motor attached to ceiling, used for propelling machinery.

In the leading article in the Columbia Law Review for February, 1926, entitled "Some Problems of Modern Collateral Banking," the writer calls attention to the increasing use of household equipment and electrical appliances, often only attached by electrical wiring, and says that the most intricate problems are now arising in respect to such electrical fixtures. The author sets out that certain fixed rules can be accepted. As between the parties an agreement that any fixture does not become part of the real estate is binding, and is often shown by recording a conditional contract of sale as a chattel mortgage. However, some states, he says, have refused to burden the purchaser of real estate with the necessity of examining the chattel mortgage record to determine whether certain fixtures are incumbered. See *Tibbetts v. Horne,* 65 N. H. 242, 23 A. 145; *Gas & Electric Shop v. Corey-Scheffel Lumber Co.,* 227 Ky. 657, 13 S. W. (2d) 1009, 62 A. L. R. 208. See notes *Scovel v. Shadyside Co.,* Ann. Cas. 1917B, 178.

The court finds that item No. 37, Volcker visible gas pump, was not invoiced in the sale of the fixtures, and

the testimony discloses that it is the property of the Dodge Oil Company. It is not claimed by the defendant Schinkel, and if it can be removed without damage to the freehold there is nothing in the evidence that discloses that it is a part of the realty, and the same is true in reference to item No. 38, self-measuring gas pump, type 577, model 25, serial number 16987, which the evidence discloses belongs to the Standard Oil Company.

In a late case it was held that a mortgage conveying two parcels of land, "together with all fixtures and machinery located thereon and used in connection with the operation of the sand and gravel pit," which was not recorded under the statute regarding chattel mortgages, gave the mortgagee no rights against conditional seller of machinery, where no title had passed to mortgagors. *Quincy Oil Co. v. New England Road Machinery Co.*, 174 N. E. (Mass.) 670.

In a Nebraska case articles not attached were claimed to be conveyed by the real estate mortgage, the same as the heavy lathe is in this case. It is the case of *Haver v. North American Hotel Co.* (1923) 111 Neb. 13, 195 N. W. 483, in which a real estate mortgage, given to obtain money for the construction of the Yancey hotel in Grand Island, after giving the legal description of the land, specifically set out: "* * * including all screens, curtain fixtures, window shades, wall beds, ice boxes, ranges, furnaces, vacuum cleaners, refrigerating, heating, plumbing, ventilating, gas and electric light fixtures, * * * and furniture and furnishings of every kind, *in, or that shall be placed in,* any building now or hereafter standing on said premises." This court on appeal refused to accept the contention of the defendant that the real estate mortgage was limited to such items only as would be included within the terms "buildings, improvements and appurtenances," and said: "We think, however, that a reading of the whole clause shows that the intention was not to so limit the articles to such things as would come within the meaning of the three general words. It could scarcely be contended that furniture and furnishings and such articles would

come within the term of an appurtenance. * * * It was the intention of the parties that the lien should attach not only to the building and appurtenances, but to all of the designated articles that might be placed in the building, either then or thereafter erected upon the premises."

Commissioner Pound sets out in *Hillebrand v. Nelson* (1901) 1 Neb. (Unof.) 783, 95 N. W. 1068, that the mortgage given by the Beatrice Paving & Building Brick Company, after describing the several tracts of land, provided that it should include "engines, and boilers and all machinery connected with the plant," etc. Would wheelbarrows, tool boxes, sand boxes, planks and boards pass as fixtures? Judge Pound, now Dean Pound, said: "The sole basis of the claim that the articles here in controversy are fixtures arises from the fact that articles of that kind are necessary to the effective operation of the plant. But this is far from sufficient as long as they are loose and portable, have no special or peculiar adaptation to this particular plant, and are either adapted to general use or to use with equal efficiency in any like establishment."

And in *Voorhis v. Freeman,* 2 Watts & Serg. (Pa.) 116, 37 Am. Dec. 490, soft and chilled rolls lying on the ground were held realty, but an examination discloses that there could be little dispute, for the scrivener had carefully inserted in the description, "for a lot of ground with one iron rolling mill establishment situated thereon with the apparatus attached to said establishment." See *Pyle v. Pennock,* 2 Watts & Serg. (Pa.) 390, 37 Am. Dec. 517.

Careful conveyancers can well avoid troublesome questions as to what items are fixtures as well as what chattels are bound for the payment of the debt by incorporating in the real estate mortgage, in addition to the legal description of the land, such equipment, fixtures, machines, furnishings and furniture as shall be bound for the payment of the debt.

12. In regard to the lathe, being item No. 1, which cost $600, the testimony shows it weighed 1,400 pounds and it was simply attached, if at all, by gravity, but connected to a shaft for power.

A statue, weighing three or four tons, in a courtyard, which was not fastened to its foundation except by its own weight, was considered a fixture upon the foreclosure of a mortgage. *Snedeker v. Warring,* 2 Kern. (N. Y.) 170. And conversely, where a bank safe was not attached to the building by bolts or screws, irons or nails, it was not a fixture, as such term includes only articles attached to the building. *Mecca Fire Ins. Co. v. First State Bank,* 135 S. W. (Tex. Civ. App.) 1083. Thus do the reported decisions add to our confusion.

The first requirement of a fixture, set out in *Teaff v. Hewitt, supra,* is actual annexation to the freehold. But the exceptions are numerous. Doors, windows, shutters are often hung but not fastened to a building, and at certain seasons may be stored elsewhere, yet they are a part of the real estate; and in *Roderick v. Sanborn,* 106 Me. 159, 76 A. 263, 30 L. R. A. n. s. 1189, it is held they will pass under a mortgage. Retention by gravity is sufficient. 26 C. J. 661.

It is not the mere fixing or fastening which is regarded, but the use, nature, intention. It was held that a log chain which was essential to the operation of a mill, although not fixed to the mill in any way, was a fixture. *Farrar v. Stackpole,* 6 Green. (Me.) 154, 19 Am. Dec. 201.

A carpet is not a fixture although nailed to the floor, and a key carried in the vest pocket may be a part of the realty, therefore each particular case of fixtures must be determined by its own facts and is more for the jury than for the court. A heating plant cemented into the foundation is a fixture and part of the realty and subject to a mechanic's lien. *Goodin v. Ellardsville Hall Ass'n,* 5 Mo. App. 289.

Modern decisions in both England and America are against the old common-law doctrine that the mode of annexation is the criterion as to whether slight and temporary or immovable and permanent, and there is a tendency in favor of declaring things to be fixtures which are attached to the realty with a view to the purposes for which it is held or employed. *First Nat. Bank v. Clifton Armory*

*Co.*, 14 Ariz. 360, 128 P. 810, Ann. Cas. 1915A, 1061; 11 R. C. L. 1059.

It should be a safe rule to say that parts of property which are not physically attached to realty, but which are absolutely necessary to the operation of machinery and equipment which is physically attached, become themselves governed by the same rules as that which is annexed to the freehold. And this court finds that this 1,400-pound lathe, placed therein by the owner before giving the real estate mortgage thereon, is a part of the realty belonging to the plaintiff.

13. The plaintiff under oath in his petition claims the ownership of item No. 24, hot water heater and tank, No. 25, lavatory, No. 26, shower bath complete, and No. 28, pressure tank connected with the shower. These items are disclaimed by defendant Schinkel, who testifies that they were all installed by Joe Stecher in his training rooms on the second floor. The plaintiff in his evidence has failed to sustain his claims to them as made in his petition, and the court declares they are not fixtures of the plaintiff.

We now come to the consideration of a number of items which were installed in the two-story building at the time it was erected by the owner. In *President and Directors of Ins. Co. v. Buckstaff* (1902) 3 Neb. (Unof.) 632, 92 N. W. 755, we have a case which was extremely conflicting, whether a steam heating plant and radiators were put in for temporary use or for permanent use, but the evidence disclosed that the boiler was very much larger than necessary for the heating plant, and the court found that the facts would justify the conclusion that such heating plant had been put in for a temporary use and could be removed from the building. But in the present case no such contention is made, and it must be evident to any one that the 17 radiators of the heating plant, set out as items Nos. 22, 23, 27, 29, 30, 39, 40 and 41, are a part of the realty, whether they are now connected up with the system or detached, and the same is true of No. 33, pressure tank connected with the system. It is likewise true that the item No. 41, one complete toilet, No. 32, one sink, are

realty. Elevators are installed and used in this building and would be useful whether it is used as a garage or for other lines of business. Item No. 34, one small elevator, and No. 35, one large elevator, are hereby found to be a part of the realty and to belong to the plaintiff.

After movables have become permanently affixed to the realty the mere change of mind on the part of the original owner of his intention in affixing the same cannot of itself change them to chattels as against the purchaser at sale under a real estate mortgage foreclosure. *Scovel v. Shadyside Co.*, 137 La. 918, Ann. Cas. 1917B, 178.

As soon as the building was constructed the owners of the building moved their entire garage equipment and the business which they had been conducting for six years into this building, and upon November 17, 1921, the $9,000 real estate mortgage was given thereon to the plaintiff's father. It is not clear from a careful reading of the bill of exceptions whether all of the fixtures claimed by the plaintiff were annexed to the building before the mortgage was given or after, and it is possible that some of them were purchased and added afterwards. Ordinarily it is of great importance to determine the intention of the one who attaches fixtures. Such intention is not the secret purpose of such owner, but it is that intention which should be implied from his acts. The controlling intention is that which the law deduces from all of the facts and circumstances connected with the installation of the article upon the land. See *First State & Savings Bank v. Oliver*, 101 Or. 42, 198 P. 920; *Thomson v. Smith*, 111 Ia. 718, 83 N. W. 789.

14. It has also been held by our court that the owner of mortgaged property who adds improvements believing the mortgage to be ineffective cannot defend on that ground. *Arlington Mill & Elevator Co. v. Yates* (1898) 57 Neb. 286, 77 N. W. 677.

We now come to the consideration of machinery and equipment used in running a garage business. The plaintiff testifies that the owner thereof pointed out all of these particular items to him, thereby giving him assurance of

the added security of these fixtures for the $9,000 that he was about to loan for his father, while the owner testifies that he told the plaintiff that these things were a part of the garage business, meaning thereby to hold out that they were merely trade fixtures which were removable. But where the owner of realty annexes chattels, the presumption that they should become a part of the realty renders immaterial the question as to whether they could be removed without injury, as stated in *Tyler v. Hayward,* 235 Mich. 674, 209 N. W. 801, and as between a mortgagor and a mortgagee the intent of the owner mortgagor in making the annexation can be considered only if annexation was made after the execution of the mortgage. *Planters Bank v. Lummus Cotton Gin Co.,* 132 S. Car. 16, 41 A. L. R. 592. And it is held that these items affixed by the owner and by him mortgaged are fixtures which have become a part of the realty: . Items No. 2, one lathe key seating attachment; No. 3, one power drill; No. 5, one small vise; No. 7, one Yankee drill; No. 9, one air compressor attached to line shaft; No. 10, one power saw; No. 11, one forge; No. 12, one suction fan; No. 13, one 20-ton press; No. 17, one emery stand; No. 18, one five-horse-power electric motor; No. 21, one two-to-five-ton hoist.

In *Young v. Hatch,* 2 Am. & Eng. Ann. Cas. 374, many cases are reviewed, and it is held in several of them that as between the mortgagee and the mortgagor annexations affixed to an estate by the owner before mortgage, of such a character as are apparently calculated to be for the permanent use and enjoyment of the realty, are presumed to be intended to form a part of the realty and to pass with it by a mortgage.

15. The evidence discloses that the following articles were installed by the defendant, Elmer Schinkel, after he had leased the building, and the rule is that as between a tenant and a landlord the evidence should be construed liberally in favor of the tenant, and the court finds that No. 4, one Universal axle stand; No. 6, one small grinder attached to the work bench; No. 8, one brake band riveter, type A668, which is listed in exhibit "A," attached to the

petition, as a riveter, but the testimony, answer 697, discloses clearly that it is a "lifter;" No. 14, one burning-in stand, and No. 15, Ford motor propelling it; No. 16, U. S. automatic air compressor; No. 19, one "U" track, being the part installed by Schinkel; No. 31, gas pipe unattached to building; and No. 36, one Echo air machine, as well as No. 20, being the small hoist of approximately a ton or a ton and a half, which was installed in the place of one that has been discarded, were each and all purchased and installed by Elmer Schinkel while he was conducting this garage as a tenant and are trade fixtures.

As to this equipment installed by Schinkel, we believe that the evidence brings it clearly within the rules laid down by Goss, C. J., in *Moran v. Otoe County Nat. Bank* (1927) 115 Neb. 515, 213 N. W. 824. This was a filling station case, and held in the first paragraph of the syllabus: "Where fixtures are erected upon and attached to leased real property, by a tenant or other person rightfully there, for a specific use connected with the occupancy during the leasehold term * * * they may be removed by the tenant, * * * during the term of the tenancy, provided the severance can be accomplished without injury to the landlord's freehold." This case is the leading case in an article on fixtures in 6 Neb. Law Bulletin, 199.

And we hold that, as the purchase price of all items in dispute is held in escrow awaiting this decision, as to all of the above items installed as trade fixtures by the tenant, Elmer Schinkel, the court shall direct that the value of such items deposited with the escrow agent shall be paid to him.

The cause is remanded to the district court, with instructions to modify the decree appealed from and to enter a new decree in accordance with this opinion as to the 41 items in the exhibit attached to the petition.

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

GOSS, C. J., and GOOD, J., concur in the result.

ROSE, J.

I think the judgment pronounced is right, but I do not

concur in the opinion adopted by the supreme court. To a great extent it contains discussions and rules of law not essential to a decision. What is said on extraneous subjects is dicta not binding on the court or parties in future litigation. The effect is to obscure the decisive points in the case and to unnecessarily increase the cost of publishing the official reports of decisions.

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JAMES F. BOURRET, APPELLEE, V. DAVID H. LAWMASTER, APPELLANT.

FILED OCTOBER 30, 1931. No. 27907.

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

*Fern S. Baker, Allen G. Fisher* and *Charles A. Fisher*, for appellant.

*Schnurr & Mumby, contra.*

Heard before GOSS, C. J., DEAN, EBERLY and PAINE, JJ., and BLACKLEDGE, District Judge.

PER CURIAM.

This action was begun in the county court of Sioux county to recover $175, with interest thereon at 7 per cent. per annum from October 20, 1928, until paid. The plaintiff, James F. Bourret, alleges that on the above date he sold a two-room dwelling-house to David H. Lawmaster, the defendant, pursuant to the terms of an oral agreement between the parties, and that the defendant then paid $175 of the purchase price of $350, and that the remainder was to be paid by the defendant on or before October 1, 1929. The dwelling-house was removed from its former location to the defendant's premises, but the plaintiff alleges that the defendant refused to pay the remainder of the purchase price now due. From a judgment in favor of the plaintiff, the defendant appealed to the district court where, upon trial to a jury, a verdict was returned for plaintiff in the sum of $175, with interest thereon at 7

per cent. from October 20, 1928. The defendant has appealed.

The defendant contends that the trial court was without jurisdiction of the subject-matter herein, and that the court erred in overruling the demurrer of the plaintiff. We do not agree with counsel. In 25 R. C. L. 538, sec. 128, it is said: "It is * * * the general rule that a contract by the owner of land for the sale of fixtures and improvements thereon including buildings, the same to be removed by the buyer, is not a contract for the sale of an interest in the land." And it appears to us that, in the present case, where such contract involves no title to land, the case is clearly within the jurisdiction of the county court. The general rule appears to be that where, as in the present case, a dwelling-house is sold with the understanding that such house is to be removed from the plaintiff's land, the dwelling-house then and thereby becomes personal property. *Moody v. Aiken,* 50 Tex. 65; *Long v. White,* 42 Ohio St. 59; *In re Bloor's Estate,* 115 Wash. 507.

Other assignments of alleged error have been cited which we do not deem it necessary to discuss, other than to observe that the parties hereto kept themselves clearly within the controversy in suit. The jury were well within the rights conferred upon that body by law in rendering the verdict herein. The judgment is

AFFIRMED.

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## INAS L. WEVER V. STATE OF NEBRASKA.

FILED OCTOBER 30, 1931. No. 27967.

1. **Criminal Law: TRIAL: INCOMPETENT EVIDENCE.** Ordinarily, admission of incompetent evidence will not be held prejudicial where the same state of facts is established by the testimony of the party complaining.
2. **Homicide: TRIAL: EVIDENCE.** In a prosecution for homicide, remoteness of acts of hostility by the defendant towards the victim of the homicide affects the weight and not the competency of evidence of such acts, especially where it is shown that such acts of hostility are continued practically to the time of the homicide.

3. Criminal Law: TRIAL: EVIDENCE: HARMLESS ERROR. Ordinarily, error in the admission of evidence is cured by withdrawing such evidence and directing the jury to disregard it.
4. ———: ———: DEMONSTRATIONS BY SPECTATORS: FAILURE TO OBJECT. In the trial of a criminal action, where spectators applaud and counsel for defendant proceed with the trial, without objection and without request for a mistrial, and take chances of a favorable verdict, they will not be heard to complain of such fact, for the first time, on motion for a new trial.
5. ———: ———: ———: NEW TRIAL. Demonstrations on the part of spectators in the courtroom do not constitute ground for a new trial, where they are promptly checked and it appears probable that the jury were not influenced thereby.
6. Homicide: INSTRUCTIONS. "In a prosecution for murder in the first degree committed by administering poison, the court is not required to instruct the jury as to the law applicable to manslaughter or murder in the second degree, where the evidence clearly establishes that the defendant is either guilty of the crime charged or entirely innocent." *Davis v. State*, 116 Neb. 90.
7. Evidence examined and outlined in the opinion, and *held* sufficient to sustain a verdict finding defendant guilty of first-degree murder.

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

*William N. Jamieson* and *J. R. Lones*, 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.

GOOD, J.

Inas L. Wever, plaintiff in error (hereinafter designated defendant), was convicted on an information charging her with first-degree murder by administering strychnine poison to her husband, George Wever. She brings the record of her conviction to this court for review.

There are numerous assignments of error, but many of them are not discussed in the briefs and are apparently abandoned. We shall consider only those which are dis-

cussed in the briefs and apparently relied upon by defendant.

Defendant complains that the court erred in permitting evidence to be received tending to show frequent quarrels and controversies between defendant and her husband, extending over a period of several years previous to the homicide in question. The record discloses that defendant, as a witness, gave evidence of like tenor, although she did deny some specific incidents related by witnesses for the state. It is a rule that the admission of incompetent evidence is not prejudicial where the same facts are established by the testimony of the complaining party himself, and whether before or subsequent to the admission of the incompetent evidence. 17 C. J. 324.

It is contended that some of the incidents related by state witnesses were too remote and should not have been considered or admitted in evidence. While some of the incidents were somewhat remote, the evidence tends to show that there was a continuous course of conduct between the parties, and that hostilities existed during many years previous to the homicide. It is also a rule that remoteness of such testimony is regarded as affecting the weight and not the admissibility of the evidence, especially when the condition continues to the time of the homicide. 30 C. J. 184, 196-198; *Sharp v. State*, 115 Neb. 737.

Defendant complains because evidence was admitted showing the purchase by her of arsenic on the day before the death of Mr. Wever. The information charged the commission of murder by the administration of both arsenic and strychnine sulphate, but there is no evidence that Mr. Wever's death resulted from arsenical poisoning. At the close of the state's evidence, on motion of the prosecuting attorney, all evidence relating to the purchase of the arsenic was stricken from the record, and the jury were directed to disregard it.

We think the evidence was properly admissible. The defendant testified that the strychnine purchased on the day of Mr. Wever's death was for the purpose of exterminating rats, and the arsenic had been purchased the

day before for the same alleged purpose. Evidently, sufficient time had not elapsed since the purchase of the arsenic on the 8th day of December to determine whether other or different poison was necessary to accomplish that purpose. The purpose for which defendant said she purchased the strychnine might very well be questioned, in view of the very recent purchase of arsenic for the same purpose. With respect to this testimony, no error prejudicial to the defendant was committed in its admission, but, had it been error, the striking thereof from the record and the direction to the jury to disregard it were sufficient to destroy any effect it might have had. This court has held in *McCormick v. State,* 66 Neb. 337, and *Robinson v. State,* 71 Neb. 142, that error in the admission of evidence is cured by withdrawing such evidence and directing the jury to disregard it.

It is contended that defendant was deprived of a fair trial on account of hissing and applauding on the part of spectators in the courtroom during the trial. There is no evidence in the record of any hissing. The only evidence of applause is a notation by the reporter, following a verbal tilt between counsel for defendant and a state witness. The court promptly rebuked such conduct and stated that if it occurred again the courtroom would be cleared. Ordinarily, this would be sufficient, but, aside from that, no objection was raised by defendant; nor is there anything in the record to disclose the nature or extent of the applause, or who was guilty of the misconduct. If counsel for defendant at the time had reason to apprehend or believe that such conduct would prejudice the rights of defendant, they should have then requested the court to declare a mistrial. Instead, they elected to proceed with the trial without objection, and took the chance of a favorable verdict, and now seek to overturn the verdict for causes which they knew and did not object to before the case was submitted to the jury.

In *Kriss v. Union P. R. Co.,* 100 Neb. 801, it was held: "The general rule is that counsel cannot remain quiet and seemingly acquiesce in remarks of opposing counsel in his

argument to the jury, and after verdict obtain a reversal because of matters not objected to at the time." The same rule is applicable to alleged misconduct of spectators. Furthermore, it is a rule that demonstrations on the part of spectators do not constitute ground for a new trial where they are checked promptly and where it appears probable that the jury were not prejudiced thereby. *Debney v. State,* 45 Neb. 856; *Lindsay v. State,* 46 Neb. 177. The evidence discloses nothing from which it could be inferred that defendant was in any wise prejudiced by whatever applause there may have been.

It is rather mildly urged in the brief that the trial court should have instructed on the lesser degrees of homicide; second-degree murder and manslaughter. In the instant case, there is no evidence in the record which would, under any circumstances, justify a verdict for murder in the second degree or manslaughter. Defendant was either guilty of murder in the first degree or not guilty of any offense. In *Davis v. State,* 116 Neb. 90, it was held: "In a prosecution for murder in the first degree committed by administering poison, the court is not required to instruct the jury as to the law applicable to manslaughter or murder in the second degree, where the evidence clearly establishes that the defendant is either guilty of the crime charged or entirely innocent."

The principal ground of complaint, and the one chiefly relied upon for reversal, is the insufficiency of the evidence to sustain the verdict. There is evidence in the record tending to show that for a period of years preceding the homicide defendant and her husband had frequent quarrels and controversies; that when her husband was away from home she telephoned a married man that "the coast was clear," and requested him to come to see her in her home, and that she entertained him until 2 o'clock, or later, in the morning; that defendant, on one occasion, stated to a witness that another married man had secured a divorce from his wife for her, the defendant, and that it was "up to her" to get rid of her husband; that she had stated this man had given her a diamond ring.

There is evidence tending to show that on another occasion she was surreptiously removing her personal property from the home, with a view to separating from her husband. There is ample testimony to show motive, on the part of the defendant, for the commission of the crime charged.

The record discloses, without question, that defendant's husband, George Wever, was employed as a painter in the railroad shops at Plattsmouth; that he worked there for a number of years; that he enjoyed fairly good health and was not laid off on account of ill health during any of this period; that he worked up until Monday noon previous to his death, which occurred on the following Tuesday, shortly after noon. On Monday, the 8th of December, he went to work as usual, although he had complained the evening before of a cramp in his leg. During the forenoon of Monday he became ill and complained of pains in his stomach, and about noon of that day he returned to his home, where he was ill and vomited freely and frequently. Defendant consulted a doctor for her husband and was given a prescription, without the physician calling upon her husband at the time. Mr. Wever continued to be quite ill during Monday afternoon, and that night the doctor was called to the house to treat him. The physician administered morphine hypodermically, and directed that the patient be given soda water, or soda in water. During the night, Mr. Wever continued to be ill and vomited frequently, and drank copiously of water or soda in water. On the following morning he was still quite ill, and the doctor was again called and gave him another hypodermic injection of morphine, and left some tablets to be given, with instructions to continue giving the soda in water. Between 12 and 1 o'clock of the same day Mr. Wever died in convulsions. The symptoms which he displayed were described by witnesses present, and competent experts testified that these symptoms were typical of strychnine poisoning. It also appears that rigor mortis set in very soon after death. Experts testified that this was also characteristic where the person died of strychnine poisoning.

On December 8 Mrs. Wever purchased from a pharmacist an ounce of arsenic, stating that it was for the extermination of rats. On the morning of December 9, while Mr. Wever was very ill, defendant went to another drug store and purchased one-eighth of an ounce of strychnine sulphate, saying that it was for the purpose of killing rats. Defendant testified that her husband directed her so to do. It may be observed that it would be a very unusual thing for one, so ill as Mr. Wever and suffering as he was, to suggest, at such a time, that his wife should leave him and go to a drug store to buy rat poison, especially in view of the fact that they had known the condition with respect to rats infesting the premises for some months previous to this time. It seems somewhat strange also that defendant, having purchased on the day previous arsenic to exterminate the rats, would not have so informed her husband, and told him that it was not necessary at that time to purchase additional poison.

A post mortem examination was held, and the walls of the stomach and part of the liver of deceased were examined, and there was found in the parts examined three and one-half milligrams of strychnine, three milligrams in one-half of the walls of the stomach and one-half milligram in one-fifth of the liver. The testimony indicates that this could only have been carried through the blood stream. Experts testified that, since strychnine was carried through the blood stream, it would be about equally distributed over various parts of the body; that, if the entire walls of the stomach had been taken, there would have been six milligrams therein, and, if all the liver had been taken, there would have been two and one-half milligrams therein, or a total of eight and one-half milligrams in the liver and walls of the stomach; that a conservative estimate would be that there was at least ten times this quantity, to wit, 85 milligrams, in the entire body, which was more than sufficient to cause death.

In our opinion, the evidence is sufficient to establish beyond a doubt that Mr. Wever's death occurred as a result of strychnine poisoning. There is no evidence in the rec-

ord tending to show that Mr. Wever saw the strychnine purchased by defendant or knew where it was placed by her. Defendant testified that she used some of it for rats and placed the bottle containing the remainder on a shelf in the cellar of the house. Mr. Wever was confined to his bed on the second floor. No one testified that he left the second floor of his dwelling on the morning of the 9th of December. If the strychnine was purchased for the extermination of rats, it was certainly a very small quantity for such a purpose. The contents of the bottle, containing the remainder of the strychnine sulphate, was later examined and weighed, and it was found that 15 grains had been taken therefrom. The evidence shows that one to one and a half grains of strychnine is sufficient, when taken internally, to cause the death of a human being, and that, in some instances, death has been known to occur to a person taking less than one-half of a grain. The evidence, both on behalf of the state and the defense, is to the effect that defendant administered to her husband frequent drafts of soda water, or soda in water. There is no evidence to indicate that Mr. Wever could have obtained the strychnine either intentionally or by accident. The evidence tends to negative the possibility of such act. There is no evidence that any person, other than defendant, administered drink or medicine to Mr. Wever. We think the evidence adduced was sufficient to warrant the jury in finding defendant guilty of murder in the first degree.

No error prejudicial to defendant has been found. The judgment is

AFFIRMED.

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GEORGE RIDENOUR, APPELLEE, V. SOL LEWIS ET AL., APPELLANTS.

FILED OCTOBER 30, 1931. No. 27982.

1. **Evidence:** DYING DECLARATIONS: COMPENSATION CASES. Whether, under the rule announced in *State v. Lake, ante*, p. 331, "dying declarations" are competent evidence in proceedings under the Nebraska workmen's compensation act, *quære*.

2. ———: RES GESTÆ. Under the circumstances of this case, statements made by the deceased immediately following his discovery in a wounded and helpless condition, as well as his statements to police officers a few moments thereafter en route from the place of injury to the hospital, relating to the cause and circumstances surrounding his injury, were properly admissible in evidence as part of the *res gestæ*.
3. Master and Servant: WORKMEN'S COMPENSATION ACT: COMPENSABLE INJURY. Where the employment included the installation, repair and servicing of radios sold by the master, and also the collection of the master's accounts by the employee, and where such employee, passing along the public streets pursuing his employment, with one of such accounts then in his possession for collection, is there assaulted for the purpose of robbery, and therein and thereby receives a wound causing his death, such injury arises out of, and in the course of, his employment.
4. Evidence examined, and award of the trial court to claimant approved.

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

*Dressler & Neely*, for appellants.

*G. F. Nye* and *Harry W. Shackelford, contra.*

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

EBERLY, J.

This is an appeal from a judgment of the district court for Douglas county awarding appellee death benefits provided by the workmen's compensation law as a partial dependent of his deceased son.

The contested issues in the trial court were: (1) Was the deceased son shot and killed by a highwayman? (2) Did his death "arise out of his employment?" (3) Was the father (appellee) partially dependent on the deceased? (4) And, was error committed by the district court in overruling appellants' motion for a new trial based on newly discovered evidence?

These questions are in effect now presented to this reviewing court for determination *de novo*. A careful exam-

ination of the bill of exceptions sustains the conclusion that there is no substantial conflict of evidence in this case. The controversy is largely one of law and includes appellants' challenge to the competency of the evidence in the record to establish the existence of certain essential incidents which, together with certain undisputed facts, make up the transaction involved.

It is established by the evidence that on September 2, 1930, Robert Ridenour, unmarried and twenty-five years of age, a son of the plaintiff (appellee), was, and for a year prior thereto had been, employed by defendant Sol Lewis at a weekly wage of $22 a week, of which $10 a week had been by the son, during this employment, contributed to his father's family. The duties imposed on the son by this employment included the installation of radios, the repair and "servicing" thereof, and the making of collections for his employer. In the performance of these duties Ridenour ordinarily made use of a green Ford roadster, of which he was the owner. This car was equipped with a ladder slung under the body thereof, and a radio test box was carried in the car. This equipment was the property of the employer. After putting in the forenoon of September 2, 1930, in his employment at the employer's place of business, between 1 and 1:30 p. m. Ridenour drove away therefrom with the green Ford roadster, carrying the usual equipment. He also had in his possession a bill in favor of his employer for collection. His immediate mission, however, was to install a radio that had been sold and delivered from the store of defendant Lewis. About 2 o'clock thereafter a report of a firearm was heard in Hummel Park in the north part of Omaha by the caretaker and the patrolman there on duty. They proceeded at once to investigate. For this purpose in a Ford they drove in a general northeasterly direction along the park boulevard which at this point is laid out in a "winding hairpin drive." As these persons "made the last bend out of the park" they discovered Ridenour's green Ford roadster, with its usual equipment, standing a little to the left of the park entrance "going out," and approx-

imately at 100 to 150 feet from the "river road" with which the drive over which they were traveling connected. Ridenour was also there lying on the ground 50 or 60 feet from the green Ford car with his head toward the driveway as though he had been dragging himself. He was then badly bleeding from a bullet wound in the right side of his chest, and the front of his body was covered with blood which saturated his clothing. These parties reached the wounded man approximately ten minutes after the shot was heard, and found him practically in a totally disabled condition, due to the wound and the loss of blood occasioned thereby. Asked by them what had happened, Ridenour replied, in substance, that he had been shot; that two men in a blue Chevrolet sedan had come alongside his car while he was en route to his appointment; one of these men got into his car and with a knife forced him to drive out to the park, and there attempted to rob him; that in a fight that followed his assailant got the best of him, took the revolver away from him, and shot him; that after the shooting the blue Chevrolet came along and the shooter got into it and was driven rapidly away. There was but one gunshot wound on Ridenour's person at this time, which was later described by the physician performing the autopsy on Ridenour's body after his death, as a bullet wound with an entrance three inches above and one inch to the left of the right nipple and about two inches below the right clavicle; that its course was to the right and slightly downward, fracturing the third rib, passing through the upper lobe of the right lung, making its exit from the pleural cavity by fracturing the fourth rib in the axillary line, then passing through the right scapula lodging in the soft tissues close to the scapula itself. From this point the bullet, a flattened 38 caliber, was removed.

These park officers immediately called up the central police station of Omaha by telephone, and "around fifteen minutes after receiving the call" the city police officers had arrived at the scene of the shooting. At the time of their arrival they found Ridenour in a serious condition; "blood squirting out of his wound," and it was evident that he

was fast weakening. In the next four or five minutes a brief examination of the green Ford roadster and the vicinity was made by the officers, and Ridenour was taken into the police car and conveyed to the hospital. Though they found the wounded man "in quite a bit of pain," yet he repeated to these officers at the scene of the shooting and en route to the hospital substantially the statements first made by him, with added details. He lapsed into unconsciousness on arrival at the hospital. At the scene of the shooting the police officers inspected the green Ford roadster of deceased and found therein a loaded revolver with the cartridge in the chamber under the hammer discharged, and also a penciled note written on the bill which deceased had for collection. This note constitutes exhibit 1 of the record. It was later identified as being in the handwriting of the deceased, and was referred to by him in reply to the officers' questions at the scene of the crime as a note written by him after he was shot because of his fear that he would or might die before any one discovered his condition. Exhibit 1 was offered but not received by the trial court, and is as follows:

"To (two) men about 25-27 pulled along side me at 23 Clark. One got on side of my car and asked if I was going up town. Said no and he got in and stuck a knife in my side, forced me to turn no (north) at 22. He said he stick the knife clear thro (through) me if I made a move. Told me to drive out here. He said give me the deposit quick. After stoping (stopping) he started looking for money. He took mine. The second fellow pulled up in back. It was a shevi (Chevrolet) sedan, new one. They thought my test case had money in it. These same 2 fellows I saw sitting in front of Omaha bank about 4 or 5 times when I made deposit. I always take test case in with me so as not to have it stolen. They must have thought it was money bag. I carry gun in back of cushion. In trying to get it I was too late. We fought for it. I got it—the bullet. He jumped out and got in chevi (Chevrolet) with other man."

Ridenour died on the third day thereafter from the effect of the bullet wound received.

Independent evidence also establishes the fact that on the afternoon of the assault, shortly prior to the shot heard in the park, Ridenour's car, occupied by two persons, unidentified, closely followed by a blue Chevrolet sedan automobile, was being driven rapidly over the highway in the direction of Hummel park.

Appellants contend that the foregoing statements made by Ridenour immediately following his discovery near Hummel park, as well as the statements made by him to the police officers en route to the hospital, made in response to questions, and which were admitted in evidence over objections, were in the nature of hearsay, constituted no part of the *res gestæ*, and as "dying declarations" were admissible only in criminal prosecutions for homicide.

The principle of evidence restricting the competency of dying declarations to homicide cases has long been recognized and adhered to in this tribunal. However, in the recent case of *State v. Lake, ante*, p. 331, a majority of this court has now approved a decided modification thereof. It was there held that "dying declarations" were admissible in a statutory proceeding brought to secure the revocation of the license of the defendant, a physician, to practice medicine. It may be said that the case just referred to is a review *de novo* of a statutory administrative procedure, and that the issue actually determined therein was necessarily narrowed by the inherent nature of the action then before this court and the rules of evidence heretofore approved by this court as applicable thereto. *Munk v. Frink*, 81 Neb. 631; *Mathews v. Hedlund*, 82 Neb. 825. Still it is to be noted that the precedents cited, expressly approved by this court in this opinion, in principle, unless limited, would apply to and control the present proceeding. In view of the inherent nature of the present proceeding, particularly the provisions of section 48-139, Comp. St. 1929, and the rule of liberal construction applicable to our workmen's compensation act, as to both substantive and adjective provisions (*Selders v. Cornhusker Oil Co.*, 111 Neb. 300; *McGuire v. Phelan-Shirley Co.*, 111 Neb. 609; *Baade v. Omaha Flour Mills Co.*, 118 Neb. 445; *Speas v.*

*Boone County,* 119 Neb. 58), no good reason appears to justify the creation of an exception here to the rule announced in the *Lake* case, and it would follow that "dying declarations" otherwise competent would now be admissible in evidence and a verdict based thereon would be sustained. The majority of this court, however, is of the opinion that the statements made by Ridenour at the scene of the tragedy and en route to the hospital therefrom, so far as admitted in evidence by the trial judge, are plainly within the limitations of the *res gestæ* rule, and it is not essential to the support of the present judgment that the competency of dying declarations in workmen's compensation cases be determined at this time. The question therefore is not decided.

This jurisdiction has long been committed to the view that, in cases similar to the one here presented, "The trial court must be permitted to exercise its discretion, very largely, in determining whether the declarations were made under such circumstances as to permit the inference that they were genuine expressions, and the jury must be left to determine whether or not such inference shall be drawn." *Hewitt v. Eisenbart,* 36 Neb. 794. See, also, *Omaha & R. V. R. Co. v. Chollette,* 41 Neb. 578; *Missouri P. R. Co. v. Baier,* 37 Neb. 235; *Pledger v. Chicago, B. & Q. R. Co.,* 69 Neb. 456.

"The fact that death impends at the time of utterance of the statements may have the effect to render them admissible, it seems; and so the fact that the declarant died subsequently and within a comparatively brief period is an element to be considered in determining admissibility of statements in any particular case." 10 R. C. L. 989, sec. 172. Also, see *Pledger v. Chicago, B. & Q. R. Co.,* 69 Neb. 456, 461; *Louisville, N. A. & C. R. Co. v. Buck,* 116 Ind. 566; *Marshall v. St. Louis, I. M. & S. R. Co.,* 78 Ark. 213; *Starr v. Aetna Life Ins. Co.,* 41 Wash. 199.

So, too, the principle of evidence which has been loosely referred to and termed *"res gestæ"* has been broadened and developed "in modern times, by an effort to afford the triers of fact all reasonable means of ascertaining the

truth, instead of withholding from them all information possible by the rigid application of certain rules of exclusion. The question is not now, how little, but how much, logically competent proof is admissible." 10 R. C. L. 975, sec. 158. See, also, *Insurance Co. v. Moseley*, 8 Wall. (U. S.) 397; *Stukas v. Warfield-Pratt-Howell Co.*, 188 Ia. 878; *Peterson v. Phillips Coal Co.*, 175 Ia. 223; *Roach v. Great Northern R. Co.*, 133 Minn. 257.

The case of *Insurance Co. v. Moseley, supra,* has been repeatedly cited with approval by this court, and the principle announced therein is apparently controlling in the present case. Under the terms of the accident policy in suit in that case, it was essential for plaintiff to establish that the death of Moseley was due to an accident as defined by the policy. The sole evidence on this subject was the testimony of the wife and son of the deceased. The former testified that the assured left his bed Wednesday night the 18th of July, 1866, between 12 and 1 o'clock; that "when he came back he said he had fallen down the back stairs and almost killed himself; that he had hit and hurt the back of his head in falling down the stairs;" that "she noticed that his voice trembled," and he "appeared faint" and "in great pain." The son, testifying in behalf of his mother, stated "that he slept in the lower part of the building occupied by his father; that about 12 o'clock of the night before mentioned he saw his father lying with his head on the counter, and asked him what was the matter; he (the father) replied that he had fallen down the back stairs and hurt himself very badly." Justice Swayne, in delivering the majority opinion of the court, approved the action of the trial court in admitting these statements in evidence, observing that "the *res gestæ* are the statements of the cause (of the bodily injury) made by the assured almost contemporaneously with its occurrence, and those relating to its consequences made while the latter subsisted and were in progress."

Consistent with this it is said: "This general principle is based on the experience that, under certain external circumstances of physical shock, a stress of nervous excite-

ment may be produced which stills the reflective faculties and removes their control, so that the utterance which then occurs is a spontaneous and sincere response to the actual sensations and perceptions already produced by the external shock. Since this utterance is made under the immediate and uncontrolled domination of the senses, and during the brief period when considerations of self-interest could not have been brought fully to bear by reasoned reflection, the utterance may be taken as particularly trustworthy (or, at least, as lacking the usual grounds of untrustworthiness), and thus as expressing the real tenor of the speaker's belief as to the facts just observed by him; and may therefore be received as testimony to those facts." 3 Wigmore, Evidence, sec. 1747. See, also, *Dodson v. State*, 119 Neb. 340.

It follows that the evidence objected to was properly received under the circumstances of the present case, and, to the points to which it was directed, is competent evidence to sustain the judgment.

It seems to be well settled that injuries caused by intentional assaults are compensable if they arise out of, or result from, a risk connected with the employment. *Socha v. Cudahy Packing Co.*, 105 Neb. 691; *Nelson v. Service Oil Co.*, *ante*, p. 762. This court is committed to the view that, when an employee is sent into the public street, under the circumstances detailed in this record, on his master's business, his employment necessarily involves exposure to all risks of the street, and injury from any such cause, not involving what is often referred to in the books as an "Act of God" (*Gale v. Krug Park Amusement Co.*, 114 Neb. 432), arises "out of the employment," within the meaning of the workmen's compensation act. *Coster v. Thompson Hotel Co.*, 102 Neb. 585. Also, in *City of Fremont v. Lea*, 115 Neb. 565, 572, a case involving injuries occasioned by the accidental discharge of a toy cannon on the public streets of a city, the following language appears in the opinion:

"It is insisted, however, that the accident occurred upon the public streets of Hastings, and that the danger created

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

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

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

" 'Where a workman is sent into the streets on his employer's business, whether habitually or occasionally, and whether on foot or on a bicycle, or on an omnibus or a car, and he meets with an accident by reason of a risk of the streets to which his employment exposes him, the ac-

cident arises out of as well as in the course of his employment; and it is immaterial that the risk which caused the accident is one which is shared by all members of the public using the streets under the like conditions.' " See, also, *Lawrence v. George Matthews, Ltd.*, 1 K. B. Div. (Eng.) 1; *Industrial Commission v. Pueblo Auto Co.*, 71 Colo. 424; *Stark v. Wilson*, 114 Kan. 459.

It would follow in the instant case that where the employment involved the installation, repair, and "servicing" of radios sold by the master, and also the collection of the master's accounts by the employee, and where such employee passing along the public streets pursuing his employment, with one of such accounts then in his possession for collection, is there assaulted for the purpose of robbery, and therein and thereby receives wounds causing his death, such injury arises out of, and in the course of, his employment.

We have carefully considered the showing made by the defendants in support of the motion for a new trial on the ground of newly discovered evidence, and conclude that in the denial of the same no abuse of judicial discretion on the part of the trial court was disclosed; and that, likewise, the trial court correctly determined the question of dependency of the claimant on the deceased.

It follows that, no error appearing in the proceeding, the judgment of the trial court is, in all things,

AFFIRMED.

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ANNA WEBER, APPELLANT, V. JAMES F. ALLEN ET AL., APPELLEES.

FILED OCTOBER 30, 1931. No. 27849.

1. **Judgment:** SUIT TO VACATE. A suit in equity to vacate a judgment procured by fraud cannot be maintained where the plaintiff has an adequate statutory remedy at law by petition or proceeding in the original action.
2. **New Trial:** FRAUD: PETITION. Where a new trial is sought by a petition filed after term, alleging fraud and perjury in procurement of judgment, the party seeking the new trial must introduce the evidence adduced at the former trial which constitutes the basis of the complaint.

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

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

*E. H. Boyd* and *W. R. Metz, contra.*

Heard before ROSE, GOOD and DAY, JJ., and MESSMORE and NISLEY, District Judges.

DAY, J.

This is an unusual appeal. It's object is to avoid a judgment rendered November 23, 1927, in favor of the defendant against the plaintiff, which was heretofore affirmed by this court in June, 1929. A petition for equitable relief was filed November 8, 1929. A supplemental petition was filed in the original case November 4, 1929, under section 20-2001, Comp. St. 1929. The prayer of each petition was that the judgment be vacated for that it had been procured by fraud and perjury.

At the outset it is apparent that the suit in equity was not proper. The petition alleges that the plaintiff has no adequate remedy at law, but said allegation was not true, since she not only had a remedy at law but was at the time actually pursuing such remedy. A suit in equity will not lie where an adequate remedy at law exists. In *Krause v. Long,* 109 Neb. 846, it was said: "The rule obtains in this and some other jurisdictions that equity will not afford relief if the complainant has a remedy by statutory proceeding in the original action, and that to be entitled to equitable relief against the enforcement of a judgment procured by fraud the party must not have neglected to avail himself of a statutory remedy. *Van Antwerp v. Lathrop,* 70 Neb. 747; *State v. Lincoln Medical College,* 86 Neb. 269; *Bankers Life Ins. Co. v. Robbins,* 53 Neb. 44; *Proctor v. Pettitt,* 25 Neb. 96; 23 Cyc. 981; *Wirth v. Weigand,* 85 Neb. 115; *National Surety Co. v. State Bank,* 56 C. C. A. 657; *Thompson v. Laughlin,* 91 Cal. 313." This was quoted with approval in *Brandeen v. Beale,* 117 Neb. 291. In passing, we note that some states have adopted a contrary rule.

We are next confronted with the disclosure in the record that the only motions for new trial filed in the cases were oral. Section 20-1144, Comp. St. 1929, requires that an application for new trial must be by motion upon written grounds filed at the time of the making of the motion. The provisions of this statute are mandatory. *Carmack v. Erdenberger,* 77 Neb. 592. Under the circumstances, there is no motion for new trial in either of the cases. The inquiry of this court in the action at law is limited to the sufficiency of the pleadings to support the judgment. *O'Donohue v. Hendrix,* 13 Neb. 255; *Farris v. State,* 46 Neb. 857; *Slobodisky v. Curtis,* 58 Neb. 211; *Walker v. Burtless,* 82 Neb. 214; *Anderson v. Union Stock Yards Co.,* 84 Neb. 305. The pleadings, upon examination, disclose that they are sufficient to support the judgment of the court. Upon consideration of the equity case, this court, in the absence of a motion for new trial, cannot consider alleged errors in the admission of testimony. *State v. Citizens State Bank,* 115 Neb. 271.

This might be of controlling force, in connection with the motion of the appellant filed in this court to make the bill of exceptions in the original case a part of the bill of exceptions in this case. The alleged false evidence upon which the judgment was rendered is no part of the record in this case. Where a new trial is sought by means of a petition filed after term, alleging fraud and perjury in procurement of judgment, the litigant moving for a new trial must introduce the evidence adduced at the former trial. *Clemont v. Cudahy Packing Co.,* 90 Neb. 449; *Omaha, N. & B. H. R. Co. v. O'Donnell,* 24 Neb. 753; *Barr v. Post,* 59 Neb. 361. The testimony in the former trial was not offered. The record is: Attorney for appellant: "I request the court to take judicial knowledge of the record of the testimony that has been made in this case heretofore." Reporter: "Are you offering that?" Attorney for appellant: "No; I am not." Since the evidence was not offered, there can be no question raised as to the failure of the trial judge to make it a part of the bill of exceptions. Obviously, this court upon motion cannot make a

part of the bill of exceptions evidence not offered in the trial and which was not considered by the trial court. *Pennington County Bank v. Bauman,* 81 Neb. 782.

It must be apparent that the appellant cannot prevail in this appeal, whether we consider his position in law or in equity. We have labored patiently upon this "double barreled" case because of the seriousness and earnestness with which it was argued by the appellant. It was insisted at the oral argument that there was evidence enough in the record without the testimony of the original case. Although we are of the opinion that the record does not present the merits of the controversy without the evidence upon the former trial included in the bill of exceptions (*Western Gravel Co. v. Gauer,* 48 Neb. 246), nevertheless, we have examined the record. The evidence in the record supports the finding of the trial court in the law action. Considered *de novo,* as is required in an equity action, we independently reach the same conclusion as the learned trial judge. It was necessary to reach our decision by elimination one by one of the many contentions of the appellant. Following our conclusions, in which we find no grounds for reversal of the judgments of the trial court in either case, we affirm them.

AFFIRMED.

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JAY LEADABRAND V. STATE OF NEBRASKA.

FILED OCTOBER 30, 1931. No. 27958.

**Contempt:** DISOBEDIENCE OF ORDER OF ATTACHMENT. In contempt proceedings growing out of an attachment, one who was not a party thereto, but to whom the sheriff had given personal notice thereof, may be held for contempt, even though there was a mistake in the notice posted, as such an error does not excuse deliberate, repeated disobedience of an order of attachment of the district court.

ERROR to the district court for McPherson county: ISAAC J. NISLEY, JUDGE. *Affirmed.*

*William E. Shuman,* for plaintiff in error.

*C. A. Sorensen, Attorney General, R. H. Beatty* and *Milton C. Murphy, contra.*

Heard before GOSS, C. J., DEAN, EBERLY and PAINE, JJ., and BLACKLEDGE, District Judge.

PAINE, J.

Jay Leadabrand prosecutes error proceedings to this court from a sentence and fine for contempt of court.

On November 8, 1930, Anton Pushman filed suit in the district court for McPherson county against Ed H. Guthard for the sum of $1,026.52, due on promissory notes, and on the same day had an order of attachment issued, which the sheriff levied upon an undivided two-thirds interest in corn standing in the field upon land near the southwest corner of McPherson county, owned by Jay Leadabrand, a third party. In making the attachment the sheriff fastened a notice under a barbed wire on a post at the corner of said land, in which notice the sheriff erroneously described the interest he had attached as one-half instead of two-thirds of the field of corn, but at the same time the sheriff went to Leadabrand's house and notified him of the attachment and warned him that he should not take any of the two-thirds of the field of corn which had been attached. Leadabrand found the defective notice the next morning when he went to get the mail, removed it and took it to his home, and in spite of repeated warnings from the sheriff, from the plaintiff who had brought the suit, from the attorneys for the plaintiff orally in North Platte, and in a written letter mailed to him by said attorneys, he deliberately continued to gather the corn and feed it to his cattle.

The plaintiff in error says in his brief: "The whole controversy in the contempt proceedings was over the claim that the sheriff had attached two-thirds interest in the corn and that Leadabrand was gathering one-half and therefore was gathering a portion of the corn attached." The sheriff, finding that Leadabrand continued in stubborn disregard and defiance of his verbal notice and warnings, brought proceedings, as provided in sections 20-1036 and

20-1521, Comp. St. 1929, to try out before a jury of five men and determine the right of Leadabrand to any part of the two-thirds interest in the corn. At this trial, upon hearing the evidence, the jury found that Leadabrand had only a one-third interest in the corn and had no right to any part of the two-thirds portion attached, and at the close of this trial Leadabrand was again warned that he would be prosecuted for contempt if he persisted in picking the attached corn, but nevertheless he did continue to pick the corn until he had picked approximately the half which he claimed.

Upon January 31, 1931, Dan V. Platt, sheriff of McPherson county, filed in the district court an affidavit for citation for contempt, setting out his attachment of two-thirds of the corn standing in the field, his personal notice thereof to Jay Leadabrand, his warning to him not to take more than one-third of the corn from the field, that the balance or two-thirds of said corn was in his custody and possession; sets out two additional dates on which he drove to said place and again warned the said Jay Leadabrand of his wilful disobedience and resistance to the lawful process and order of the district court, and prayed the court to enter an order directing the said Jay Leadabrand to appear before the court and show cause why he should not be committed for contempt of court; that thereupon a citation was issued by the district court and served upon the said Jay Leadabrand, directing him to appear and show cause upon February 10, 1931; and upon said day the said Jay Leadabrand filed his answer, denying that a valid or lawful levy had ever been made upon said corn, and denying that he had ever taken more than the one-half thereof, alleging he has always had full and complete respect for the courts, and asking that he be dismissed and discharged. Trial being had and the testimony of the witnesses being set out in nearly 200 pages of evidence, the court, being advised in the premises, ordered and decreed that the said Jay Leadabrand be fined in the sum of $75 and costs and stand committed until the same are paid. Motion for new trial being overruled, the sentence was sus-

pended pending appeal to this court on the giving of bond in the sum of $300.

The testimony of Anton Pushman is that he made a trip to McPherson county on December 13 and had a conversation with Leadabrand. "Q. Will you relate the talk you had with Leadabrand; what talk you did have? A. Well, we had a talk and I met him a half mile from the house. I asked him, I said, 'Jay, you are husking the corn, aren't you?' He said, 'Yes.' I said, 'Don't you know you are going above the law?' He said, 'I don't care about the law.' He said, 'I have got to have corn.'" Jay Leadabrand testified that he had very limited educational opportunities, only reaching the fifth grade in a country school. "Q. Is it your understanding of the law that, when the sheriff goes out and attaches property, you have a right to forcibly take that property away from the sheriff? A. If it belongs to me, I have a right to my own property. Q. So you think that, regardless of the fact that if the sheriff attaches property and it belongs to you, that you have got a right to take it forcibly away from him, against his will? A. I didn't take any property only one-half which he attached. * * * Q. You say that you didn't know that the sheriff had attached two-thirds of this corn out there? A. He told me that he had, but his notice showed only one-half. Q. He told you a half dozen times that he had attached two-thirds of the corn. A. Two or three times."

The first question to be considered is the error in the notice posted on the land by the sheriff, which stated that he attached but one-half of the corn instead of two-thirds, as he was directed to do; and to support the proposition that it is no defense in a contempt proceeding that there are irregularities in the attachment proceedings so long as the court has jurisdiction, our attention is directed to the case of *Nebraska Children's Home Society v. State*, 57 Neb. 765, being a contempt proceeding based on a violation of the judicial order, in which it was held that such an order may be examined only with a view to ascertaining whether it was *coram judice*. No mere error or irregularity thereon, or in the proceedings leading thereto, excuses its disobedience.

The case of *Miles v. State,* 74 Neb. 684, held that an order must be respected by all parties until it is set aside by the court, and that if one knowingly disobeys an injunction which is not voidable he is liable to punishment for contempt. *Kregel v. Bartling,* 23 Neb. 848.

In *Winchell v. McKinzie,* 35 Neb. 813, it was held: "Where proceedings in attachment are irregular and erroneous, but not void, such errors and irregularities cannot be taken advantage of by third parties in a collateral proceeding." See *Smith v. Schlink,* 44 Colo. 200.

"A party is guilty of contempt who wilfully disregards, or refuses to comply with, an order of court directing him to restore the subject-matter of litigation, if the court possessed jurisdiction to enter the same, although the proceedings may have been ever so erroneous." *Jenkins v. State,* 59 Neb. 68.

In proceedings in contempt for failing to obey an order of court, respondent may question the order only in so far as he can show it to be absolutely void, and cannot be heard to say it was merely erroneous. *American Cigar Co. v. Berger,* 221 Ill. App. 285.

Mere irregularity of order or process issued by court within its jurisdiction and power held not to excuse disobedience. *Burtch v. Zeuch,* 200 Ia. 49, 39 A. L. R. 1349.

"It is well settled that actual notice of the injunction is sufficient to render even one who was not a party guilty of contempt in violating it, and that it is not necessary, if he had actual notice, that he should have been served with a copy of the injunction or the writ." 6 R. C. L. 504, sec. 16.

Complaint is made that the sheriff did not perform his duty in not taking this crop of standing corn into his possession, as section 20-1008, Comp. St. 1929, requires that, where it is personal property "and accessible," he shall take it into his custody and hold it subject to the order of the court; and corn in the field may be gathered and the expenses allowed, as in *Deering v. Wisherd,* 46 Neb. 720. But the sheriff in his testimony explained that a snowstorm prevented him from gathering the corn for quite a while

and in the meantime a large portion of it had been gathered and fed by Leadabrand.

It is also claimed that the order was void and that Leadabrand is not concluded by a judgment in a suit to which he is not a party, but we find that the order was valid. It is said that the state is the real prosecutor in contempt proceedings, and that a fine or sentence for contempt will not be reviewed in a proceeding to which the state is not a party. No one of these charges requires a reversal of this case, and we quote the following from another decision: "It may not be out of place to say that the sentence appears to have been fully warranted. The record shows a settled purpose and persistent effort * * * to trifle with the court, defy its decree and obstruct its process. Such a course of conduct is not to be tolerated. * * * But when it takes the direction of open defiance of the orders and decrees of a court of competent jurisdiction, it becomes reprehensible and should be summarily dealt with and punished as contempt of court." *Whitaker v. McBride,* 5 Neb. (Unof.) 411. See *Auto Highball Co. v. Sibbett,* 11 Ga. App. 618.

In contempt proceedings growing out of an attachment, one who was not a party thereto, but to whom the sheriff had given personal notice thereof, may be held for contempt, even though there was a mistake in the notice posted, as such an error does not excuse deliberate, repeated disobedience of an order of attachment of the district court.

It is therefore ordered that the judgment of the district court be affirmed.

AFFIRMED.

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STATE, EX REL. CITY OF O'NEILL, APPELLEE, V. GEORGE W. MARSH, AUDITOR, APPELLANT.

FILED OCTOBER 30, 1931. No. 28069.

**Municipal Corporations: BONDS: VALIDITY.** As municipal corporations have no power to issue bonds except by legislative permission, the legislature, in granting permission to a municipality

to issue its bonds, may impose such conditions as it may choose, and unless the conditions are complied with the issue is unauthorized and the bonds are invalid.

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

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

*W. J. Hammond, contra.*

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

PAINE, J.

This was an action in mandamus, brought in the district court for Lancaster county by the relator, the city of O'Neill, to compel the respondent, the auditor of public accounts of the state of Nebraska, to register $7,000 of municipal bonds of the city of O'Neill, Nebraska, which bonds are called "O'Neill fire department bonds," which bonds the city issued to procure fire fighting equipment. The district court found that the relator could legally issue the bonds presented, and that it was the duty of the state auditor to register them, and directed him so to do, and the respondent has appealed the case to this court.

An election was legally called, upon proper notice given, and a sufficient majority voted in favor of the issuance of the bonds, which were issued in pursuance thereof. When presented to the state auditor, with a history of all proceedings, he refused to register them.

The relator bases its authority upon sections 17-101, 17-121, and 17-149, Comp. St. 1929. The first section declares, among other things, that cities containing a population of more than 1,000 and less than 5,000 shall be cities of the second class, and the second section authorizes such cities to enact ordinances for the following purposes, and in the third section above cited it provides that one of the purposes is "to procure fire engines, hooks, ladders, buckets and other apparatus." It is not denied that it was necessary for said city to purchase the fire equipment and that no money was available.

It is claimed by the relator and appellee that this court twice held in 1888 that cities of the second class have the power to issue bonds to enable them to carry out the powers granted. In *State v. Babcock,* 22 Neb. 614, the state auditor declined to register bonds presented by the city of Norfolk because cities of the second class were not authorized to issue bonds to aid in the construction of sewers, and the closing paragraph in this opinion reads as follows: "We are fully aware of the necessity for great care in the exercise of the right to borrow money by municipal corporations, and that the power so to do should not be held to have been conferred except when expressly given or when absolutely necessary to carry out and make effective the power expressly conferred. But we think the present case falls clearly within the latter class, and that the bonds were legally issued."

In the case of *State v. Babcock,* 25 Neb. 278, the state auditor, not feeling certain as to his duty, declined to register bonds presented by the city of Kearney for the purpose of erecting a building for the fire department, city officers, police department, and for a city jail, and an original action in mandamus was brought in this court and the auditor was compelled to register them for the same reasons set out in the foregoing case.

The relator does not contend that it has any express power to issue the bonds in question, and the respondent contends that in Nebraska no municipal corporation can now legally issue its municipal bonds except as authority for such issue is expressly conferred upon it by section 17-441, Comp. St. 1929, which expressly forbids cities of the second class to borrow money or to issue bonds except under the exact terms as authorized therein.

The respondent admits that in 1879 an act was passed (Laws 1879, p. 193) which permitted cities of the second class to enact ordinances to provide the city with water and procure fire fighting equipment, and that said act gave no express authority to issue bonds therefor; that in 1887 an act was passed (Laws 1887, ch. 12, sec. 1, subd. XV) which in express terms authorized cities of the second class

to issue bonds for such purposes under certain restrictions, and that the act has been amended several times, the last amendment being in 1925 (Laws 1925, ch. 41), and as amended said section 17-441 now reads in part as follows: "To provide for the purchase of steam engines or fire extinguishing apparatus and for a supply of water for the purpose of fire protection and public use. * * * Such cities or villages may borrow money or issue bonds for the purpose not exceeding seven per cent. (7%) of the actual value of the taxable property within said city or village according to the last preceding assessment thereof, for the purchase of steam engines or fire extinguishing apparatus, and for the purchase, erection and construction and maintenance of such water-works, mains, * * * Provided, no such money shall be borrowed, or bonds issued, unless the same shall have been authorized by three-fifths of the legal votes of such city or village, cast for and against the proposition at an election held for the purpose, notice of which election shall have been given by publication in some newspaper published or of general circulation in such city or village for at least two weeks prior to the date of such election. The bonds shall be the bonds of such city or village and called 'water bonds' to become due in twenty (20) years from the date of issue, but payable any time after five years, drawing interest not exceeding six per cent. (6%) per annum, payable semi-annually, or annually."

This statute requires that bonds issued as therein provided should be called "water bonds" and become due in 20 years from the date of issue, with optional payments after five years, and draw interest at not exceeding 6 per cent. The bonds tendered to the auditor in this case by the relator are called "O'Neill fire department bonds," instead of "water bonds," and are in the denomination of $500 each, bearing 4½ per cent. interest, but are all due seven years from their date, with certain options prior thereto, and not due in 20 years, as the statute provides.

It is insisted by the relator that, if cities of the second class are given the right to provide by ordinance for the

purchase of fire fighting equipment, such cities must have implied power to issue bonds to raise money to purchase such equipment; but in *Brinkworth v. Grable,* 45 Neb. 647, it was held: "It is settled law that a municipal corporation has no power to issue its bonds in aid of a work of internal improvement unless expressly authorized by statute to do so." This statement is cited with approval in *Village of Grant v. Sherrill,* 71 Neb. 219, which cites *Jury v. Britton,* 15 Wall. (U. S.) 566, and adds: "It has been said that it is one thing to have the power to incur a debt and to give proper vouchers therefor, and a totally different thing to have the power of issuing obligations unimpeachable in the hands of third persons. *Claiborne County v. Brooks,* 111 U. S. 400. Thus the power to build a courthouse does not include the power to issue municipal bonds in payment therefor."

In *State v. Babcock,* 24 Neb. 640, in refusing to compel the state auditor to register bonds of the city of Sutton, the court sets out the requirements that they must be styled "water bonds" and mature in 20 years, but be payable any time after five years, and said: "As the bonds were issued under statutory power, the statute is the measure of the authority of the city council in the premises."

Rose, J., in *State v. Marsh,* 104 Neb. 159, approves the statement: "It is a general principle of law that municipal bonds must be issued in conformity with the statute in force at the time of issuance."

In *Painter v. City of Norfolk,* 62 Neb. 330, Commissioner Ames uses this language: "If this transaction can be upheld, the statutory limitations upon the power of the city to borrow money and issue bonds * * * are practically nullities."

In *Swanson v. City of Ottumwa,* 131 Ia. 540, we find the statement: "Even where power to borrow money is expressly given, we have held that there is no implied authority to issue negotiable bonds to accomplish that end."

The supreme court of Iowa has quite recently said: "Authority of municipality to issue negotiable bonds must be found in express language of statute and cannot be im-

plied." *Muscatine Lighting Co. v. City of Muscatine,* 217 N. W. 468 (205 Ia. 82).

Municipalities cannot issue bonds or other like securities unless power to do so is conferred by legislative authority, or clearly implied, and any reasonable doubt as to the existence of such power should be resolved against its existence. *Kaw Valley Drainage District v. Kansas City,* 119 Kan. 368; *Hall v. Hood River Irrigation District,* 57 Or. 69.

Section 17-441, Comp. St. 1929, provides clearly how the bonds in question must be issued, the exact terms as to name and maturity; and the early authorities relied on by the relator, when there was only an implied power in cities to issue such bonds, do not govern when by amendments the legislature has now provided certain requirements to make such bonds legal.

The bonds presented to the state auditor for registration lack much of complying with these statutory requirements. Why should this court at this time hold that any kind of bonds may be issued under implied power, when definite, positive power to issue such bonds is expressly given?

In our opinion the rule prevailing in the majority of states at this time, as well as in the later decisions of the United States supreme court, may be expressed as follows: As a municipal corporation has no power to issue bonds except by legislative permission, the legislature, in granting permission to a municipality to issue its bonds, may impose such conditions as it may choose, and unless the conditions are complied with the issue is unauthorized and the bonds are invalid. See 19 R. C. L. 992, sec. 288; *Hill v. Memphis,* 134 U. S. 198.

For the reasons given herein, judgment is reversed, and proceedings dismissed.

REVERSED AND DISMISSED.

JOHN FLETCHER COLLEGE, APPELLANT, V. ESTATE OF MAGGIE PAILING, APPELLEE.

FILED NOVEMBER 5, 1931. No. 27908.

1. **Husband and Wife:** MARRIED WOMEN: CONTRACTS. The statute has removed the common-law disability of a married woman to bind her separate property, where her contract is made with intent on her part to bind it.
2. ———: ———: ———: BURDEN OF PROOF. Whether a note of a married woman was made with the intent on her part to bind her separate property is a question of fact; and the burden of proving it is on the party asserting such intent.
3. ———: ———: ———: PROOF. Payment of interest and of part of the principal by a married woman on her note does not, in and of itself, prove her intent to charge her separate property for the payment of the note, nor of the balance thereof.

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

*C. A. Rawls,* for appellant.

*Dwyer & Dwyer, contra.*

Heard before GOSS, C. J., DEAN and EBERLY, JJ., and RAPER and RYAN, District Judges.

GOSS, C. J.

On or about June 22, 1921, Mrs. Maggie Pailing, of Greenwood, Nebraska, a married woman living with her husband, pledged $500 to Central Holiness University and gave her note therefor as follows:

"$500.00. June 22, 1922.

"5 years after date I promise to pay to the order of Central Holiness University, University Park, Iowa, Five Hundred Dollars with interest at the rate of five per cent. from date, for value received.

"Mrs. Maggie Pailing.
"Address—Greenwood, Nebr."

By amendment of the articles of incorporation of the payee, the name of the payee was changed to that of plaintiff, which is the legal owner and holder of said note. In her lifetime, on June 28, 1923, there was paid $100 on the

principal, interest to June 23, 1923, amounting to $25, and $5 interest paid in advance. The maker has since died and this suit was duly instituted to recover of her estate the balance of said note. She was a housewife. There is no claim that she was engaged in trade or business. The money was intended to be used with other money for the erection of a dormitory. What was paid was so used. The contract was made in Nebraska and the answer sets up, among other things, that, when the note was made, the maker was a married woman, residing with her husband and family, and the note was not given by her with intent to bind her separate estate and that her estate is not liable therefor. We do not find it necessary to consider other issues.

There was a trial and the jury returned a verdict for the defendant. Judgment was rendered for defendant and plaintiff appealed.

In substance the errors assigned are that the verdict is not sustained by the evidence, is contrary to the evidence, and contrary to law; and that the court erred in submitting the question of intent to the jury.

Without quoting them, it is sufficient for the purposes of this case to say that the sections of the statute bearing on the power of a married woman to make contracts with reference to her separate property and the extent of her liability thereon are sections 42-201, 42-202, and 42-203, Comp. St. 1929. The effect of these sections has been well stated in *Farm Mortgage & Loan Co. v. Beale,* 113 Neb. 293: "The statute has removed the common-law disability of a married woman to make contracts only in cases where the contract made has reference to her separate property, trade, or business, or was made on the faith or credit thereof, and with the intent on her part to thereby bind her separate property. *Hale v. Christy,* 8 Neb. 264; *Godfrey v. Megahan,* 38 Neb. 748; *Grand Island Banking Co. v. Wright,* 53 Neb. 574; *Smith v. Bond,* 56 Neb. 529; *Farmers Bank v. Boyd,* 67 Neb. 497; *Northwall Co. v. Osgood,* 80 Neb. 764; *Marsh v. Marsh,* 92 Neb. 189."

Whether a contract of a married woman was made with

the intent on her part to bind her separate property is a question of fact. *Godfrey v. Megahan,* 38 Neb. 748; *Grand Island Banking Co. v. Wright,* 53 Neb. 574; *Whittier v. Wenner,* 96 Neb. 228. The burden is on the plaintiff to prove such intent. *Farmers Bank v. Boyd,* 67 Neb. 497; *First Nat. Bank v. Ernst,* 117 Neb. 34.

The note, which we have heretofore quoted, shows no intent on the part of the maker to charge her separate estate. And there is no evidence in the record indicating an intent on the part of the maker, either at the time she made the note or at any later time, to charge her separate estate with the payment of the note or with the balance unpaid at the time of her death.

Quite likely Mrs. Pailing intended to pay the whole of the $500, but that she intended so to do did not make the payment enforceable out of her separate estate in the absence of proof of an intent to bind her separate estate for the payment of this liability. Such a contract is by statute made an exception to the common law as to the power and liability of a married woman. For that reason and because not only public policy suggests the preservation of the separate property of a married woman but also proper legal procedure requires one who relies on a fact to prove that fact, we have always laid the burden on the party asserting the intent. The mere fact that Mrs. Pailing paid interest on her note and paid part of the principal does not, in and of itself, prove that she intended to bind her separate estate for the payment of the whole note or for the payment of the balance for which the plaintiff sued. Unaided by proof of intent to charge her separate property, those payments were voluntary and were not legally enforceable.

Plaintiff cites cases to the effect that the interpretation put upon a contract by the parties before any controversy arises will ordinarily be enforced by the courts. Plaintiff therefore argues that, as Mrs. Pailing paid interest and part of the principal, she is deemed to have interpreted the contract as binding on her separate estate and it ought so to have been considered; and that the district court

therefore erred in submitting to the jury the question of intent. The cases cited are based on commercial contracts, contracts of employment, and the like. They afford no precedent in a case like this, where the contract is dependent on a statute in derogation of the common law and where our interpretation of the statute requires the intent to be proved as a fact.

The judgment of the district court is

AFFIRMED.

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JOSEPH GAROFOLA V. STATE OF NEBRASKA.

FILED NOVEMBER 5, 1931. No. 28015.

1. **Assault with Intent to Inflict Bodily Injury: INTENT.** Intent is an essential element in the crime of assault with intent to inflict great bodily injury and proof of such intent is indispensable to sustain a conviction.
2. ———: ———: INFERENCE. Where such specific intent is an essential element of the crime, such intent may be inferred from the facts and circumstances, inclusive of the assault.

ERROR to the district court for Douglas county: FRED A. WRIGHT, JUDGE. *Affirmed.*

*S. L. Winters,* 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.

GOSS, C. J.

Defendant was tried and convicted on a charge of assault with intent to inflict great bodily injury upon Joseph C. Campsey. From a sentence for the minimum of one year (Comp. St. 1929, sec. 28-413), he brings proceedings in error.

The assignments of error raise only one question. Were sufficient facts and circumstances shown in the evidence to authorize the jury to infer that the defendant had the specific intent to inflict great bodily injury?

The defendant lived at 1223 South Fourteenth street, Omaha, in a block bounded on the north by Pierce street and on the south by Williams street. East of his lot was a paved alley. It was described as a "one-way alley, a blind alley." It extends south some distance from the regular east and west alley which runs from Thirteenth street to Fourteenth street. On the northeast part of this lot he had a double cement garage with double doors opening on the alley and locked from the inside. On the west was a single door fastened with a padlock. This garage extended only to within about four feet of the alley. He had paved this strip and had built a curb or low wall north of the garage on his north line. His garage had been robbed several times and he had installed an electric device so that when the small garage door was opened and the contact broken it would ring a bell in the house. Fourteenth street is west of Thirteenth street.

The evidence on behalf of the state shows: On February 6, 1931, Joseph C. Campsey, a paperhanger, and H. P. McLaughlin, his helper, were hanging paper for a party at Thirteenth and Pierce streets. About 11:15 they quit work to stop at a place adjacent to the blind alley at the request of a party living there to look at a job and give her a figure on it, and then to go to lunch. They went south on Thirteenth street, west on the main alley and south about 100 feet to a point in the blind alley near defendant's garage, where they came upon Clarence Ransom, a negro laborer, who had been sitting on defendant's wall or curb, sunning himself, as he testified. He lived farther south on the alley and the sun did not strike his place. Campsey had formerly lived next door to defendant and now lives four blocks away and he and McLaughlin knew Ransom. All three were standing in the alley talking. The others had told Ransom they were going down to see about another job, and McLaughlin was asking Ransom how his wife, who was sick, was getting along, when Garofola came up behind Campsey and struck him a severe blow in the ribs with a club. This club was twenty inches long and about five inches in circumference at the small

end and about nine inches in circumference at the larger end. It is of hard wood, unpeeled. Nine branches or twigs have been cut from it, but not close to the club, so that it is a weapon with which one would not choose to be hit. Defendant struck Campsey a second blow, across the kidney, threatening in profane language to kill him, and then struck a third blow at Campsey's head, but he dodged and received the blow on his shoulder. After hitting Campsey the second time, McLaughlin, who knew defendant, said to him, "What's the matter with you, Joe," and defendant struck McLaughlin on the head and "knocked him cold, he didn't know anything." Campsey and Ransom broke and ran east through a gate and defendant chased them to Thirteenth street. Campsey was taken to St. Catherine's Hospital that evening and was there for thirteen days under the care of an Omaha police surgeon, who testified that he believed the patient had a ruptured kidney and a fracture of the ribs, that at first he had black and blue marks on the lower left chest, and that a blow from the club in evidence could produce the ruptured kidney. The physician also believed there was an injury to the stomach. Campsey and Ransom testified that defendant said nothing before beginning the attack.

Defendant's daughter testified that the electric bell rang in the dining-room, and she called her father, who got up and went out. She remained in the house and did not see any of the trouble. Defendant's tenant, who used part of the garage, testified that he drove into the alley just as defendant came out of his yard into the alley and that two of the men were right up against the doors of the garage.

Defendant testified that his locks had been broken six times. When he went out on his daughter's notice he found the lock of the small door on the west side broken and lying on the ground. Then he went to the alley and saw three fellows by the garage, asked them what they were doing there, one of them "near jumped on him," and he went back into the yard and got the stick to protect himself; he had never had any trouble with them before but thought they were the ones who had broken into his garage; he had been ill with the flu for eighteen days and

had a rupture for which he was operated on ten days later at the hospital; and that they were on his property when he told them to leave.

Defendant requested, among other things, instructions in relation to defendant's right to use force against trespassers on his property and to defend himself by force against an assault on his person. The court refused these in the form presented but, on his own motion, instructed the jury on these phases. The court also instructed the jury that the crime of assault with intent to inflict great bodily injury also includes the charge of assault and battery, carefully instructed them on that offense, and furnished them three forms of verdict—one of guilty on the major charge, one of guilty on the minor charge, and third, of not guilty as charged in the information. The instructions are not the subject of any error assigned.

The statute involved here is of the same type and requires the same proof of intent as the statute (Comp. St. 1929, sec. 28-410), on shooting with intent to kill. We recently decided a case involving the latter statute adversely to the contention of the appellant on the very point in question here. *Swartz v. State, ante,* p. 696. In that case we affirmed certain rules of law which are fitting here, and as applied to this case may be stated as follows: Intent is an essential element in the crime of assault with intent to inflict great bodily injury and proof of such intent is indispensable to sustain a conviction. *Botsch v. State,* 43 Neb. 501; *Ward v. State,* 58 Neb. 719; *Clary v. State,* 61 Neb. 688; *Garrett v. State,* 110 Neb. 118. Where such specific intent is an essential element of the crime, such intent is inferable from the facts and circumstances, inclusive of the assault. *Ward v. State,* 58 Neb. 719; *Clary v. State,* 61 Neb. 688; 16 C. J. 81, 116.

Applying these rules to the facts in evidence, we are of the opinion that the trial court did not err in submitting the case to the jury, and that the facts were such as to authorize the jury to find that the defendant intended to inflict great bodily injury. Therefore, the judgment of the district court is

AFFIRMED.

AMERICAN MORTGAGE & FINANCE COMPANY, APPELLANT, V. DANIEL HORRIGAN, APPELLEE.

FILED NOVEMBER 5, 1931. No. 27882.

Appeal: PLEADING: MOTION TO STRIKE: NOTICE. It is error for the court to sustain a motion to strike an amended petition on the ground that such petition is not verified and to dismiss plaintiff's action where the plaintiff has no notice of a hearing on such motion.

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

*Amos E. Henely*, for appellant.

*Benjamin S. Baker* and *D. E. O'Brien, contra.*

Heard before GOSS, C. J., DEAN, EBERLY and PAINE, JJ., and BLACKLEDGE, District Judge.

DEAN, J.

This action was begun May 17, 1928, in the district court for Douglas county, by the American Mortgage & Finance Company, plaintiff, against Daniel Horrigan and other defendants, to foreclose a certain mechanic's lien upon property located in Omaha. A motion was filed June 18, 1928, by the defendant Horrigan, to require the plaintiff to make more certain and definite the terms of the petition. Thereafter, upon leave of court, an amended petition was filed September 10, 1928, by the plaintiff. October 11, 1929, defendant Horrigan filed a motion to strike the amended petition from the files for the reason that the petition was not verified. In the absence of plaintiff's attorney and with no notice either oral or written, the court sustained the motion and, on December 2, 1930, entered an order dismissing the action at plaintiff's costs. From the order so entered the plaintiff has appealed.

We think the court erred in dismissing the suit, from the fact that the action apparently had not been entered on the dismissal docket and no notice of a hearing on the motion to dismiss was served on the plaintiff as provided by the rules of court. Nor had the plaintiff or his attorney

been notified in any manner that any action would be taken in the premises. True, from certain affidavits in the record, it appears that the defendant called the plaintiff's attention to the fact that the amended petition had not been verified. But no notice whatever was given to the defendant of a pending hearing. In an early case we held: "The failure to sign and verify a petition is no ground for dismissing an action." *Fritz v. Barnes*, 6 Neb. 435. And, in *Berggren v. Berggren*, 24 Neb. 764, we held: "It is the duty of the moving party to serve notice of such motion upon the adverse party." The *Berggren* case is cited with approval in *Abbott v. Johnston*, 93 Neb. 726. It appears to us that it was clearly an abuse of discretion on the part of the learned trial court to dismiss the action on the ground that the amended petition had not been verified.

The judgment entered by the court is reversed, with directions that the plaintiff's petition be reinstated without prejudice.

REVERSED.

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PLATTE SAND & GRAVEL COMPANY, APPELLEE, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLANT.

FILED NOVEMBER 5, 1931. No. 27888.

Carriers: FREIGHT RATES: MODIFICATION. A through or joint freight rate over two lines of railway, jointly established and put into effect, pursuant to an order of the state railway commission, cannot be modified or abrogated by the establishment of a terminal switching charge, which is subject to absorption by the initial carrier, where such switching charge is established on an *ex parte* application by one of the carriers without notice to the other.

APPEAL from the State Railway Commission. *Reversed and dismissed.*

*Byron Clark, Jesse L. Root, J. W. Weingarten, C. A. Sorensen* and *Hugh La Master*, for appellant.

*Robins & Yost, contra.*

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

GOOD, J.

This appeal is from an order entered by the state railway commission, directing defendant to refund to plaintiff certain alleged overcharges for freight on 22 car lots of gravel, shipped by plaintiff from its gravel pit in Saunders county to DeBolt Place in Douglas county, over defendant's line of railway to Omaha and thence over the Chicago & Northwestern railway to DeBolt Place. Defendant appeals.

The rate exacted by defendant was 5½ cents per cwt. Defendant contends that this rate was lawfully established by the railway commission as a joint-haul rate for gravel over the two lines of railway, and was in force and effect at the time the shipments in question moved.

Plaintiff contends that the lawful freight rate on gravel from its pit to Omaha was 3 cents per cwt.; that the connecting carrier was entitled to a switching charge of $12 per car from Omaha to DeBolt Place, which charge defendant was required to absorb, and that this rate, and not the joint-haul rate, was the one applicable to the shipments in question.

From the record it appears that at the time of, and many years prior to, the movement of the cars in question, DeBolt Place was designated on the distance charts of the Chicago & Northwestern Railway Company as one of its stations, about seven miles distant from the Omaha station, and that at the time of the shipments here involved DeBolt Place was not within, but was a considerable distance beyond, the limits of the switch-yards of the Chicago & Northwestern Railway Company at Omaha. It appears that the cars in question were transported from Omaha to DeBolt Place by the latter railway company in its regular trains and over its main-line track. The 5½-cent rate on gravel between plaintiff's pit and DeBolt Place by way of Omaha was the regular established rate, at least until the latter road, upon its application, procured from the railway commission an order providing for a $12 switching charge from its station in Omaha to DeBolt Place. This latter order, providing for a switching charge, was made

without notice to the defendant. It also appears that the rate on gravel from plaintiff's gravel pit to Omaha by way of defendant's railway was 3 cents per cwt., and that there was a provision also for absorption of switching charges when the car was destined to an industry on the switches of a connecting carrier at Omaha. That order provided for the absorption of the switching charge, provided that it left the initial carrier $18.50 per car for its freight charge.

The plaintiff's contention is that this 3-cent rate was the one in force and that the defendant company was required to absorb the switching charge made by the connecting carrier. Defendant apparently concedes that, if the order providing for the $12 switching charge is valid and binding upon it, then the 3-cent rate should prevail and the order entered by the railway commission in this case is proper and valid.

The real question for determination, therefore, is: May a through or joint rate over two lines of railway, jointly established and put into effect, pursuant to an order of the railway commission, be modified or abrogated by the establishment of a terminal switching charge which is subject to absorption by the initial carrier, and where such switching charge is established on an *ex parte* application of one of the carriers without notice to the other?

Section 75-408, Comp. St. 1929, authorizes the state railway commission to establish through joint rates for the shipment of freight and cars over two or more connecting lines of railway in this state, and further provides that in the making thereof and in changing or revising the same they shall be governed, as nearly as may be, by the provisions of article IV of said chapter 75, with reference to original schedules of rates and tariffs for railway companies and common carriers. By reference to section 75-402, Comp. St. 1929, we find that the commission is authorized to alter, change, amend or abolish any classification or rate, when deemed necessary, and that such amended, altered or new classifications or rates shall be put into effect in the same manner as the originals, and in so

doing the commission is required to fix a time and place for a hearing and to give the railway company or common carrier, to be affected thereby, ten days' notice thereof. Any railway company or common carrier shall be entitled to be heard at such time and place, to the end that justice shall be done.

Section 75-712, Comp. St. 1929, makes it unlawful for any railway company or common carrier to change any rate, schedule, or classification until application has been made to the railway commission and permission had for that purpose. For a violation, the carrier is subjected to a penalty not exceeding $10,000. Section 75-501 provides for a revision or modification of the rates charged, but only upon a hearing before the commission, with due notice to the common carriers affected. Section 75-505 provides that if the railway company or common carrier, or other person affected by the order made, shall be dissatisfied with the decision made by the commission an appeal may be had to this court to review its action.

If the order of the railway commission, fixing the $12 switching charge via Chicago & Northwestern railway from Omaha to DeBolt Place is valid, and if such switching charge must be absorbed by defendant on gravel shipments from plaintiff's pit to DeBolt Place via Omaha, then it is clear that such an order abrogates and cancels the former joint rate of 5½ cents and establishes a new joint rate of 3 cents per cwt.

In *McCaffrey Bros. Co. v. Chicago, B. & Q. R. Co.*, 114 Neb. 382, it was held: "A freight rate once lawfully established continues to be the legal rate until legally canceled. Subsequent tariffs naming new rates, without canceling previous rates, cannot carry the new rate into lawful effect." To the same effect are *Knight v. Chicago, B. & Q. R. Co.*, 114 Neb. 387, and *Knight v. Chicago, B. & Q. R. Co.*, 114 Neb. 388.

In *Southern Roads Co. v. Galveston, H. & S. A. R. Co.*, 140 I. C. C. 413, it was, in effect, held that, so far as the shipping public is concerned, the effect of requiring the absorption of a switching charge is to establish a joint rate.

In *Chicago, M. & St. P. R. Co. v. State of Minnesota,* 134 U. S. 418, 33 L. Ed. 970, in the body of the opinion it was said (p. 457): "No hearing is provided for, no summons or notice to the company before the commission has found what it is to find and declared what it is to declare, no opportunity provided for the company to introduce witnesses before the commission, in fact, nothing which has the semblance of due process of law."

In *Central of Georgia R. Co. v. Georgia R. Commission,* 215 Fed. 421, it was held: "Notice and hearing are necessary to the validity of an action by the Georgia Railroad Commission, changing a freight classification of a railroad company doing business within the state, so as to reduce its freight rates, under authority conferred by the Georgia Railroad Commission Law." With respect to the manner of making and changing rates, the law of Georgia seems to be quite similar to that of Nebraska. In *Silica Sand Producers' Traffic Ass'n v. Chicago, B. & Q. R. Co.,* 73 I. C. C. 588, it was held, in effect, that a joint rate may not be established, modified or canceled unless all the carrier parties to the joint rate are parties to the proceeding.

As heretofore noted, in the instant case the $12 switching charge from Omaha to DeBolt Place purported to be effective without notice to the defendant. Under the authorities cited, it is apparent that the order of the commission, establishing the $12 switching charge, is not binding upon the defendant. It may be observed that, if the commission could establish a switching charge to a regular station, it might also extend it, not only to the first station, but to the second or third or still farther station, and would thereby abrogate and cancel existing joint rates. But such joint rates may not be canceled or modified except upon a hearing, with notice to all carriers affected thereby.

It follows that the order entered by the commission in this case, directing a refund, is erroneous and is hereby reversed, and plaintiff's complaint dismissed.

REVERSED AND DISMISSED.

CATHERINE SIBILIA, APPELLANT, V. PAXTON MEMORIAL HOSPITAL, APPELLEE.

FILED NOVEMBER 5, 1931. NO. 27917.

Charities: HOSPITALS: LIABILITIES: NEGLIGENCE OF NURSES. "A charitable institution conducting a hospital solely for philanthropic and benevolent purposes is not liable to inmates for the negligence of nurses." *Duncan v. Nebraska Sanitarium & Benevolent Ass'n*, 92 Neb. 162.

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

*Grenville P. North, James Millett* and *North, Caldwell & Gillogly*, for appellant.

*Brown, Fitch & West, contra.*

Heard before ROSE, GOOD, DAY and PAINE, JJ., and BEGLEY, District Judge.

DAY, J.

This action was brought to recover damages from the Paxton Memorial Hospital alleged to have been sustained by reason of a burn caused by the negligent placing of a hot water bottle on the person of the plaintiff. At the close of all the testimony, the trial court directed the jury to return a verdict in favor of the defendant.

It appears from the record that the plaintiff paid the defendant for the services rendered; that the hospital was not organized for profit; that no dividends were to be paid upon the stock; and that no benefits out of the funds were to accrue on account of membership. The articles of incorporation provided that "the only persons who shall receive any remuneration out of its funds shall be managers, employees, nurses, superintendents, teachers and those who actually render full service therefor;" that any surplus accumulated beyond its needs was to be paid over to other Nebraska charities.

This case seems to come within the rule announced in *Duncan v. Nebraska Sanitarium & Benevolent Ass'n*, 92 Neb. 162, which was later discussed in *Marble v. Nicholas*

*Senn Hospital Ass'n,* 102 Neb. 343, and in *Malcolm v. Evangelical Lutheran Hospital Ass'n,* 107 Neb. 101. These later cases did not depart from the rule that "a charitable institution conducting a hospital solely for philanthropic and benevolent purposes is not liable to inmates for the negligence of nurses." *Duncan v. Nebraska Sanitarium & Benevolent Ass'n,* 92 Neb. 162. The overwhelming weight of authority supports this rule of law, although there is great disagreement upon the reason for the rule. It does not seem necessary to again discuss the reason for the rule or the conflicting theories. It has been so exhaustively discussed by courts, text-writers and annotators that we forego the opportunity to enter this inviting field of theoretical discussion. Applying the rule to the case at bar, the trial court did not err in directing a verdict in favor of defendants. Judgment

AFFIRMED.

PAINE, J., concurring.

Innumerable cases from many states support the law as stated in the syllabus of this case. These cases have been founded upon the fact that many communities have in their midst wonderful hospitals, conducted by devout men and women of Protestant and Catholic churches, who unselfishly render charitable aid to any who knock at their doors. Persons accepting charity in such a hospital, or even pay-patients, have not been allowed to recover for negligence of incompetent servants or for lack of careful treatment. Many of these cases are discussed in the long note found in 14 A. L. R. 563.

In the opinion in the case at bar it states that the articles of incorporation provided that its funds could be paid out to its managers, employees, nurses, superintendents and teachers who rendered services, and under such a broad provision it is easy to see that a private hospital might be so organized for the sole purpose of avoiding all liability for injuries to its patients, thereby using such articles of incorporation as a cloak to avoid liability, while its managers might receive princely salaries even though no dividends could be paid. In *Stewart v. California Medical Mis-*

*sionary & Benevolent Ass'n*, 178 Cal. 418, paragraph 2 of the syllabus in 176 P. 46, reads: "Where a hospital charged prices similar to those charged by other hospitals being conducted for profit and had operated for 13 years without receiving any charity patients, it was a hospital being conducted for profit and not a charitable institution, though the corporation had been organized for charitable purpose." *Tribble v. Missionary Sisters of Sacred Heart*, 137 Wash. 326.

In any case it should be open to investigation whether the institution was being conducted ostensibly as a charity institution for the sole purpose of avoiding liability, to better protect those institutions which were *bona fide* in their object and nature and rendering distinct charitable service to the community.

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STATE, EX REL. C. A. SORENSEN, ATTORNEY GENERAL, APPELLEE, V. AMERICAN BANK OF MITCHELL, APPELLEE: OLIVER P. BURROWS, APPELLANT.

FILED NOVEMBER 5, 1931. No. 27900.

Schools and School Districts: CLAIM AGAINST INSOLVENT BANK: PROSECUTION BY TAXPAYER. Where school district officers have presented a claim against an insolvent bank seeking to have the deposit of the district declared to be a preferred claim, upon its being classified as a general claim only by the receiver a taxpayer may intervene and prosecute proceedings on behalf of the school district to a final determination if the district officers refuse or neglect so to do.

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

*Raymond & Fitzgerald*, for appellant.

*Mothersead & York, contra.*

Heard before ROSE, GOOD, DAY and PAINE, JJ., and BEGLEY, District Judge.

PAINE, J.

A taxpayer, being dissatisfied with the action of the re-

ceiver of the American Bank of Mitchell in classifying a claim for his school district's deposit as a general claim, filed his amended petition of intervention in the district court, asking that the claim be reclassified and that his school district be declared to be entitled to a preferred claim and lien upon the cash fund and assets of said bank. To this an answer was filed by the receiver and thereafter an amended reply was filed, and upon a demurrer being argued to the amended reply the demurrer was sustained and the amended petition of intervention of the taxpayer was dismissed. From this final order of dismissal the intervener prosecutes this appeal.

The American Bank of Mitchell became insolvent and closed its doors January 4, 1930, at which time the school district of Mitchell, Nebraska, had on deposit in a checking account in said bank the sum of $7,000. To secure the deposits of such funds the school district had required a bond in the sum of $10,000, which bond was dated May 11, 1929, and is set out as exhibit A attached to the amended reply herein, and which bond was executed by three of the directors of said bank.

Upon the failure of said bank the treasurer of said school district filed a claim for the $7,000 deposit in the receivership proceedings and the receiver classified this claim as a general claim only and refused to classify said claim as a preferred claim.

Oliver P. Burrows, a resident and taxpayer of school district No. 31 of Scotts Bluff county, which includes the city of Mitchell, made oral demand upon the treasurer and upon the board of education to further prosecute said claim. The said board refused to take action therein and instructed its attorney to proceed no further. Thereupon said taxpayer filed his amended petition of intervention, in which he alleges that the said bank and all of its officials had notice and actual knowledge that said funds were the funds of the school district and that they constituted public funds, and that said bank officers wrongfully mingled said funds with the cash funds of the bank, knowing the same constituted a special deposit, and that at the time of the clos-

ing of the bank $7,000 remained in said account, no part of which has been paid; that including the funds of said school district there remained in cash at the time of the closing of said bank the sum of $17,000, which funds were turned over to Clarence G. Bliss, receiver.

In the answer filed by the receiver it is alleged that all of the deposits of said school district in said bank were protected by a special depositary bond executed to said district, and that the officers of said district have brought action upon said bond for the collection of the amount of its deposit, and that said taxpayer has no right or authority to maintain his petition of intervention and thereby direct what course shall be pursued in the recovery of the funds of said district from the receiver. An amended petition of intervention was filed, and later the plaintiff was allowed to file an amended reply, in which he denied that the deposits were made at the direction of the school district or protected by the bond, and alleges that neither the directors nor officers of said bank were authorized or had power to make and deliver the alleged bond, and that it is necessary that appeal be taken from the order of classification entered by the receiver, and prays that the claim be allowed and paid as a preferred claim. To this amended reply a demurrer was filed, as allowed by section 20-803, Comp. St. 1929, and the demurrer was sustained by the district court.

It is set out in the brief of the appellee that after the filing of the petition of intervention an action was brought by the school district upon the bond, which was tried and the school district obtained judgment for the full amount of its deposit against the bondsmen, but that an appeal has been taken therefrom and such case is now pending in this court.

The only issue involved in this case is whether a resident taxpayer may intervene in this action for the purpose of bringing the classification made by the receiver before the district court for a review. It is contended that in Nebraska collectors and receivers of public funds are mere custodians thereof. In *State v. Midland State Bank*, 52 Neb. 1, it was held:

"It is not within the power of the treasurer of a school district by a general deposit of funds held by virtue of his office to create between such district and his banker the relation of debtor and creditor.

"A banker by receiving on deposit from a school district treasurer funds known to be held by the latter in his official capacity becomes thereby a trustee for the beneficial owner with respect to such funds, and the same may, upon his insolvency, be recovered by the owner as a preferred claim against his estate."

In a comment upon the last above case in *State v. Citizens State Bank,* 117 Neb. 358, it was said "that, before priority could be declared against the general assets of the trustee, it must be shown that assets of the particular character of the trust property, *e. g.* cash, are included in the general assets."

The school district in this case had filed a claim with the receiver and the receiver had refused to allow the same as a preferred claim, and upon the district failing to appeal therefrom this taxpayer intervened for the sole purpose of continuing a proceeding which they had initiated.

Section 20-328, Comp. St. 1929, states: "Any person who has or claims an interest in the matter in litigation * * * in any action pending or to be brought in any of the courts of the state of Nebraska, may become a party to an action between any other persons or corporations, either by joining the plaintiff in claiming what is sought by the petition, or by uniting with the defendants in resisting the claim of the plaintiff, or by demanding anything adversely to both the plaintiff and defendant, either before or after issue has been joined in the action, and before the trial commences." And in *Engdahl v. Laverty,* 110 Neb. 672, it holds that this statute permitting intervention before trial does not prevent a court of equity from allowing intervention after the trial has begun.

The Indiana case of *Pipe Creek School Tp. v. Wagler,* 194 Ind. 496, refers to some earlier cases and lays down the rule as follows: "Taxpayers may sometimes be admitted to sue on behalf of a municipal corporation when

its officers refuse to do so, and may sometimes take up and carry forward pending litigation which the officers wrongfully abandon, on a sufficient showing of cause for being permitted to intervene." See *Sheibley v. Fales*, 81 Neb. 795; *Shepard v. Easterling*, 61 Neb. 882; *State v. Farmers State Bank, ante*, p. 532.

It seems clear to this court that the taxpayer had a perfect right to intervene and appeal on behalf of the school district from the classification made by the receiver. The school district had a right to pursue its remedy of filing a claim to have its deposit declared a preferred claim and paid in full out of the assets on hand at the time of the failure of the bank. And a taxpayer who was individually affected by the failure to appeal from the receiver's adverse classification had a right to intervene. In this case it is shown by the pleadings that the district officers in the exercise of their judgment decided not to appeal from the receiver's classification of its claim as a general claim only. The school district has elected to proceed in another manner. It is, of course, evident that one may have several actions upon the same claim and obtain judgments thereon, but in all such cases there can be but one satisfaction and when and if the school district receives the sum of $7,000 or whatever is found due it for this bank deposit it can secure no more.

The judgment of the district court in sustaining the demurrer to the amended reply and dismissing the case is hereby

REVERSED.

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VAN E. PETERSON, RECEIVER, APPELLEE, V. FRANK P. STRAYER ET AL., APPELLANTS.*

FILED NOVEMBER 20, 1931. No. 27689.

**Appeal.** A cross-appeal not perfected within the time required by the rules of the supreme court may be disregarded.

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* See former opinion, *ante*, p. 587.

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

*Norval Brothers* and *Scott & Scott,* for appellants.

*Butler & James, H. P. Armitage, C. D. Ritchie* and *Cordeal, Colfer & Russell, contra.*

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

ROSE, J.

This is an action by Van E. Peterson, receiver, plaintiff, to enforce the constitutional liability of stockholders of the insolvent Citizens State Bank of Stratton. The district court rendered judgment against a number of stockholders, among whom were Frank P. Strayer who was held primarily liable and Will C. Dahnke who was held secondarily liable. There was an appeal to the supreme court in which Dahnke was designated an "appellee." A review of the judgment from which the appeal was taken resulted in an affirmance. The former opinion contains a statement of the case. *Peterson v. Strayer, ante,* p. 587. Upon motion for a rehearing a reargument was granted on the question involving the secondary liability of Dahnke. Later this question was reargued.

A reexamination of the record discloses that the right of Dahnke to a review of the judgment against him for a secondary liability depends on a cross-appeal which he did not perfect within the time required by the rules of the supreme court. It follows that the cross-appeal may be disregarded. *Ellingwood v. Schellberg, ante,* p. 207. That part of the syllabus and opinion in *Peterson v. Strayer, ante,* p. 587, relating to the secondary liability of Will C. Dahnke is therefore withdrawn, the reargued question left open for future determination, and the judgment of the district court

REAFFIRMED.

CASES DETERMINED

IN THE

# SUPREME COURT OF NEBRASKA

JANUARY AND SEPTEMBER TERMS, 1931.

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UNITED STATES TRUST COMPANY, APPELLEE, V. MARY HOWARD DOYLE ET AL., APPELLANTS: UNITED STATES NATIONAL BANK, APPELLEE.

FILED MAY 29, 1931. No. 27723.

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

*Arthur F. Mullen* and *Arthur F. Mullen, Jr.*, for appellants.

*Morsman & Maxwell* and *John R. Fike, contra.*

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

PER CURIAM.

This is an appeal from a decree of the district court for Douglas county confirming sale of real estate under 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.

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ISABELLE E. MCFAYDEN, ADMINISTRATRIX, APPELLEE, V. DAVID BERNSTEIN ET AL., APPELLANTS.

FILED MAY 29, 1931. No. 27738.

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

*Stalmaster & Beber,* for appellants.

*Arthur F. Mullen* and *James H. Hanley, contra.*

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

PER CURIAM.

Plaintiff brought this action in the district court for Douglas county to set aside a sale of property from defendants Mary Bernstein and Helen Fried to defendants Martin Mahern and David Bernstein. The trial court found that defendants had not complied with the provisions of section 36-501, Comp. St. 1929, commonly known as the "Bulk Sales Law," and entered a decree in favor of plaintiff. 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.

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DONALD UMPHENOUR, APPELLANT, V. W. ROY VAN HOOSEN, APPELLEE.

FILED MAY 29, 1931. No. 27753.

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

*S. D. Killen,* for appellant.

*Mills & Mills, contra.*

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

PER CURIAM.

The relator commenced this proceeding in the district court for Gage county to obtain a writ of habeas corpus against the sheriff of Polk county. The sheriff had arrested relator by virtue of a warrant issued out of the district court for Polk county in a contempt proceeding. The relator appeals from a denial of the writ. The only question presented here is whether or not the district court for Polk county had jurisdiction in the contempt proceeding. *Keller v. Davis,* 69 Neb. 494. The Polk county court

had jurisdiction of the suit for divorce, since the wife resided there. *McConnell v. McConnell,* 37 Neb. 57; *Eager v. Eager,* 74 Neb. 827; *Aldrich v. Steen,* 71 Neb. 57. It had power to enter a temporary order for alimony, suit money, and attorney's fees, and to enforce it. *Cain v. Miller,* 109 Neb. 441; *Jensen v. Jensen,* 119 Neb. 469.

The action of the Polk county district court in adjudging relator in contempt for refusal to comply with the order for temporary alimony cannot be reviewed in this proceeding. *Hulbert v. Fenton,* 115 Neb. 818; *In re Carbino,* 117 Neb. 107. We have examined the record and find no error. The judgment of the trial court is

AFFIRMED.

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JOHN MILTON V. STATE OF NEBRASKA.

FILED MAY 29, 1931. No. 27869.

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

*William N. Jamieson* and *Ray W. McNamara,* 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.

PER CURIAM.

Error proceedings from conviction for violation of liquor laws.

JUDGMENT AFFIRMED.

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THOMAS H. BARNES ET AL., APPELLEES, V. EARL C. BARKER ET AL., APPELLANTS.

FILED MAY 29, 1931. No. 27912.

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

*R. O. Reddish* and *J. W. Kinsinger,* for appellants.

*Neighbors & Coulter, contra.*

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

PER CURIAM.

Appeal from confirmation.

JUDGMENT AFFIRMED.

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HENRY C. LUCKEY, APPELLEE, V. MARY A. WRIGHT ET AL., APPELLANTS.

FILED JUNE 5, 1931. No. 27668.

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

*G. E. Hager*, for appellants.

*George I. Craven, contra.*

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

PER CURIAM.

This case was tried as a suit in equity in which Luckey as plaintiff was asking specific performance and the Wrights as defendants were asking for a rescission of a contract. The controversy was over the purchase price of a house and lot; the defendants seeking to recover the amount paid and the plaintiff seeking the balance of the purchase price. The trial court entered a judgment in favor of the plaintiff and decreed that an order of sale should issue if the judgment were not paid. The court found that there was no fraud practiced by the plaintiff. A trial *de novo* results in the conclusion that a preponderance of the evidence required the decree entered by the district court and that there is no prejudicial error in the record. The judgment of the district court is accordingly

AFFIRMED.

STATE, EX REL. C. A. SORENSEN, ATTORNEY GENERAL, V. FARMERS & MECHANICS BANK OF HAVELOCK, APPELLANT: FRANK PAXTON LUMBER COMPANY, APPELLEE.

FILED JUNE 10, 1931. No. 27717.

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.

*Baylor & TouVelle, contra.*

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

PER CURIAM.

The district court for Lancaster county allowed a trust fund of $1,209.65 as a preferred claim in favor of Frank Paxton Lumber Company, claimant, and directed its payment in full out of money in the hands of the receiver of the Farmers & Mechanics Bank of Havelock. The receiver appealed.

Upon a trial *de novo,* the court finds the preponderance of the evidence in favor of claimant and that there is no error in the record and proceedings of the trial court.

AFFIRMED.

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MARIE C. FREED, APPELLANT, V. MARVIN C. FREED, APPELLEE.

FILED JUNE 10, 1931. No. 27789.

APPEAL from the district court for Thurston county: CHARLES LESLIE, JUDGE. *Affirmed.*

*Saxton & Hammes* and *Robert G. Fuhrman,* for appellant.

*Archie M. Smith* and *James H. Hanley, contra.*

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

PER CURIAM.

This is an action by a wife against her husband for a divorce on the ground of extreme cruelty and nonsupport

and for a settlement of their property rights. Defendant in an answer denied the allegations on which his wife's plea for a divorce was based. In a cross-petition he prayed for a divorce from her on the ground of extreme cruelty and for a division of the property jointly owned by them. The district court entered a decree granting defendant a divorce, awarding plaintiff the custody of a minor son, requiring defendant to contribute toward the son's support $15 a month until he attains the age of 17 years, and ordering a division of the property generally on the equitable basis that each of the parties is entitled to approximately one-half interest therein through their joint efforts in accumulating and preserving it. Plaintiff appealed and defendant took a cross-appeal.

A trial *de novo* results in the conclusion that a preponderance of the evidence required the decree pronounced by the district court, and that there is no material error in the record. The decree is therefore affirmed, each party to pay his or her own costs in the supreme court.

AFFIRMED.

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JOHN L. RITCHEY, APPELLANT, V. JOHN HERDT ET AL., APPELLEES.

FILED JUNE 10, 1931. No. 27925.

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

*Margaret Gettys Hall* and *Herbert W. Baird*, for appellant.

*Field, Ricketts & Ricketts* and *Stewart, Stewart & Whitworth, contra.*

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

PER CURIAM.

This is an action by appellant for compensation under the terms of our workmen's compensation act. There was a trial in the district court and judgment entered therein adverse to claimant, and he appeals.

On a careful consideration of the record before us *de novo,* we are unanimously of the opinion that the disability from which the plaintiff is suffering, lead poisoning, is wholly the result of a disease which is occupational in its nature and therefore not compensable under the terms of the workmen's compensation act.

The conclusion of the district court is correct, and its judgment is therefore

AFFIRMED.

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CHARLES HILL, APPELLEE, V. FEGLES CONSTRUCTION COMPANY, APPELLANT.

FILED JUNE 18, 1931. No. 27962.

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

*Rosewater, Mecham, Burton, Hasselquist & Chew,* for appellant.

*James H. Hanley* and *Paul P. Massey, contra.*

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

PER CURIAM.

This is an action under the compensation law brought by the father as a dependent of the deceased. The only question presented is that of the dependency of the father. The trial court found that the plaintiff was partially dependent, within the meaning of the compensation statutes, and made an award thereunder.

Upon a trial *de novo,* we find the preponderance of the evidence supports our finding that the father who brings this action was partially dependent upon the deceased son; that the judgment of the trial court was a proper one, and it is made the judgment of this court; and the plaintiff's attorneys are allowed a fee of $200 in this court.

AFFIRMED.

BERTHA STEADMAN, ADMINISTRATRIX, APPELLANT, V. CHERRY COUNTY ET AL., APPELLEES.

FILED OCTOBER 16, 1931. No. 27999.

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

*John M. Tucker, Allen G. Fisher* and *Charles A. Fisher*, for appellant.

*Will C. Heelan, James C. Quigley* and *Harry W. Shackelford, contra.*

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

PER CURIAM.

This is an appeal by Bertha Steadman, administratrix of the estate of William Steadman, deceased, from an order of the district court for Cherry county reversing and setting aside an award of the compensation commissioner of the state of Nebraska in her favor, and dismissing the proceeding at the cost of claimant.

William Steadman, the deceased, was, prior to his death, a highway patrolman employed by Cherry county. His demise occurred on August 12, 1929. The principal cause of death was gangrene of the scrotum. Whether this condition was caused, or contributed to, by any injury sustained by deceased arising out of, and received by him in the course of, his employment, under the issues in this case, was a disputed question of fact. A careful consideration *de novo* of the testimony as preserved by the bill of exceptions sustains the conclusion that the action of the trial court in the premises is in accord with the preponderance of the evidence, and the law applicable thereto, and is correct.

The judgment of the district court is therefore

AFFIRMED.

MUTUAL BENEFIT HEALTH & ACCIDENT ASSOCIATION, APPELLEE, V. FEDERAL SURETY COMPANY, APPELLANT.

FILED OCTOBER 23, 1931. No. 27884.

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

*Kennedy, Holland & De Lacy* and *Ralph E. Svoboda,* for appellant.

*Cleary, Horan & Skutt, contra.*

Heard before GOSS, C. J., DEAN, EBERLY and PAINE, JJ., and BLACKLEDGE, District Judge.

PER CURIAM.

This was an action at law brought in the district court for Douglas county by the Mutual Benefit Health & Accident Association againt the Federal Surety Company upon a bond of indemnity covering plaintiff's defaulting agent. Such bond was conditioned in part, that, "in consideration of the sum of Ten and no/100 Dollars, in hand paid to the company (defendant)," such defendant would "make good and reimburse the obligee (plaintiff) to the extent of the sum of One Thousand and no/100 Dollars * * * for such pecuniary loss of money, funds or other personal property, belonging to the obligee, as shall be sustained by the obligee by reason of any fraudulent or dishonest act or acts of the employee in connection with the duties of said position, amounting to embezzlement or larceny." The breach of the bond by the employee and resulting loss to plaintiff was not seriously contested; the defendant below relying on alleged cancelation of the bond prior to the breach occasioning the loss. There was trial to a jury, and at the conclusion of the evidence both parties moved for an instructed verdict. The district court then found for plaintiff and entered judgment as prayed.

On the issue of cancelation of the bond, the defendant had the burden of proof. A careful examination of the evidence and briefs of the parties on this subject convinces

us that in the decree entered the trial court committed no error, and the same is amply supported by the record.

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

AFFIRMED.

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MINNIE GLANDT, APPELLEE, V. PASQUALE RICCERI, APPELLANT.

FILED OCTOBER 23, 1931. No. 27887.

APPEAL from the district court for Douglas county: CHARLES E. FOSTER, JUDGE. *Affirmed.*

*Battelle, Travis & Strehlow,* for appellant.

*Bryce Crawford, Jr., contra.*

Heard before GOSS, C. J., DEAN, EBERLY and PAINE, JJ., and BLACKLEDGE, District Judge.

PER CURIAM.

Plaintiff recovered a judgment for $3,500 damages for personal injuries received in an automobile accident. Sixteen errors were formally assigned in appellant's printed brief. We sustained his motion and allowed him to add another discussed in the brief but not listed in the group of errors assigned. We have carefully considered them all and find there was no prejudicial error committed by the trial court. In his brief and oral argument counsel for defendant made a strong appeal for a reduction of the judgment on the ground that the verdict was excessive. The age, the evidence as to the injury, the physical condition of the plaintiff before and after the accident, her pain and suffering caused by the accident, which the jury found to be the proximate result of the negligence of the defendant, constrain us not to order a new trial or a remittitur. The judgment of the district court is

AFFIRMED.

## C. D. RIDENOUR v. STATE OF NEBRASKA.

FILED OCTOBER 29, 1931. No. 27794.

ERROR to the district court for Phelps county: J. W. JAMES, JUDGE. *Affirmed: Sentence modified.*

*Harry H. Ellis* and *Hoagland, Carr & Hoagland,* 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.

PER CURIAM.

The defendant, C. D. Ridenour, was informed against in the district court for Phelps county, and there charged with having unlawfully and feloniously stolen 22 chickens of the value of $20, or about that sum. Upon trial to a jury the defendant was found guilty as charged and he was thereupon sentenced to serve a term of six months in the penitentiary. He prosecutes error to this court.

This is the second appearance of this case here. On the first appeal the cause was remanded for a new trial because of certain errors in the record. The facts in the case are set out in the former opinion, to which reference may be had. *Ridenour v. State,* 119 Neb. 688.

Upon an examination of the record we conclude that the verdict is amply sustained by the evidence. We have examined the various assignments of alleged error to which the defendant has directed our attention and find them free from prejudicial error.

The judgment of the district court is therefore affirmed, but with directions, however, that the defendant be confined in the county jail six months instead of in the penitentiary.

AFFIRMED: SENTENCE MODIFIED.

SCOTT SAFFORD ET AL., APPELLEES, V. JOE ELAM, APPELLANT.

FILED NOVEMBER 5, 1931. No. 27902.

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

*John E. Lowe,* for appellant.

*William Niklaus* and *John E. Mockett, contra.*

Heard before ROSE, GOOD and DAY, JJ., and MESSMORE and NISLEY, District Judges.

PER CURIAM.

Plaintiffs brought this action in the district court for Lancaster county seeking to recover a balance alleged to be due on two promissory notes executed by defendant. From a verdict and judgment in favor of plaintiffs the 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.

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JESSE KRUEGER V. STATE OF NEBRASKA.

FILED NOVEMBER 5, 1931. No. 27936.

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

*E. L. Hyde,* for plaintiff in error.

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

Heard before GOSS, C. J., DEAN and EBERLY, JJ., and RAPER and RYAN, District Judges.

PER CURIAM.

A complaint was filed in Cheyenne county against Jesse Krueger, the defendant, wherein he was charged with having in his possession and with having unlawfully sold a quantity of intoxicating liquor, March 11, 1930, to a youth then 16 years of age. A jury found the defendant guilty

as charged, and he was thereupon sentenced to serve 60 days in the county jail and to pay a fine of $100 and costs. The defendant prosecutes error.

The evidence discloses that the youth mentioned in the complaint, with two other young men, visited the farm home of the defendant on the day in question with the view of purchasing a quantity of intoxicating liquor for a party which they were to attend that evening. Krueger admits that the young men were at his home on March 11, 1930, and that they inquired of him what the prospects were of purchasing liquor of him. But the defendant denied that he sold any liquor to them. The fact is established by competent evidence that the youth named in the complaint was intoxicated on the evening of the day in question and that the results of his unfortunate condition led to the discovery of the unlawful sale of liquor to him by the defendant.

It clearly appears that the evidence justified the finding by the jury that the defendant was guilty of having intoxicating liquor in his possession on the day in question and that he sold a quantity of such liquor to the youth named in the complaint, as charged by the state.

The only error complained of by the defendant is the failure of the court to sustain his motion for a new trial. We do not think the court erred in this respect.

The judgment is right and it is therefore

AFFIRMED.

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ROBERT ELIC V. STATE OF NEBRASKA.

FILED NOVEMBER 5, 1931. No. 27972.

ERROR to the district court for Douglas county: FRED A. WRIGHT, JUDGE. *Affirmed.*

*J. R. Lones* and *Raymond T. Coffey,* 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.

PER CURIAM.

This is a proceeding in error brought to this court by Robert Elic to review the judgment of the district court for Douglas county, wherein he was convicted of possession of a still and mash for the manufacture 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.

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ANNA KRESL, APPELLANT, V. VILLAGE OF DODGE, APPELLEE.

FILED NOVEMBER 5, 1931. No. 27991.

APPEAL from the district court for Dodge county: FREDERICK L. SPEAR, JUDGE. *Affirmed.*

*Courtright, Sidner, Lee & Gunderson,* for appellant.

*J. C. Cook, Kennedy, Holland & De Lacy* and *E. J. Svoboda, contra.*

Heard before GOSS, C. J., DEAN and EBERLY, JJ., and RAPER and RYAN, District Judges.

PER CURIAM.

The dependent widow of Ludwig Kresl brings this suit against the Village of Dodge for an award under the workmen's compensation law. The evidence shows he was village marshal and in addition to the duties incident to that position he was assigned and performed the usual duties of a water and light commissioner. He received $80 a month and had held the position for over a year. His duties began about noon each day and ended about 3:00 a. m. the next morning, with time out for the evening meal, which he took at his home in the village. The night hours were chiefly devoted to his work as marshal or watchman. For his daytime work he wore work-clothes and at night he changed to other suitable clothing.

About 6 o'clock in the evening of December 23, 1925, he took home some meat for the evening meal, gave it to his wife in the kitchen and went to the sitting room. It

was his custom to change his clothes before eating if he had the time before the meal was ready. In a few minutes the plaintiff, who was about her duties as a housewife, but not then in the room with him, heard a shot. She went to the sitting room and found he had been killed by a pistol shot through his left temple. He was in the habit of carrying in his pocket a small automatic shell-ejecting pistol. This was found on the floor beside him. It was "off the safety" and was so bound with adhesive tape that it was necessary only to pull the trigger to discharge it. Later, when the undertaker and his assistant arrived to care for the body, which had been left in the same position on the floor, they undressed him. After they unfastened the bib of his overalls and rolled or pulled it down, they heard some small object fall on the floor. On examination they discovered near his left side an empty shell of the same caliber as those in the pistol. It was evidently this cartridge that was used in producing his death. Plaintiff had last seen him in the sitting room. She had gone to get a dress on which she had been working that day. As she carried it past him he was standing near the table with the gun in his hand. This gun had a bad history. It had been accidentally discharged in the house. Once when Mr. Kresl was handling the gun it went off, the bullet going through a dresser in the bedroom, and another time when Mrs. Kresl was moving his overalls from one place to another the gun fell out of a pocket and was discharged, shooting her in the leg.

The above gives a mere outline of the testimony. Both the compensation commissioner and the district court found for defendant. Upon a careful consideration of the case *de novo*, we find the appellant has not sustained the burden of proving that the death was the result of an accident arising out of and in the course of Kresl's employment.

The judgment of the district court is

AFFIRMED.

ELIZABETH THOMAS V. STATE OF NEBRASKA.

FILED NOVEMBER 5, 1931. No. 28018.

ERROR to the district court for Gage county: FREDERICK W. MESSMORE, JUDGE. *Affirmed.*

*S. D. Killen* and *A. J. Van Borkum,* for plaintiff in error.

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

Heard before ROSE, GOOD and DAY, JJ., and NISLEY, District Judge.

PER CURIAM.

This is a proceeding in error brought to this court by Elizabeth Thomas to review the judgment of the district court for Gage county, wherein she was convicted of the possession of intoxicating liquor for unlawful sale, use, and disposition.

We have carefully examined the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

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2. An employee or officer of a bank may lend his credit to the bank by signing a note for the purpose of raising funds or aiding the bank's credit. *Kirk v. City Nat. Bank.* ..... 150
3. The validity of the appointment of a receiver of an insolvent bank cannot be collaterally questioned. *Brownell v. Adams* ..... 304
4. The remedy to enforce the constitutional liability of

stockholders of an insolvent state bank is a suit in equity by a creditor for the benefit of all creditors, or by the receiver. *Brownell v. Adams* ..... 304
5. The constitutional liability of stockholders of an insolvent bank is enforceable under the rule that equity has jurisdiction of a receiver's action against all stockholders jointly to enforce their contractual or statutory liability. *Brownell v. Adams* ..... 304
6. Statute giving priority to debts due the United States from insolvent estates should be liberally construed. *State, ex rel. Sorensen, v. Thurston State Bank* ..... 407
7. A state bank, though exempt from the federal bankruptcy act, may commit an act of bankruptcy in contemplation of the statute giving priority to debts due the United States from insolvent estates. *State, ex rel. Sorensen, v. Thurston State Bank* ..... 407
8. The right of the United States to priority in payment of debts due from insolvent estates cannot be impaired by state law. *State, ex rel. Sorensen, v. Thurston State Bank* ..... 407
9. Appeal by a receiver *held* authorized. *State, ex rel. Sorensen, v. Thurston State Bank* ..... 407
10. Priority of unsecured deposits in a state bank is fixed by their status at the time of the actual closing of the bank under order of court. *State, ex rel. Sorensen, v. Thurston State Bank* ..... 407
11. Former holding modified in respect to the time when priority of deposits is fixed. *State, ex rel. Sorensen, v. Thurston State Bank* ..... 407
12. It is not contrary to public policy for a depository bank to pledge sufficient assets to reasonably secure repayment of county deposits. *Bliss v. Mason* ..... 484
13. The statutory specification of certain assets which a bank may pledge to secure repayment of deposits of public funds was not intended as a limitation on the pledging power of the bank, but for the greater security of public funds. *Bliss v. Mason* ..... 484
14. A state bank, designated as a county depository, may pledge sufficient assets to protect sureties on its depository bond. *Bliss v. Mason* ..... 484
15. Section 77-2601, Comp. St. 1929, authorizes a state bank to contract for indemnity of sureties on a depository bond securing deposit of public funds. *Bliss v. Mason* ..... 484
16. Evidence *held* to sustain conviction of bank officer for illegally issuing bills payable and making false reports and entries. *Hinds v. State* ..... 508

17. Bank officer *held* not guilty of borrowing money from bank. *Hinds v. State* ..... 508
18. War risk insurance payments by the United States to the guardian of an incompetent soldier *held* a first lien on assets of an insolvent bank in which they were deposited. *State, ex rel. Spillman, v. First State Bank* ..... 515
19. An expression of opinion as to a note by the agent in charge of liquidating a bank that a similar note might be a forgery, *held* not a misstatement of existing facts such as to allow the maker to recover from the depositors' funds of the failed bank. *State, ex rel. Spillman, v. Dunbar State Bank* ..... 528
20. The maker who paid a duplicate note to an agent of a failed bank cannot recover from the depositors' funds of the failed bank. *State, ex rel. Spillman, v. Dunbar State Bank* ..... 528
21. The interpretation by federal courts of federal laws relating to distribution of assets of insolvent banks does not control state courts in interpreting state laws. *State, ex rel. Sorensen, v. Farmers State Bank* ..... 532
22. The statute giving priority to unsecured depositors of an insolvent bank *held* not to apply to a trust fund unlawfully converted by the bank and mingled with the bank's assets. *State, ex rel. Sorensen, v. Farmers State Bank* ..... 532
23. A trust fund *held* to be a preferred claim on the general assets of an insolvent bank. *State, ex rel. Sorensen, v. Farmers State Bank* ..... 532
24. Trust funds traced into assets of an insolvent state bank *held* payable in full out of such assets in preference to claims of general depositors. *State, ex rel. Sorensen, v. Farmers State Bank* ..... 547
*State, ex rel. Sorensen, v. Farmers State Bank* 580
25. Owners selling bank stock when bank is in liquidation are primarily liable for the constitutional liability accruing while they were stockholders. *Peterson v. Strayer* ..... 587
26. Making a note payable at a particular bank does not alone constitute that bank agent for collection. *First Nat. Bank v. Redding* ..... 642
27. Payment of a note to a bank where payable by a check drawn on itself is not payment of the note held by its owner at a distant point. *First Nat. Bank v. Redding* .... 642
28. A bank to which money was paid on a note by check *held* agent of the payor. *First Nat. Bank v. Redding* .... 642
29. One who knowingly permits a certificate for bank stock to stand in his name, and who by virtue of such ap-

parent ownership becomes a director of the bank, cannot in an action for the price of the stock deny ownership thereof during the period he served as director. *Kienke v. Kirsch* ..... 688

**Bills and Notes.**

1. The holder of nonnegotiable paper may transfer an equitable title thereto, subject to defenses. *Nebraska Central Bldg. & Loan Ass'n v. H. J. Hughes & Co* ..... 266
2. The loss from failure of a bank in which the maker has placed funds to pay a note before maturity does not fall on the holder who has never sent it for payment. *First Nat. Bank v. Redding* ..... 642

**Blackmail.**

To constitute blackmail by means of sending threatening letters, it is immaterial who actually wrote or printed the letters; the offense consisting in sending the letters to the one sought to be blackmailed. *Fetty v. State* ..... 228

**Building and Loan Associations.**

1. The statute governing transfer of evidence of debt in favor of building and loan association does not prevent an equitable transfer. *Nebraska Central Bldg. & Loan Ass'n v. H. J. Hughes & Co* ..... 266
2. On liquidation of an insolvent savings and loan association, a borrowing member cannot set off moneys paid in against the loan, but must repay the loan with interest. *Saunders v. State Savings & Loan Ass'n* ..... 473
3. On liquidation of an insolvent savings and loan association, all members are entitled to *pro rata* dividend on their shares. *Saunders v. State Savings & Loan Ass'n* 473
4. Mutuality is the essential principle of a savings and loan association. *Saunders v. State Savings & Loan Ass'n* ..... 473
5. Members of a savings and loan association, whether borrowers or nonborrowers, must alike share its earnings and bear its losses. *Saunders v. State Savings & Loan Ass'n* ..... 473

**Burglary.**

Evidence *held* sufficient to sustain conviction of burglary. *Madden v. State* ..... 750

**Carriers.**

A joint freight rate established pursuant to an order of the railway commission cannot be modified or abrogated by establishment of a terminal switching charge on an *ex parte* application without notice, which charge is subject to absorption by the initial carrier. *Platte Sand & Gravel Co. v. Chicago, B. & Q. R. Co* ..... 855

**Cemetery Associations.**

Where the by-laws of a cemetery association required notice of amendment, but did not provide the manner thereof, an amendment without notice *held* void. *State, ex rel. Craig, v. Offutt* ..... 76

**Charities.**

A charitable institution conducting a hospital solely for philanthropic purposes is not liable to inmates for negligence of nurses. *Sibilia v. Paxton Memorial Hospital* 860

**Chattel Mortgages.**

1. After five years from time of filing, a chattel mortgage ceases to be valid as against creditors or subsequent purchasers or mortgagees in good faith. *State Bank of Beaver Crossing v. Mackley* ..... 28
2. The filing of a chattel mortgage on crops, executed after they have been planted, operates as constructive notice, even after the crops have been severed. *Thomas v. Prairie Home Cooperative Co* ..... 603
3. A chattel mortgage on an unplanted crop is ineffective to create a lien until some new act intervenes. *Nelson v. State* ..... 658

**Constitutional Law.** SEE ACTION, 2. AUTOMOBILES, 7. STATUTES.

1. The constitutional provision requiring courts to be open for redress of any injury and administration of justice is self-executing and mandatory. *Burnham v. Bennison* 291
2. Equity jurisdiction is vested in the district courts by the Constitution, and is beyond the power of the legislature to limit or control. *Burnham v. Bennison* ..... 291
3. Statute authorizing counties to foreclose lien for delinquent taxes *held* constitutional. *Commercial Savings & Loan Ass'n v. Pyramid Realty Co* ..... 493

**Contempt.**

One not a party to an attachment proceeding, but given personal notice thereof, may be held for contempt, notwithstanding error in the posted notice. *Leadabrand v. State* ..... 836

**Continuance.**

1. The time of trial cannot be made to depend on the whim or convenience of a litigant. *Waldron v. Lapidus* ..... 54
2. A motion for continuance of a cause regularly reached for trial is addressed to the sound discretion of the court. *Waldron v. Lapidus* ..... 54
3. Showing in support of motion for continuance on account of absence of defendant *held* insufficient for failure to disclose the material facts to which defendant would testify, if present. *Waldron v. Lapidus* ..... 54
4. Parties *held* bound by agreement of their attorneys for

a continuance. *National Cooperative Hail Ass'n v. Doran Bros.* ..... 746

**Contracts.**

1. A contract which in its nature and purpose is susceptible of division and apportionment is divisible and severable. *Reichert v. Mulder* ..... 11
2. Whether a contract is entire or severable is a question of intention as determined from the terms of the instrument. *Reichert v. Mulder* ..... 11
3. Whether a contract is entire or severable is to be determined from the language, the subject-matter, and the construction placed upon it by the parties in the light of the surrounding circumstances. *Reichert v. Mulder* .... 11
4. A contract will be treated as abandoned where each party performs acts inconsistent with its existence and acquiesces in such acts by the other. *Reichert v. Mulder* 11
5. An implied contract arises where the intention of the parties is not expressed but circumstances disclose a mutual intent to contract. *Acton v. Schoenauer* ..... 62
6. There can be no implied contract where there is an express agreement between the parties relative to the same subject-matter. *Acton v. Schoenauer* ..... 62
7. Where plaintiff installed plumbing and heating material, under a contract, he could recover the value of the material and labor though the building, before completion, was destroyed by fire without fault of either party. *Acme Plumbing & Heating Co. v. Hirsch* ..... 134
8. A construction placed on an ambiguous contract by the parties thereto will be adopted by the court. *Sesto v. City of Omaha* ..... 730
9. Time is not generally of the essence of a contract, unless expressly provided or intended. *J. H. Melville Lumber Co. v. Welpton Lumber Co* ..... 370
10. Where a contractor constructs a building defective in materials or workmanship, the measure of recovery is the agreed price, less resulting damages. *Graham v. Anderson* ..... 733
11. Where defects in construction of a building are remediable without material injury to the building, the owner may recover the expense of making the building conform to contract. *Graham v. Anderson* ..... 733
12. Where defects in construction of a building cannot be remedied without reconstruction of, or material injury to, a substantial portion of the building, the measure of damages is the difference between its value as constructed and its value if built according to contract. *Graham v. Anderson* ..... 733

**Conversion.**

Equitable conversion of a bank's real estate into money *held* accomplished by a contract between depositors and reorganizers directing conversion of the realty into money. *Jensen v. Ballmer* ..... 488

**Corporations.**

1. A foreign corporation may be served with process in Nebraska by service on its managing agent in the state. *Wilken v. Moorman Mfg. Co* ..... 1
2. A sales manager of a foreign corporation who exercises judgment and discretion in the conduct of its affairs *held* a "managing agent," within the statute governing service of process. *Wilken v. Moorman Mfg. Co* ..... 1
3. Evidence *held* to establish a foreign corporation was doing business in the state, authorizing service of process on the auditor of public accounts. *Wilken v. Moorman Mfg. Co* ..... 1
4. An agreement to repurchase corporate stock at the buyer's option is valid and enforceable. *Reichert v. Mulder* 11
5. The measure of damages for breach of contract to repurchase corporate stock is the amount the seller agreed to pay as the repurchase price. *Reichert v. Mulder* ..... 11
6. An agreement in a contract of sale of corporate stock to an employee to repurchase when the employment is terminated is valid and enforceable. *Reichert v. Mulder* 11
7. A *bona fide* purchaser of stock may sue in equity to compel the corporation to enter the assignment on its books, and to issue a new stock certificate therefor. *Rudolph v. Andrew Murphy & Son* ..... 612

**Costs.**

In denying insurance carrier's application for reduction of compensation payments, an attorney's fee is taxable against the insurance company. *Southern Surety Co. v. Parmely* ..... 146

**Counties and County Officers.**

1. The official term of a county attorney is four years and until his successor is elected, or appointed, and qualified. *State, ex rel. Schroeder, v. Swanson* ..... 459
2. The death of one elected county attorney before qualifying does not create a vacancy, where the incumbent qualifies anew. *State, ex rel. Schroeder, v. Swanson* ..... 459

**Courts.** SEE BANKS AND BANKING, 21.

1. The district court, upon overruling objections to a claim appealed from the probate court, may enter judgment thereon, and remand the case to the probate court. *In re Estate of Neville* ..... 15
2. A court speaks by its orders and judgments, and opin-

ions merely state the reasons therefor. *Reams v. Clopine* ..... 86
3. Decisions of the supreme court commission establish no precedent and are authority only in the particular case. *McIntosh v. Standard Oil Co*..... 92
4. Certiorari from the federal supreme court to a state supreme court calls for a record of the proceedings and judgment in a cause for the purpose of determining federal questions only. *Engen v. Union State Bank*..... 257
5. A mandate of the federal supreme court remanding a cause to a state supreme court *held* not to preclude further consideration of undetermined issues arising exclusively under state law. *Engen v. Union State Bank* 257
6. Jurisdiction is the power to hear and determine a matter in controversy; it is *coram judice* whenever a case is presented which brings the power into action. *State, ex rel. Sorensen, v. Knudtsen*..... 270
7. Jurisdiction may be exercised according to rules of common law, by special direction, or informally. *State, ex rel. Sorensen, v. Knudtsen*..... 270
8. A court cannot appoint another receiver of mortgaged property of an insolvent bank under control of a receiver for the department of trade and commerce. *Wells v. Farmers State Bank*..... 462
9. The statute authorizing appointment of receivers in foreclosure suits *held* inapplicable where the property, with other assets of an insolvent bank, is under control of a receiver for the bank. *Wells v. Farmers State Bank* ..... 462
10. Dwelling-house *held* to be personalty, and action for price thereof within jurisdiction of county court. *Bourret v. Lawmaster*..... 815

**Criminal Law.**

1. A trial court is without power to set aside a sentence after commitment thereunder, and impose a greater sentence, even at the same term. *Myers v. Fenton*..... 56
2. Rulings of the trial court in a criminal case cannot be reviewed before final judgment, and consent of parties will not confer jurisdiction. *Weir v. State*..... 129
3. An order overruling a plea in abatement to an indictment is not a "final order." *Weir v. State*..... 129
4. The sufficiency of circumstantial evidence depends on whether the circumstances are so conclusive as to exclude to moral certainty every rational hypothesis except that of guilt of accused. *Hansen v. State*..... 169
5. Denial of applications for change of venue and for extension of time to make showing will not be disturbed,

unless abuse of discretion is shown. *Fetty v. State*..... 228
6. In a prosecution for blackmail, statement of court when cautioning the jury prior to separation regarding misconduct of a juror on a previous trial *held* not prejudicial. *Fetty v. State*..... 228
7. A verdict based on conflicting evidence will not be disturbed unless clearly wrong. *Fetty v. State*..... 228
8. The trial court is not required to give a cautionary instruction relative to weighing of circumstantial evidence, in absence of a request therefor. *Fetty v. State* 228
9. Refusal to permit defendant to examine jurors before their discharge, relative to a recommendation for leniency, *held* not error. *Fetty v. State*..... 228
10. The scope and effect of the statute regarding reversal of conviction where there was no miscarriage of justice will be determined in connection with constitutional provisions and statutes *in pari materia*. *Scott v. State*..... 232
11. Statute precluding reversal, unless substantial miscarriage of justice has occurred, construed. *Scott v. State* 232
12. Instruction that words "if you find from the evidence" mean "if you find from the evidence beyond a reasonable doubt," *held* not prejudicial, in view of other instructions. *Huckett v. State*..... 364
13. Instruction as to alibi *held* sufficient. *Huckett v. State* 364
14. Where defendant charged with felony does not waive preliminary examination, but demands such right and preserves it in the record, a sentence on a verdict of guilt is erroneous. *Davis v. State*..... 399
15. A convict illegally permitted to absent himself from prison without penal restraint *held* not entitled to credit on his sentence for time absent. *Philbrook v. Dunn*..... 421
16. The trial court may properly admonish the jury as to the importance of agreeing on a verdict. *Griess v. State* 467
17. Permitting jury in criminal case to separate after arriving at a verdict and before it is received by the court is a mere irregularity. *Griess v. State*..... 467
18. A mere irregularity in a criminal case not prejudicial to substantial rights of accused is not ground for reversal. *Griess v. State*..... 467
19. Statute providing that filing of lease containing chattel mortgage *on unplanted crop* shall constitute *notice* is intended to protect landlords against chattel mortgages given after the crop is *in esse*, but does not authorize conviction of a tenant for selling mortgaged property in case he sells such crop. *Nelson v. State*..... 658
20. A court may instruct in the exact language of the statute; but an instruction which follows a portion of the

statute and closes with the court's own conclusions will be *held* erroneous if it confuses the jury as to the law. *Nelson v. State* ..... 658

21. Failure to keep witnesses segregated until all have testified is not error, where no prejudice is shown. *Swartz v. State* ..... 696
22. In reception of evidence, a committing magistrate is not strictly governed by technical rules applicable on a final trial. *Harmer v. State* ..... 731
23. That the county attorney in his opening statement stated more than he was able to prove *held* not prejudicial error. *Harmer v. State* ..... 731
24. A paroled prisoner, whose parole was revoked, will not be relieved from serving the unexpired term of sentence because during the parole he was convicted of a second felony and served sentence therefor. *Vernon v. Miller* ..... 748
25. A motion for continuance is addressed to the discretion of the court, and the ruling thereon is not reversible, unless the record discloses abuse of discretion. *Cockeram v. State* ..... 757
26. A conviction may rest on the uncorroborated evidence of an accomplice, when, considered with all the testimony, it satisfies the jury beyond a reasonable doubt of the guilt of the accused. *Cockeram v. State* ..... 757
27. Generally, error in admission of evidence is cured by withdrawing such evidence and directing the jury to disregard it. *Wever v. State* ..... 816
28. Accused cannot complain of applause by spectators at the trial for the first time on motion for new trial. *Wever v. State* ..... 816
29. Demonstrations by spectators do not constitute ground for new trial, where they are promptly checked and it appears probable that the jury were not influenced thereby. *Wever v. State* ..... 816
30. Generally, admission of incompetent evidence is not prejudicial, where the same facts are proved by the party complaining. *Wever v. State* ..... 816

**Damages.** SEE CONTRACTS, 10-12.

Where an automobile cannot be placed in substantially as good condition as before an accident, the measure of damages is the difference between its reasonable market value immediately before and after the accident. *Helin v. Egger* ..... 727

**Death.**

1. In an action for wrongful death, a petition which discloses no survivor entitled to decedent's support, and

does not allege pecuniary loss, *held* insufficient. *Killion v. Dinklage* ..... 322
2. A presumption of pecuniary loss exists in favor of one legally entitled to service or support of one killed by the wrongful or negligent act of another. *Killion v. Dinklage* ..... 322
3. A petition alleging injury from loss of service and support *held* a sufficient averment of pecuniary loss in an action for wrongful death. *Killion v. Dinklage* ..... 322
4. A parent may recover funeral expenses incurred for an unmarried minor child whose death was caused by defendant's negligence. *Killion v. Dinklage* ..... 322

**Deeds.**

Where a deed was delivered without performance of certain conditions precedent, and was immediately returned, *held* that title did not pass. *Mayfield v. Dwelling House Mutual Ins. Co* ..... 217

**Divorce.**

Extreme cruelty, to justify divorce, where there is no physical injury or violence, must be of such character as to destroy peace of mind, seriously impair health, or destroy the legitimate ends and objects of matrimony. *Chipperfield v. Chipperfield* ..... 204

**Dower.**

The estate of dower, before abolishment, was confined to lands of which the husband died seised. *Engen v. Union State Bank* ..... 257

**Elections.**

1. Facts relating to application from absent voter for a mail ballot must be entered in a poll book. *Rasp v. McHugh* ..... 380
2. A mail voter's ballot must be identified by the clerk indorsing his name and title on the back thereof, and if not so indorsed is not legal. *Rasp v. McHugh* ..... 380
3. The board of county canvassers must count mail votes with no other person present. *Rasp v. McHugh* ..... 380
4. The fact that election judges signed ballots with initials or last name only *held* not to invalidate such ballots. *Rasp v. McHugh* ..... 380
5. Ballots indorsed by a judge of election and an inspector of the polling place instead of two judges *held* valid. *Rasp v. McHugh* ..... 380
6. Statute governing voting by mail explained and requirements necessary to make such voting effective discussed. *Rasp v. McHugh* ..... 380

**Embezzlement.**

1. In a prosecution for embezzlement, intent to defraud the

owner of property described in the information is an element of the felony and must be charged and proved. *Davis v. State* ..... 399
2. Information charging embezzlement of money *held* not sufficient to charge embezzlement of notes. *Davis v. State* ..... 399
3. An information for embezzlement must inform accused with reasonable certainty of the particular property involved in the felonious act charged. *Davis v. State* ..... 399

**Eminent Domain.**

Damages for taking or for injury to land belong to the one owning the land at the time, and they do not pass to a subsequent grantee, except by a provision therefor in the deed or by assignment. *Croft v. Scotts Bluff County* ..... 343

**Equity.**

A court of equity has power to determine controverted issues involving priority of specific liens on real estate. *Shafer v. Wilsonville Elevator Co.* ..... 280

**Estoppel.**

1. The maker, who voluntarily pays a note to an agent in charge of liquidating a bank, is estopped to recover from the receiver, after he discovers that by mistake he has signed duplicate notes. *State, ex rel. Spillman, v. Dunbar State Bank* ..... 528
2. A party knowingly assuming and maintaining a position in judicial proceedings is estopped to assume an inconsistent position to his adversary's prejudice. *Peterson v. Strayer* ..... 587

**Evidence.**

1. The rule excluding parol evidence to vary or contradict a written instrument applies only between parties to such instrument and those claiming under them. *State Bank of Beaver Crossing v. Mackley* ..... 28
2. The party pleading a material fact has the burden of proving it. *Gutzmer v. Nelsen* ..... 214
3. The properly identified stock book of a bank is competent evidence of ownership of stock. *Brownell v. Adams* 304
4. In a suit to establish the constitutional liability of bank stockholders, the stock book of the bank, properly identified by the president, and the quarterly report to the department of trade and commerce, *held* sufficient evidence to sustain a finding that one was a stockholder. *Brownell v. Adams* ..... 304
5. Delivery of bonds as a gift may be established by declarations of the donor, since deceased. *In re Estate of Dayton* ..... 402

6. The defense of fraud may be shown by parol, not to contradict or vary, but to destroy, the effect of the instrument. *Paper v. Galbreth* ..... 454
7. The rule that fraud may be shown by parol is not rendered inapplicable by a provision in the instrument that no other agreement shall limit or qualify the contract. *Paper v. Galbreth* ..... 454
8. Where expert testimony is conflicting, it must be considered with all the other evidence in the case. *Lincoln Telephone & Telegraph Co. v. Smith* ..... 711
9. Whether dying declarations are admissible in proceedings under the workmen's compensation act, *quære*. *Ridenour v. Lewis* ..... 823
10. In an action for compensation for death of a son, statements by deceased immediately following injury, relating to the cause and circumstances surrounding his injury, *held* admissible as part of the *res gestæ*. *Ridenour v. Lewis* ..... 823

**Executors and Administrators.**

1. Publication of notice to creditors of an estate *held* invalid, where there was no antecedent order signed by the probate judge and filed in his office. *In re Estate of Neville* ..... 15
2. A decree of final accounting only discharges an administrator from past liability. *Brownell v. Adams* ..... 304
3. A contingent claim against an estate cannot be allowed before it has become absolute. *In re Estate of Bolton* ..... 737
4. The holder of a contingent claim cannot appeal from an order granting him all the relief to which he is entitled. *In re Estate of Bolton* ..... 737
5. The holder of a contingent claim against an estate cannot appeal from an order impounding assets to pay such claim if it should become absolute. *In re Estate of Bolton* ..... 737
6. "Contingent claim" defined. *In re Estate of Bolton* ..... 737

**Fixtures.**

1. At common law, buildings erected by a tenant became part of freehold. *Frost v. Schinkel* ..... 784
2. Criteria of fixtures *held* to be actual annexation, appropriation to use, and intention. *Frost v. Schinkel* ..... 784
3. "Trade fixtures" defined. *Frost v. Schinkel* ..... 784
4. Generally, trade fixtures are removable by tenant while in possession, if removal does not cause substantial damage to the freehold. *Frost v. Schinkel* ..... 784
5. "Fixture" defined. *Frost v. Schinkel* ..... 784
6. Generally, vendor of chattels who retains title may re-

move them as against prior mortgagee. *Frost v. Schinkel* ..... 784
7. A chattel mortgage on trade fixture preserves its status as personalty, unless rights of innocent third persons are prejudiced. *Frost v. Schinkel* ..... 784
8. Articles sold on conditional sale contract do not become fixtures. *Frost v. Schinkel* ..... 784
9. Detached personalty necessary to operation of machinery physically attached is governed by the same rules as property annexed to the freehold. *Frost v. Schinkel* ..... 784
10. In determining whether fixtures are removable, the intention of the party attaching them is of great importance. *Frost v. Schinkel* ..... 784
11. Articles affixed to realty by owner before execution of mortgage presumptively pass under the mortgage. *Frost v. Schinkel* ..... 784
12. Trade fixtures attached to freehold by tenant may be removed, if removable without substantial injury to freehold, or they may be sold by tenant with right of removal during his term. *Frost v. Schinkel* ..... 784

**Fraud.**

1. Whether a purchaser relied on vendor's false representations and whether he was justified in so doing is ordinarily a question for the jury. *Martin v. Harris* .... 372
2. Evidence of positive, false statements of particular facts as to the value of land exchanged is material on the issue of fraud. *Martin v. Harris* ..... 372
3. Provision in a contract to exchange lands that the parties had not made representations as to value and that each should rely on his own judgment *held* not to defeat an action for damages, where false representations induced the contract. *Martin v. Harris* ..... 372

**Fraudulent Conveyances.**

1. Fraud cannot be predicated on the transfer of the homestead interest by the debtor to his wife. *State Bank of Beaver Crossing v. Mackley* ..... 28
2. A person, solvent or insolvent, may dispose of his property for a valid consideration as his judgment dictates, in absence of mutual fraudulent intent. *State Bank of Beaver Crossing v. Mackley* ..... 28
3. In determining whether a conveyance was made to hinder and delay creditors, the question of fraudulent intent is a question of fact. *State Bank of Beaver Crossing v. Mackley* ..... 28
4. A *bona fide* transfer of real estate between husband and wife will be upheld as against creditors. *Bartels v. Staben* ..... 376

**Gaming.**

1. The *pari-mutuel* system of betting on horse races *held* a "game of chance," a "lottery," likewise "gambling," and therefore unlawful. *State, ex rel. Sorensen, v. Ak-Sar-Ben Exposition Co.* ..... 248
2. The statute creating the state racing commission *held* not to authorize the *pari-mutuel* system of betting on horse races. *State, ex rel. Sorensen, v. Ak-Sar-Ben Exposition Co.* ..... 248

**Gifts.**

1. Facts *held* to show delivery of bonds as a gift. *In re Estate of Dayton* ..... 402
2. Reservation of interest to the donor during his lifetime does not invalidate a gift. *In re Estate of Dayton* ..... 402

**Guardian and Ward.**

In awarding custody of an orphan, courts consider solely the best interests of the child. *State, ex rel. Bize, v. Young* ..... 619

**Habeas Corpus.**

1. Where there is a valid judgment of imprisonment against an applicant for habeas corpus, the court should remand relator to proper custody, notwithstanding the judgment questioned in the habeas corpus proceeding was void. *Myers v. Fenton* ..... 56
2. Habeas corpus is not a proper remedy to review errors in criminal proceedings. *Liske v. Kavanaugh* ..... 256
3. Where a court has jurisdiction of a suit for divorce, its action in adjudging relator in contempt for noncompliance with an order for payment of temporary alimony cannot be reviewed on habeas corpus. *Umphenour v. Van Hoosen* ..... 870

**Highways.**

1. All county roads designated by statute as part of the county highway system must be maintained by the county. *State, ex rel. Piercey, v. Steffen* ..... 39
2. Counties are without power to contract with townships, whereby, for consideration, the county will construct and maintain township roads. *Lynn v. Kearney County* 122

**Homestead.**

1. A "homestead" is the place where the home is and where members of the family reside. *Engen v. Union State Bank* ..... 257
2. Nonresident aliens are not within the terms of the homestead law. *Engen v. Union State Bank* ..... 257
3. The statutory requirement that conveyance of a married person's homestead be executed and acknowledged by both husband and wife *held* not to apply where the

wife was a nonresident alien without intention of making the homestead her home. *Engen v. Union State Bank* ..... 257
4. "Rural homestead" defined. *Engen v. Union State Bank* ..... 257

**Homicide.**
1. Proof of intent to kill is indispensable to sustain a conviction of shooting with intent to kill. *Swartz v. State* 696
2. Intent to kill, as an essential element of the crime of shooting with intent to kill, is inferable from the facts and circumstances, inclusive of the act of shooting. *Swartz v. State* ..... 696
3. In a prosecution for homicide, remoteness of continued acts of hostility by defendant toward deceased affects only the weight of evidence. *Wever v. State* ..... 816
4. It is not necessary to instruct as to manslaughter or murder in the second degree, where the evidence establishes first degree murder or innocence. *Wever v. State* 816

**Husband and Wife.**
1. In an action for alienation of affections, defendant can be held liable only for loss of consortium caused by his acts. *Sonneman v. Atkinson* ..... 752
2. By statute, a married woman may bind her separate property, by contract made with intent so to do. *John Fletcher College v. Estate of Pailing* ..... 847
3. The burden of proving that a married woman's note was made with intent to bind her separate property is on the party asserting it. *John Fletcher College v. Estate of Pailing* ..... 847
4. Payment of interest by a married woman on her note does not, of itself, prove her intent to charge her separate property for its payment. *John Fletcher College v. Estate of Pailing* ..... 847

**Indemnity.**
Indemnity bond *held* to be without consideration. *National Surety Co. v. Larson* ..... 395

**Indictment and Information.** SEE EMBEZZLEMENT.
1. A properly verified information may be held sufficient if it states the name and authority of a qualified informer and sets out facts constituting murder in the first degree in simple, concise, and direct language. *Hansen v. State* ..... 169
2. An information for murder in the form approved by the supreme court is sufficient. *Hansen v. State* ..... 169

**Infants.**
1. Prior to April 20, 1921, females ceased to be minors on attaining the age of 18 years. *State Bank of Beaver*

*Crossing v. Mackley* ..... 28
2. An infant who has received some benefit during infancy must repudiate a contract within a reasonable time after attaining majority, or he is bound. *Brownell v. Adams* ..... 304
3. An infant not having received any benefit and not having ratified a contract after reaching majority is not bound by same. *Brownell v. Adams* ..... 304
4. Every child is entitled to governmental protection, and the government is thereby obligated to consult the child's welfare, comfort, and interests in awarding its custody during minority. *State, ex rel Bize, v. Young* 619
5. In awarding custody of a child over nine years of age and of apparent intelligence and discretion, the child's express wishes will usually be accorded great weight. *State, ex rel. Bize, v. Young* ..... 619
6. In awarding custody of a child, if its temporal interests will be as well taken care of when placed in custody of persons of the same religious faith as its parents, that fact should be controlling. *State, ex rel. Bize, v. Young* 619
7. The custody of an infant should be placed with an individual holding the same religious faith as the parents, or with some association controlled by persons of like religious faith. *State, ex rel. Bize, v. Young* ..... 619

**Injunction.**

1. Repeated violations of a penal statute harmfully affecting the rights of people generally is a public wrong which may be enjoined by the supreme court in an original suit by the state. *State, ex rel. Sorensen, v. Ak-Sar-Ben Exposition Co.* ..... 248
2. The district court has power, by injunction, to compel observance of and enforce the provisions of chapter 12, Laws 1927, pertaining to eradication of diseases among domestic animals. *State, ex rel. Sorensen, v. Knudtsen* 270

**Insurance.** SEE COSTS.

1. Language in application, medical examination, and policy, on which insurer relied, *held* representations, and not warranties. *Towle v. New York Life Ins. Co.* ..... 175
2. Insurer, claiming fraud as to answers given in an application for insurance, must plead and prove specifically facts constituting fraud. *Towle v. New York Life Ins. Co.* ..... 175
3. An insurance company, by an unconditional denial of its liability, waives condition of indemnity policy requiring assured to forward every summons and other process. *Thomas Kilpatrick & Co. v. London Guarantee & Accident Co.* ..... 354

4. Indemnity insurer's denial of liability *held* to release insured from provision in policy not to settle any claim. *Thomas Kilpatrick & Co. v. London Guarantee & Accident Co.* ..... 354
5. On proof of injury from a fall from a dangerous height, it will be presumed that the fall was accidental. *Thomas Kilpatrick & Co. v. London Guarantee & Accident Co.* 354
6. A touring car converted into a repair and tow car *held* not an "automobile truck," within an accident policy. *Paltani v. Sentinel Life Ins. Co.* ..... 447
7. Presumption against self-destruction prevails where the evidence shows death was caused by violence and does not tend to prove suicide. *Sawyer v. Mutual Benefit Health & Accident Ass'n.* ..... 504
8. The presumption against self-destruction *held* overcome by evidence tending to show suicidal death. *Sawyer v. Mutual Benefit Health & Accident Ass'n.* ..... 504
9. After designated beneficiary's death, war risk insurance is payable to estate of insured for distribution to persons then living within permitted class of beneficiaries. *State, ex rel. Sorensen, v. Security Bank* ..... 521
10. Money payable under war risk insurance acts is money of the United States until it reaches the beneficiary, and where deposited in a bank *held* a first lien on the bank's assets. *State, ex rel. Sorensen, v. Security Bank* ..... 521
11. The word "immediate," in reference to notice required in an insurance policy, means with reasonable diligence, and what is reasonable time depends on the circumstances of each particular case. *George v. Aetna Casualty & Surety Co.* ..... 647
12. Requirement in public liability policy that notice of accident be given immediately is complied with if notice is given within a reasonable time under the circumstances of the particular case. *George v. Aetna Casualty & Surety Co.* ..... 647
13. Forfeiture will not be adjudged unless language of the policy requires it. *George v. Aetna Casualty & Surety Co.* ..... 647
14. Whether notice given eleven months after accident was timely under a policy requiring immediate notice *held* a question for the jury under the evidence. *George v. Aetna Casualty & Surety Co.* ..... 647

**Judgment.**

1. The pleadings and judgment, but not the opinion, of an appellate court may be introduced in evidence to support a plea of *res judicata*. *Reams v. Clopine* ..... 86
2. *Res judicata* does not exist where there is no identity in

the thing sued for or in the cause of action. *Gutzmer v. Nelsen* ..... 214
3. A former judgment relied on as an estoppel must be pleaded. *Gutzmer v. Nelsen* ..... 214
4. A decree setting aside a will for mental incapacity and undue influence *held* not *res judicata* in a suit to set aside a deed executed by testatrix nine months later. *Gutzmer v. Nelsen* ..... 214
5. The action of a statutory tribunal having jurisdiction of the subject-matter and the parties is conclusive unless reversed or modified in the mode provided by law. *State, ex rel. Sorensen, v. Knudtsen* ..... 270
6. The trial court at the same term may vacate invalid or erroneous orders in a decree. *Shafer v. Wilsonville Elevator Co.* ..... 280
7. A void judgment in an undetermined suit may be canceled in the same proceeding, even after expiration of the term at which it was rendered. *Shafer v. Wilsonville Elevator Co.* ..... 280
8. Where the court improperly vacated a valid judgment on motion of a third person, equity may in subsequent proceedings in the same cause require its reinstatement as of the date originally entered. *Shafer v. Wilsonville Elevator Co.* ..... 280
9. Under a prayer for general and special relief, the court may give such relief as the case warrants. *Burnham v. Bennison* ..... 291
10. A judgment is a bar to a subsequent action as to questions raised or which might have been raised in the first action. *Dutch v. Welpton* ..... 480
11. A suit in equity to vacate a judgment for fraud cannot be maintained where plaintiff has an adequate remedy at law. *Weber v. Allen* ..... 833

**Judicial Sales.**

A judicial sale of land will not be set aside for inadequacy of price, unless it is so gross as to make it appear that it was the result of fraud or mistake. *Lindberg v. Tolle* ..... 25

**Jury.**

Failure of defendant's attorney to inquire into the relationship between plaintiff's attorney and some of the jurors, called to his attention, *held* lack of diligence. *Killion v. Dinklage* ..... 322

**Landlord and Tenant.**

1. Generally, improvements by tenant which cannot be removed without considerable injury to freehold belong to owner of fee. *Frost v. Schinkel* ..... 784

2. Tenant's right to remove improvements may be exercised before he yields possession, and holder of chattel mortgage has no greater rights. *Frost v. Schinkel*..... 784

**Libel and Slander.**

1. An oral charge by the manager of a laundry, in the presence and hearing of other employees, that an employee addressed is a thief, is of itself slanderous. *Iden v. Evans Model Laundry*..... 184
2. In an action for slander, malice is presumed from an oral, published charge that plaintiff is a thief. *Iden v. Evans Model Laundry*..... 184
3. Evidence that defendant, in the presence and hearing of others, falsely called plaintiff a thief under circumstances tending to prove express malice may be sufficient to prove slander and resulting damages, notwithstanding there was occasion for privileged communications. *Iden v. Evans Model Laundry*..... 184
4. Express malice creating liability for slander, notwithstanding occasion for qualified privilege, means want of legal excuse for false and defamatory utterance. *Iden v. Evans Model Laundry*..... 184

**Liens.**

1. To establish an equitable lien by agreement, intention to charge the particular fund with a lien must clearly appear. *Mihan v. Great Western Sugar Co*..... 109
2. To establish an equitable lien by agreement, there must be a distinct appropriation of the fund *pro tanto* by giving an order thereon or transferring it so that the holder may pay it directly to the assignee. *Mihan v. Great Western Sugar Co*..... 109
3. An equitable lien may arise by implication where circumstances present ground for equitable relief, but an equitable lien will not be implied where the parties have agreed for legal liability. *Mihan v. Great Western Sugar Co.*..... 109

**Limitation of Actions.** SEE WATERS, 2.

**Lis Pendens.**

The filing and recording of *lis pendens* does not give notice of rights under a cause of action not pleaded. *Shafer v. Wilsonville Elevator Co*..... 280

**Mandamus.**

County commissioners may be required by mandamus to approve an official bond tendered by the county attorney for the purpose of qualifying him to hold over, where the elected candidate died before qualifying. *State, ex rel. Schroeder, v. Swanson*..... 459

**Marriage.**

1. Where a man and woman live together as husband and wife, and are so received into society, the law will presume a legal marriage. *Collins v. Hoag & Rollins* ..... 716
2. The phrase "no marriage hereafter contracted shall be recognized as valid" in section 42-104, Comp. St. 1929, refers only to marriages requiring a license. *Collins v. Hoag & Rollins* ..... 716
3. A common-law marriage is provable by showing express consent, or by holding forth to the world, by manner of daily life, conduct, demeanor, and habits, that the man and woman living together are husband and wife. *Collins v. Hoag & Rollins* ..... 716
4. Evidence *held* to establish a valid marriage between parties to a suit for divorce. *Allen v. Allen* ..... 635

**Master and Servant.**

1. The workmen's compensation act should be so construed that technical refinements of interpretation will not defeat it. *McIntosh v. Standard Oil Co* ..... 92
2. In workmen's compensation cases, clerks of district courts must immediately issue summons upon the filing of a proper petition on appeal, without the filing of a præcipe. *McIntosh v. Standard Oil Co* ..... 92
3. Where claimant files notice of appeal with the compensation commissioner, and files petition on appeal in the district court, failure of duty of clerk to issue summons will not deprive him of the right of review. *McIntosh v. Standard Oil Co* ..... 92
4. A compensation award is subject to modification, if the award covers a period of more than six months, though part of the period has elapsed when award is made. *Harmon v. J. H. Wiese Co* ..... 137
5. The statute limiting modification of compensation awards should be construed with the statute providing for modification of awards payable periodically for six months or more. *Harmon v. J. H. Wiese Co* ..... 137
6. Plaintiff, in a proceeding for additional compensation, *held* entitled to attorney's fee in the supreme court, where defendant did not reduce the award. *Harmon v. J. H. Wiese Co* ..... 137
7. On a trial *de novo* of compensation cases, the supreme court will consider the fact that the trial court observed the witnesses and their demeanor. *Southern Surety Co. v. Parmely* ..... 146
8. One seeking modification of compensation award has the burden of proof. *Southern Surety Co. v. Parmely* ..... 146
9. Provisions of compensation law entitling the employer

to reimbursement for compensation paid dependent of employee if a third person responds in damages for the employee's death are parts of the contract of employment and bind the employee and the latter's personal representative. *Bronder v. Otis Elevator Co.* ..... 581
10. Reimbursement for compensation paid to employee's dependent and employer's expenses of recovery are the measure of the employer's statutory right to subrogation, where a third person's negligence caused the employee's death. *Bronder v. Otis Elevator Co.* ..... 581
11. Evidence *held* insufficient to establish a compensable injury. *Lincoln Telephone & Telegraph Co. v. Smith* .... 711
12. Evidence *held* to sustain finding that injury was incurred in course of employment. *Nelson v. Service Oil Co.* ..... 762
13. A workman may receive, concurrently, compensation for two or more injuries, but the combined payments may not exceed $15 a week. *Nelson v. Service Oil Co.* ..... 762
14. Only injuries arising out of and in course of employment are compensable. *Pappas v. Yant Construction Co.* ..... 766
15. Injury occurring while repairing truck away from premises of employer *held* not compensable. *Pappas v. Yant Construction Co.* ..... 766
16. Injury to employee on highway *held* to arise out of, and in the course of, employment. *Ridenour v. Lewis* ..... 823

**Mechanics' Liens.**

1. A stipulation against mechanics' liens in a contract between the owner and a general contractor will not deprive a subcontractor of the right to a lien, unless he assents to such stipulation. *Walker v. Collins Construction Co.* ..... 157
2. Interest on a mechanic's lien commences six months after date of last item in account. *Walker v. Collins Construction Co.* ..... 157
3. Time for filing mechanics' liens cannot be extended by tacking two or more contracts. *Walker v. Collins Construction Co.* ..... 157
4. Material necessarily used as an incident to construction is lienable. *Walker v. Collins Construction Co.* ..... 157
5. One who, in good faith, furnishes material for the erection of a building need not prove that it was actually used in the building to entitle him to a lien. *Walker v. Collins Construction Co.* ..... 157
6. Items classed as "tools" furnished a general contractor are not lienable. *Walker v. Collins Construction Co.* .... 157

**Mortgages.**

1. A "subsequent incumbrancer," within the statute limiting the period of constructive notice, is one who acquires his incumbrance after the statute has run against the prior recorded incumbrance. *Bliss v. Redding* ..... 69
2. A "subsequent purchaser for value," within the statute providing for relief against prior incumbrancers, is one who acquires title after the statute has run against a prior recorded incumbrance. *Tynon v. Bliss*..... 80
3. A purchaser of land who assumes a mortgage and pays interest thereon cannot defend against the mortgage on the ground of the mortgagee's failure to file extensions of the mortgage. *Tynon v. Bliss*..... 80
4. Where a mortgagee, without joining other mortgagees, forecloses his mortgage and purchases the land at the sale, his mortgage is merged in the fee, unless he intended to keep the estates separate. *McCook Cooperative Bldg. & Savings Ass'n v. Gragg*..... 83
5. Where grantee paid a mortgage and took an assignment thereof, no merger resulted, where intervening lien existed, and a contrary intention was shown. *Nebraska Central Bldg. & Loan Ass'n v. H. J. Hughes & Co*..... 266
6. Where a mortgagee purchases the fee without intention of merging his two estates, the mortgage lien is not discharged. *Shafer v. Wilsonville Elevator Co*..... 280
7. Release of mortgage induced by fraudulent representations will be set aside. *Mayfield v. Dwelling House Mutual Ins. Co*..... 217
8. Mortgage by owner of realty who placed trade fixtures thereon *held* to cover such fixtures. *Frost v. Schinkel*.... 784

**Municipal Corporations.**

1. Under the terms of an ordinance permitting a property owner to connect buildings by a subway under a street, the property owner, having failed to keep the sidewalk over the subway in repair, *held* liable for injuries to a pedestrian. *Campbell v. Brandeis Investment Co*..... 50
2. The term "street," within an ordinance permitting construction of a subway, includes sidewalks and public thoroughfares affected by the construction. *Campbell v. Brandeis Investment Co*..... 50
3. Petition in a suit to enjoin a city from making a street improvement *held* good as against demurrer. *Sheets v. City of Cozad*..... 452
4. A city of the metropolitan class may levy taxes to pay a judgment, though the maximum amount of taxes authorized to be assessed for municipal purposes general-

ly has been imposed. *Benner v. County Board of Douglas County* ..... 773
5. Municipal bonds, not issued in compliance with law, are void. *State, ex rel. City of O'Neill, v. Marsh* ..... 841

**Negligence.**
1. Negligence of automobilist *held* a question for the jury. *Combs v. Owens Motor Co* ..... 5
2. Issues of negligence are questions for the jury only when the evidence is sufficient to sustain a finding of negligence. *Kelly v. Gagnon* ..... 113
3. Negligence and contributory negligence must be submitted to the jury, where different minds may reasonably draw diverse conclusions from the facts. *Wiegand v. Lincoln Traction Co* ..... 130
4. An instruction casting the burden upon defendant to establish contributory negligence to such a degree as to defeat recovery, *held* erroneous, as being in conflict with the statutory comparative negligence rule. *Killion v. Dinklage* ..... 322

**New Trial.**
1. In a personal injury action, where defendant's counsel failed to advise the court during trial that certain jurors had examined the scene of the accident, overruling defendant's motion for new trial on account thereof, *held* not error. *Campbell v. Brandeis Investment Co.* ..... 50
2. Newly discovered evidence, which is merely cumulative or impeaching, or not such as would probably change the result, is not ground for a new trial. *Killion v. Dinklage* ..... 322
3. A new trial should be granted if newly discovered evidence presents material facts which might cause a different result, provided diligence is shown. *Nelson v. State* ..... 658
4. Refusal to grant a new trial on account of violation of agreement for a continuance *held* abuse of discretion. *National Cooperative Hail Ass'n v. Doran Bros.* ..... 746
5. In a suit to vacate a judgment for fraud filed after term, plaintiff must introduce the evidence adduced at the former trial which constitutes the basis of complaint. *Weber v. Allen* ..... 883

**Partition.**
Will construed and *held* to authorize sale of land in partition with the value of the widow's life estate therein reserved to her. *Laub v. Laub* ..... 599

**Paupers.**
1. Liability of one county for expenses paid by another

county in caring for a pauper whose residence is in the former county is statutory. *Frontier County v. Lincoln County* ..... 701
2. To enforce liability of one county to another for expenses in caring for a pauper, statutory conditions must be complied with. *Frontier County v. Lincoln County* ..... 701
3. A petition, in an action by one county against another for expenses in caring for a pauper, should state every fact essential to a recovery under the statute. *Frontier County v. Lincoln County* ..... 701

**Physicians and Surgeons.**

1. Verdict revoking a physician's license for procuring an abortion *held* sustained by evidence. *State, ex rel. Sorensen, v. Lake* ..... 331
2. In an action for malpractice against an osteopathic physician, testimony by physicians of another school of practice is admissible, where the same diagnosis is recognized in both schools. *Cook v. Moats* ..... 769
3. Malpractice may consist in a lack of skill or care in making diagnosis. *Cook v. Moats* ..... 769

**Pleadings.**

1. Refusal to dismiss petition was not error, where variance did not involve bad faith nor prejudice. *Acme Plumbing & Heating Co. v. Hirsch* ..... 134
2. A defendant waives any error in overruling demurrer to petition for misjoinder of causes of action by answering over and going to trial on the merits. *Walker v. Collins Construction Co* ..... 157
3. A contract inserted in a petition as part of a cause of action controls allegations which it contradicts. *Shafer v. Wilsonville Elevator Co* ..... 280
4. A demurrer *ore tenus* admits only material facts well pleaded and inferences arising therefrom. *Burnham v. Bennison* ..... 291
5. A demurrer to a petition lies only to the statement of facts constituting the cause of action, not to the prayer for relief. *Burnham v. Bennison* ..... 291
6. Failure to allege a material fact raises a presumption that it does not exist. *Croft v. Scotts Bluff County* ..... 343
7. Where particular facts constituting notice are necessary to a cause of action under a new statutory remedy, the petition must allege such facts. *Frontier County v. Lincoln County* ..... 701
8. Mere conclusions of law are not admitted by a demurrer to a petition. *Frontier County v. Lincoln County* ..... 701
9. A demurrer admits facts well pleaded, but not mere

conclusions of law. *Wright v. Schram* ..... 775
10. In an action for damages under an oral contract for the purchase of corn exceeding $500 in value, a petition not stating facts taking the contract out of the statute of frauds is insufficient. *Wright v. Schram* ..... 775
11. Striking petition, without notice, for want of verification *held* error. *American Mortgage & Finance Co. v. Horrigan* ..... 854

**Principal and Agent.**

1. An agency may be revoked by either party thereto at any time, subject to liability in damages for violation of the agency agreement. *Rudolph v. Andrew Murphy & Son* ..... 612
2. An action for damages is ordinarily the only remedy for breach of an agency contract. *Rudolph v. Andrew Murphy & Son* ..... 612

**Principal and Surety.**

The fact that sureties on a note were financially interested in the consideration therefor negatived the defense that they were merely accommodation signers. *Bliss v. Venner* ..... 44

**Process.**

1. To constitute "issuance of summons," the process must be made out, properly attested, and delivered to the proper officer for service. *McIntosh v. Standard Oil Co.* 92
2. Where a *bona fide* defendant is served in the county where an action is brought, a summons may be issued to other counties for service on proper defendants. *Brownell v. Adams* ..... 304
3. An agent of a sister state, while acting under a requisition for extradition of an alleged fugitive from justice, is exempt from service of civil process. *Zimmerman v. Buffington* ..... 670

**Quo Warranto.**

Evidence *held* to establish abandonment of office, precluding relief in *quo warranto*. *Stafrin v. Malster* ..... 178

**Replevin.**

1. In replevin, evidence of a set-off is permissible under a general denial. *Stull v. Taylor* ..... 200
2. In replevin, where the property is returned, damages, in absence of special damages, are limited to interest. *Stull v. Taylor* ..... 200

**Robbery.**

1. Mere presence of recently stolen property on premises of third person with whom accused was living, though unexplained, *held* insufficient to establish guilt of theft or robbery. *Scott v. State* ..... 232

2. Evidence showing stolen property was found in the possession of a person with whom accused was living *held* admissible, where there was evidence of conspiracy. *Scott v. State* ..... 232

**Sales.**

Where seller ships flour inferior to that specified in a sale contract, purchaser may rescind. *International Milling Co. v. Stamm* ..... 48

**Schools and School Districts.**

1. Except as controlled by statute, the validity of a contract of employment of a public school teacher is governed by the rules relating to contracts generally. *Spence v. School District* ..... 64
2. False representation as to the term of his certificate *held* ground for rescission of a school teacher's contract of employment. *Spence v. School District* ..... 64
3. A school district need not show monetary damage to avoid a teacher's contract of employment, if induced by teacher's fraud. *Spence v. School District* ..... 64
4. The statute authorizes a county superintendent to transfer children to an adjoining district only on compliance with prescribed conditions. *State, ex rel. Ratermann, v. McCartney* ..... 153
5. Application for transfer of children to adjoining district *held* insufficient because not attested by a majority of the school board. *State, ex rel. Ratermann, v. McCartney* ..... 153
6. "Attest," in statute relating to transfer of children to ~~another~~ school district, means to certify to or vouch for the truth of statements in the application. *State, ex rel. Ratermann, v. McCartney* ..... 153
7. A taxpayer may prosecute proceedings on behalf of a school district to have a deposit in an insolvent bank declared a preferred claim, where the district officers refuse to act. *State, ex rel. Sorensen, v. American Bank of Mitchell* ..... 862

**Set-Off.**

1. Maker of note held by insolvent bank *held* entitled to set off a deposit. *Bank of Dakota County v. Pedersen* 760
2. Maker of note held by insolvent bank *held* not entitled to set off a certificate of deposit purchased after institution of action on the note. *Bank of Dakota County v. Pedersen* ..... 760

**Specific Performance.**

1. In a suit for specific performance of an oral contract respecting issue of capital stock, evidence *held* to sustain decree for plaintiff. *Ellingwood v. Schellberg* ..... 207

2. An application for specific performance is addressed to the discretion of the court. *J. H. Melville Lumber Co. v. Welpton Lumber Co.* 370
3. Option to purchase stock *held* supported by consideration and enforceable. *Hirschman v. Casey* 471
4. Courts will not ordinarily enforce specific performance of a contract for personal services. *Rudolph v. Andrew Murphy & Son* 612
5. Equity will not decree specific performance of a contract at the instance of either party where the right thereto is not mutual and reciprocal. *Rudolph v. Andrew Murphy & Son* 612
6. Evidence to establish a parol contract to devise realty and bequeath personalty must be clear, convincing and satisfactory. *Smith v. Raubach* 703

**Statute of Frauds.**

1. An oral pledge of a title deed, naming a third person as grantee, *held* not to create a valid mortgage, in view of the statute of frauds and the recording act. *Shafer v. Wilsonville Elevator Co* 280
2. An oral agreement by seller to retain possession of chattel for buyer *held* not sufficient delivery and acceptance within the statute of frauds. *Wright v. Schram* 775

**Statutes.**

1. A statute operates prospectively only, unless the legislature clearly intended it to operate retrospectively. *Bliss v. Redding* 69
*Tynon v. Bliss* 80
2. The invalidity of the provision relating to "drive-it-yourself" cars *held* not to affect the validity of the remaining provisions of the statute requiring deposit of insurance or securities on motor vehicles operated for hire. *Petersen v. Beal* 348
3. A test of the validity of a statutory amendment is whether its provisions are germane to the original statute. *Wayne County v. Steele* 438
4. An amendatory statute is germane to the original statute when it is "alike," "closely allied," "pertaining to," or "related to" same. *Wayne County v. Steele* 438
5. Amendment designating the county treasurer as agent of the department of public works in collection of automobile registration fees and granting him a fee of five cents for each registration *held* germane to the original statute and valid. *Wayne County v. Steele* 438
6. A statute creating a liability for its violation, not measured by the damage caused, is penal. *Wayne County v. Steele* 438

7. The title of a legislative act is a part thereof and must clearly express the subject of legislation. *Wayne County v. Steele* ..... 438
8. Any provision in a legislative act not clearly expressed in the title cannot be enacted into law. *Wayne County v. Steele* ..... 438
9. Substituting a new act, by amendment germane to the original act, is not violative of the constitutional requirement that the new act set out amended sections. *Commercial Savings & Loan Ass'n v. Pyramid Realty Co.* ..... 493
10. An independent statute, complete in itself, may modify an earlier statute without referring to it. *Bronder v. Otis Elevator Co* ..... 581

**Subrogation.**

Where no equity intervenes, sureties on a bond securing a United States deposit in an insolvent state bank will be subrogated to priority rights of the United States, on paying the deposit. *State, ex rel. Sorensen, v. Thurston State Bank* ..... 407

**Taxation.**

1. In demanding refund of school taxes, notice to the county treasurer is not notice to the "treasurer of the district" contemplated by statute. *City Nat. Bank v. School District* ..... 213
2. The constitutional two-year period of redemption from tax sale is satisfied by elapse of two years after sale before issuance of tax deed, or by stay of two years after a judicial sale before confirmation and issuance of sheriff's deed. *Commercial Savings & Loan Ass'n v. Pyramid Realty Co* ..... 493
3. Personal notice required in tax sales applies where a tax deed is sought, but not to sales under foreclosure of tax liens under section 77-2039, Comp. St. 1929. *Commercial Savings & Loan Ass'n v. Pyramid Realty Co.* ..... 493
4. Redeemer from foreclosure of tax lien by county under section 77-2039, Comp. St. 1929, must pay the full amount of taxes due with interest. *Commercial Savings & Loan Ass'n v. Pyramid Realty Co* ..... 493
5. The valuation fixed by a taxing board on the uncontested value of property is not a final certification of the amount due, and on final adverse determination by a court the remainder of the assessment may be collected. *Chicago & N. W. R. Co. v. State Board of Equalization and Assessment* ..... 592
6. An assessment order of a board of equalization, par-

ticipated in by all members, is not invalid merely because at a later hearing a quorum, but not all members of the board, were present. *Chicago & N. W. R. Co. v. State Board of Equalization and Assessment* ..... 592

7. It is presumed that a board of equalization is composed of members familiar with details of assessment of properties, and in absence of unlawful procedure or apparent misjudgment, or omission of vital facts, the supreme court will not interfere with its jurisdiction. *Chicago & N. W. R. Co. v. State Board of Equalization and Assessment* ..... 592

**Tender.**

Debtor's appearance at place of payment and ability and readiness to pay *held* equivalent to tender, though the note was not there. *Nelson v. State* ..... 658

**Theaters and Shows.**

1. One who operates a public place of amusement is held to stricter accountability for injuries to patrons than owners of private premises. *Welsh v. Jefferson County Agricultural Society* ..... 166
2. One who operates a public place of amusement is not an insurer of the safety of patrons, but owes them only ordinary and reasonable care. *Welsh v. Jefferson County Agricultural Society* ..... 166

**Treaties.**

The treaty with Norway providing that the subjects of the contracting parties may freely dispose of their "goods and effects" *held* to apply to real estate, but not to override the law of Nebraska governing disposition of homestead property acquired by any resident alien of Norway. *Engen v. Union State Bank* ..... 257

**Trial.** SEE APPEAL AND ERROR. CRIMINAL LAW.

1. Error in receiving incompetent evidence is presumed waived, unless objected to. *Combs v. Owens Motor Co.* 5
2. Refusal to strike incompetent testimony received without objection *held* within the court's discretion. *Combs v. Owens Motor Co.* ..... 5
3. Hearsay evidence tending to prove a material fact, if admitted without objection, may sustain a finding of the existence of such fact; the probative force of the evidence is for the jury. *Combs v. Owens Motor Co.* ..... 5
4. In an action for death from automobile collision, instruction as to admission of evidence concerning liability insurance disapproved. *Combs v. Owens Motor Co.* 5
5. The question whether the jury shall be permitted to view the *locus in quo* is addressed to the discretion of the trial court. *Reams v. Clopine* ..... 86

6. In an action for personal injuries, plaintiff may show, while the jury are being impaneled, that an insurance company is interested in defending the action, in order that the right of challenge may be intelligently exercised. *Nichols v. Owens Motor Co*..... 105
7. Plaintiff in an action for personal injuries may on cross-examination elicit testimony to show that defendant is indemnified from loss by insurance. *Nichols v. Owens Motor Co*..... 105
8. The purpose of inquiry whether the defendant in a personal injury action carries liability insurance is to ascertain the status and actual interest of the parties. *Nichols v. Owens Motor Co*..... 105
9. Instructions should be construed as a whole. *Iden v. Evans Model Laundry*..... 184
10. "Quotient verdict" defined. *Killion v. Dinklage*..... 322
11. Verdict *held* not a quotient verdict. *Killion v. Dinklage* 322
12. Refusal of instructions having the same effect as those given *held* not error. *Sonneman v. Atkinson*..... 752
13. Argument of counsel based on matters not in evidence will not be reviewed if made in reply to similar argument of adverse counsel. *Sonneman v. Atkinson*..... 752

**Trusts.** SEE BANKS AND BANKING, 22-24.

1. Equity courts have supervisory jurisdiction of the administration of trusts. *Burnham v. Bennison*..... 291
2. A court of equity has power to remove a trustee. *Burnham v. Bennison*..... 291
3. Petition in suit against testamentary trustees *held* to state facts sufficient to entitle plaintiffs to substantial relief, within the jurisdiction of the district court. *Burnham v. Bennison*..... 291
4. Where a guardian invests trust funds in land, a trust may be impressed only for the amount invested. *Bartels v. Staben*..... 376
5. A stock dividend on stock conveyed in trust *held* a part of the corpus of the trust estate. *United States Trust Co. v. Cowin*..... 427
6. Where minors have a contingent interest in an estate in process of administration, the executor is the proper person to sue for an accounting. *Dutch v. Welpton*..... 480
7. Conveyance of property to a trustee, under an agreement between depositors and reorganizers of a state bank, for liquidation and distribution to depositors and creditors creates an express trust. *Jensen v. Ballmer*.... 488
8. The trustee of property conveyed under a contract between depositors and reorganizers of a state bank may

sell the assets, as provided by the contract. *Jensen v. Ballmer* ..... 488

**Waters.**

1. In an action for damages from flooding land, evidence *held* to sustain verdict for defendant. *Reams v. Clopine* 86
2. Section 39-833, Comp. St. 1929, *held* applicable to an action for damages from flooding due to faulty construction of a bridge by a county; but that the action must be brought within 90 days. *Croft v. Scotts Bluff County* ..... 343
3. A party changing or restraining the flow of water in a natural channel must make reasonable provision to prevent flooding adjacent land as the result of extraordinary rainfalls which are likely to occur. *Croft v. Scotts Bluff County*..... 343
4. A patent for land on which a perpetual spring is the fountainhead of a natural stream does not grant to patentee exclusive use of the waters. *Slattery v. Dout* 418
5. In an action for negligence against an irrigation district, contract between the United States and the irrigation district *held* not to establish the relation of principal and agent, or master and servant, between the parties such as will impute the negligence of the United States to the irrigation district. *Livanis v. Northport Irrigation District.* ..... 777

**Wills.**

In a will contest, undue influence cannot be established by merely showing opportunity for its exercise. *In re Estate of Bainbridge*..... 695

**Witnesses.**

1. Cross-examination of a witness to show bias, hostility, or a spirit of revenge, is entirely distinct from impeachment. *Vassar v. Chicago, B. & Q. R. Co*..... 140
2. On cross-examination of a witness to show bias or hostility, the court should exclude matters showing justification of hostility. *Vassar v. Chicago, B. & Q. R. Co*..... 140