Nebraska Supreme Court Online Library
www.nebraska.gov/apps-courts-epub
11/08/2026 04:17 PM CST

REPORTS OF CASES

IN THE

SUPREME COURT OF NEBRASKA

SEPTEMBER TERM, 1927, AND JANUARY TERM, 1928.

VOLUME CXVI

HENRY P. STODDART,

OFFICIAL REPORTER

CLAFLIN PRINTING COMPANY
LINCOLN, NEBRASKA
1929

Copyright A. D. 1929

By Henry P. Stoddart, Reporter of the Supreme Court,
For the benefit of the State of Nebraska.

SUPREME COURT

DURING THE PERIOD OF THESE REPORTS

JUSTICES

CHARLES A. GOSS, CHIEF JUSTICE
WILLIAM B. ROSE, ASSOCIATE JUSTICE
JAMES R. DEAN, ASSOCIATE JUSTICE
GEORGE A. DAY, ASSOCIATE JUSTICE*
EDWARD E. GOOD, ASSOCIATE JUSTICE
WILLIAM H. THOMPSON, ASSOCIATE JUSTICE
GEORGE A. EBERLY, ASSOCIATE JUSTICE
FRANCIS S. HOWELL, ASSOCIATE JUSTICE†

COMMISSIONERS

WILLIAM T. THOMPSON	GEORGE W. TIBBETS
WILMER W. WILSON	JOHN C. MARTIN
FREDERICK L. WOLFF	THOMAS F. NEIGHBORS‡
	CLAUDE A. DAVIS§

OFFICERS

O. S. SPILLMAN	Attorney General
GEORGE W. AYRES	Assistant Attorney General
LLOYD DORT	Assistant Attorney General
HUGH LA MASTER	Assistant Attorney General
LEE BASYE	Assistant Attorney General
HENRY P. STODDART	Reporter
CHARLES B. LETTON	Clerk
GEORGE H. TURNER	Deputy Clerk

* Died December 20, 1927
† Appointed December 29, 1927
‡ Resigned December 31, 1927
§ Appointed January 1, 1928

JUDICIAL DISTRICTS, AND DISTRICT JUDGES OFFICIATING AT THE ISSUANCE OF THIS VOLUME

Number of District	Counties in District	Judges in District	Residence of Judge
First	Johnson, Nemaha, Pawnee and Richardson.	John B. Raper	Pawnee City
Second	Cass, Otoe and Sarpy.	James T. Begley	Plattsmouth
Third	Lancaster.	Jefferson H. Broady	Lincoln
		Elwood B. Chappell	Lincoln
		Lincoln Frost	Lincoln
		Frederick E. Shepherd	Lincoln
Fourth	Burt, Douglas and Washington.	Francis M. Dineen	Omaha
		James M. Fitzgerald	Omaha
		Charles E. Foster	Omaha
		William G. Hastings	Omaha
		Charles Leslie	Omaha
		William A. Redick	Omaha
		Herbert A. Rhoades	Tekamah
		Arthur C. Thomsen	Omaha
		Alexander C. Troup	Omaha
Fifth	Butler, Hamilton, Polk, Saunders, Seward and York.	Lovel S. Hastings	David City
		Harry D. Landis	Seward
Sixth	Boone, Colfax, Dodge, Merrick, Nance and Platte.	Louis Lightner	Columbus
		Frederick L. Spear	Fremont
Seventh	Fillmore, Nuckolls, Saline and Thayer.	Robert M. Proudfit	Friend
Eighth	Cedar, Dakota, Dixon and Thurston.	Mark J. Ryan	Pender
Ninth	Antelope, Cuming, Knox, Madison, Pierce, Stanton and Wayne.	DeWitt C. Chase	Stanton
		Charles H. Stewart	Norfolk
Tenth	Adams, Clay, Franklin, Harlan, Kearney, Phelps and Webster.	Lewis H. Blackledge	Red Cloud
		J. W. James	Hastings
Eleventh	Blaine, Garfield, Grant, Greeley, Hall, Hooker, Howard, Loup, Thomas, Valley and Wheeler.	Edwin P. Clements	Ord
		Bayard H. Paine	Grand Island
Twelfth	Buffalo, Custer, Logan and Sherman.	Bruno O. Hostetler	Kearney
Thirteenth	Arthur, Banner, Cheyenne, Dawson, Deuel, Keith, Kimball, Lincoln and McPherson.	Isaac J. Nisley	Lexington
		J. Leonard Tewell	Sidney
Fourteenth	Chase, Dundy, Frontier, Furnas, Gosper, Hayes, Hitchcock, Perkins and Red Willow.	Charles E. Eldred	McCook
Fifteenth	Boyd, Brown, Holt, Keya Paha and Rock.	Robert R. Dickson	O'Neill
Sixteenth	Box Butte, Cherry, Dawes, Sheridan and Sioux.	Earl L. Meyer	Alliance
Seventeenth	Garden, Morrill and Scotts Bluff.	Edward F. Carter	Gering
Eighteenth	Gage and Jefferson.	Frederick W. Messmore	Beatrice

PRACTICING ATTORNEYS

Admitted since the Publication of Vol. CXV

ANDERSEN, OTTO M.
ATHEY, ATLANTA G.
BABCOCK, E. DAYLE
BEACH, LYLE L.
BEBER, DAVID E.
BIDDLE, WILLIAM HUMPHREY
BLANCHARD, EDGAR A.
BOHLKE, W. HALSEY
BOWEN, PAUL B.
BROTHERTON, JOHN J.
BUSMAN, LESLIE H.
CAMERON, WENDELL E.
CHAMBERS, ROBERT E.
COHEN, HARRY BERNARD
CONWELL, JOHN J.
COOK, A. WARREN
CORENMAN, HERMAN
CRUMBAUGH, LAWRENCE W.
CUNNIFFE, WALTER P.
DAVIS, GEORGE RAYMOND
DEVRIES, DONALD E.
DONELSON, THEODORE F.
DREIBUS, RUSSELL A.
EDENS, RUDOLPH H.
EDGELL, CARLYLE W.
EISER, JOHN R.
ELLIS, LESLIE W.
EPPERSON, GEORGE A.
FINKEL, ABRAHAM B.
FISHER, CLARENCE E.
FOLSOM, ARTHUR R.
FOSTER, DAVID F.
FOX, DONALD T.
FRENCH, HERBERT STEDMAN
GAUGHAM, THOMAS CLEMENT
GERWE, H. NEVIN
GLENN, THOMAS W.
GRADY, THOMAS LAWRENCE
GRAY, NORMAN B.
GREENSLIT, HENRY VANCE
GUMB, HAROLD
HALL, N. FLOYD
HALL, LISTON M.
HANNAN, EVA E.
HARVALIS, CHRIS C.
HEALD, MAURICE G.
HEATON, HENRY R.
HEIN, WILLIAM H.
HEVELONE, MAURICE SYLVESTER
HILL, HERBERT E.
HODDER, ERNEST C., JR.
HRDLICKA, CHARLES R., JR.
HUBKA, ERNEST A.
HUMBLE, ALEXANDER H.
JAMES, JESSE LEROY
JENSEN, NORMAN H.
JONES, ERWIN A.
KEEFE, RICHARD HERBERT
KEEVAN, ROBERT JAMES
KOEHN, GEORGE W.
KUNS, JOHN HAYDEN
LANG, ELMER P.
LAUB, DONALD R.
LEAMY, MARY J.
LIESVELD, JOHN H.
MCCARTHY, WILLIAM B.
MCGINLEY, GEORGE J.
MCNAMARA, RAYMOND W.
MANDELSON, MILTON A.
MAPES, ANDREW D.
MATTHEWS, ANDREW B.
MEISSNER, HENRY R.
MILLARD, Q. SCOTT
MILLER, CLARENCE
MILLER, PAUL T.
MINGUS, CLARK J.
MOELLER, ALBERT J. C.
MOLLOY, LEON PATRICK
MOYER, MILO
MULLIN, THOMAS E.

MUMBY, WENDELL E.
MUNRO, GEORGE A.
MURPHY, MILTON C.
NELSON, DORA
NICKELL, JOE
OLSEN, HOWARTH N.
PALMER, HAROLD A.
PEDDICORD, WARREN S.
PEGG, JOHN G.
PHELAN, BASIL ARTHUR
PHILLIPS, CHARLES WILLIAM
PLACEK, CAMILLE BARTOS
POWELL, ROBERT E.
RAMBOUR, LOUIS RICHARD
RANERI, ALFRED A.
ROBEY, C. ALVIN
ROBINSON, PHILIP H.
ROGERS, LOUIE A
RUNYAN, GLENN E.
SAUSER, EARL E.
SHOPEN, CECIL F.
SIDLES, PHIL L.
SIMON, SIMON A.
SMITH, JOSEPH LEO
SMITH, RAYMOND L.
STANLEY, HAROLD E.
STEMLER, FRANK J.
STOCKWELL, GEORGE W.
STORY, HERBERT E.
THOMAS, JOHN C.
THOMSEN, ALFRED C.
TIBBELS, BERTRAND V.
TROUP, LESLIE E.
TRUMBULL, WILLIAM S.
TURPIN, LESLIE L.
VAN BORKUM, ARNOLD J.
VLACH, EDWARD C.
WALKER, CHARLES E.
WEHMILLER, WILBUR F.
WELSH, JAMES
WILSON, IVAN DUNBAR
WINKELMAN, RICHARD A.
WOERNER, GEORGE W.
YODER, RONALD G.

IN MEMORIAM

JACOB FAWCETT

At the session of the Supreme Court of the State of Nebraska, October 1, 1928, there being present Honorable Charles A. Goss, Chief Justice, Honorable William B. Rose, Honorable James R. Dean, Honorable Edward E. Good, Honorable William H. Thompson, Honorable George A. Eberly, and Honorable Francis S. Howell, Associate Justices, the following proceedings were had:

May it Please the Court:

Your committee appointed to prepare and submit a testimonial to the life and character of Jacob Fawcett, formerly judge of this Court, respectfully presents the following:

Judge Jacob Fawcett was born in Wisconsin, April 9, 1847, and departed this life in Lincoln, Nebraska, April 19, 1928. He was an important actor in many of the momentous events that came to pass between those years. A catalogue of the more important ones nationally, and others to him personally, are: November 16, 1861, enlisted in Company 1, 16th Wisconsin Infantry, for combat service in the Civil War; March 13, 1862, departed with his regiment from Wisconsin; as a member of General Prentiss' division on the 6th and 7th days of April, 1862, actively engaged in the battle of Shiloh, during which he was severely wounded; mustered out of service July 12, 1865. Married April 16, 1868, to Margaret J. Doxey. Five children born the fruits of that union, of whom four yet survive. Admitted as a practicing attorney in Illinois in 1873. Appointed county judge of Jo Davies county in 1885; elected to that office in 1886; resigned in 1887, and moved to Omaha, Nebraska, where he practiced his profession with conspicuous success until elected as one of the judges of the district court in the Fourth judicial district of Nebraska in 1895; re-elected in 1899. Appointed supreme court commissioner by this court October 1, 1907,

and served until December 1, 1908, then appointed one of the judges of this court by Governor Sheldon, and appointment confirmed by Governor Shallenberger. Served as member of this court until January 4, 1917, whereupon he re-entered the practice of law at Lincoln, Nebraska, forming a partnership with Robert S. Mockett under the name of Fawcett & Mockett, later Fawcett, Mockett & Finklestein, which continued until Judge Fawcett's death. Member for many years of the Grand Army of the Republic, and the Masonic Lodge, and at all times a devout Christian gentleman. His domestic life was one of unsurpassed felicity.

Judge Fawcett was ever forward looking, sunny tempered and optimistic. His remarkable strength and courage sustained him during his years of army service so that he participated in every battle in which his regiment engaged, save during short periods of time while he was recuperating from wounds. Returning to civil life, a youth in years, a matured man in judgment, intensely loyal to his country, its institutions, his comrades and his host of friends, always industrious, ambitious, and hopeful, he labored and studied until he was elevated to the exalted position of a judge of this court. To the duties of that office he devoted most strenuously his every talent. The record of Judge Fawcett's service in this court is indeed an index of his learning, wisdom and character; it reveals a well trained intellect, great powers of analysis, a marvelous understanding of the spirit as well as of the letter of the law, and a fixed determination that justice should be done, all stated in terse, lucid terms, that all might know if they would read.

Those friends who best knew Judge Fawcett do honor to his public record, but they most admire the stalwart friend, a type of rugged masculine beauty, clean in mind and action, devoid of malice, sympathetic, generous in service and substance, arising from every defeat, more lovable than before; the friend and comrade who ever saw a silver lining, no matter how dark the clouds might seem to be. His philosophy is well expressed by the poet:

"O pusillanimous heart, be comforted
And like a cheerful traveler take the road,
Singing beside the hedge. What if the bread
Be bitter in thine inn, and thou unshod
To meet the flints? At least it may be said
'Because the way is short, I thank thee, God'"

After 67 years of strenuous service for country, home and humanity he sleeps with his fathers: the influence of his good deeds did not perish with his mortal life, but shall operate until time shall be no more.

We recommend that this testimonial be ordered spread upon the journal of the court, and that a copy duly certified under its seals be sent to his surviving children.

JESSE L. ROOT
R. S. MOCKETT
GEORGE W. IRWIN
DAN J. RILEY
CHARLES LESLIE
Committee

Judge Jesse L. Root:

May it Please the Court: By your permission may I not be permitted to briefly supplement the resolutions submitted for your consideration?

I became acquainted with Judge Fawcett almost 25 years ago. For the greater part of that time our relations were not only friendly but most intimate. A history of Judge Fawcett's life and achievements may well be separated into five divisions: First, his early childhood of less than 14 years during which his physical, mental and moral development produced a sturdy, alert, honest, clean child budding into youth; then as a youthful crusader in the defense of his country and its institutions; then years of toil, study and development wherein by sheer force of character and indomitable will he established a home for himself and family and became an important factor in the professional and civil life of his community; then the period of an extended useful and successful term of public service: finally, that twilight zone which he but barely entered wherein he

sought surcease from years of strenuous toil in contact with the great outdoors.

Our associations were under such conditions that men could not, if they would, conceal from each other their inmost thoughts. I gladly acknowledge his assistance on more than one occasion. I cheerfully testify to the nobility of his character, the honesty of his purpose, his unswerving determination, and his unfailing generosity. I, indeed, have suffered a deep personal loss in Judge Fawcett's passing, but I am confident that he is happy in that land "Where the flowers are always blooming and the sun is ever high."

Honorable R. S. Mockett:

May it Please the Court: Further adding to the resolution as to the life and character of Judge Fawcett, I wish to say:

My birthplace was a short distance from the birthplace of Judge Fawcett in Wisconsin; however, I did not know him until he became a member of this court and did not know him intimately until he had reached the age of three score years and ten. During the next ten years our association was close. He was a busy and successful practioner at the Lancaster county bar and my only regret is that his life was not spared another five or ten years so that he could have carried out his plans to travel, hunt, fish and mingle with his family and friends. However, it seems that man is not the shaper of his own destiny.

If it may be permitted, I wish for a few moments to go into a field of partial speculation. There is no doubt in my mind that the name Fawcett came to England during the Norman conquest; that his ancestors were of Anglo-Saxon Norman; that they no doubt participated in the movement against King John out of which sprang the Magna Charta wherein there was a partial reversal of the old order to the new, the individual thereafter having something to say about the laws and government and it did not all originate with the king. There is no doubt but that his ancestors

down to Judge Fawcett assisted in maintaining that concession of liberty and assisted in enlarging upon it.

Judge Fawcett as a boy fought in the American Rebellion to preserve individual freedom and the Constitution of his country. He put in a long life as a lawyer and judge carrying out the ideas and principles of freedom that first saw the light of day at Runnymede.

Judge Fawcett was thorough in everything he undertook and firm in his beliefs and convictions. He did not waiver from one side to the other. He came from stock that only knew one road and that road was straight ahead.

Honorable George W. Irwin:

May it Please the Court: The report submitted by the committee is complete, but I should like at this time to add a few words in support of the resolutions of respect just offered to the memory of the late Judge Jacob Fawcett, whose death we feel so keenly.

The other members of the committee appointed by Your Honors, and the majority of the members now sitting on this court, had the pleasure of knowing Judge Fawcett several years longer than I. However, in the time I knew him, I feel that I learned to know him well; so well, in fact, that I became an ardent admirer of his sterling traits of character and of his profound abilities.

Our associations were such that I considered him an esteemed friend of mine and had every assurance that he considered me as one of his. I have visited with him frequently in recent years and heard him relate many of his varied experiences. He has told me how as a boy of fourteen he enlisted in the service of his country and fought in many of the battles of the Civil War; various amusing incidents in the early days of the practice of his chosen profession, and of outstanding cases which he heard as a judge of the district and supreme courts of this state.

I am perhaps more familiar with his service as a member of this court than with his activities prior to the time he was appointed, and afterwards elected, as one of its members.

Although his work in that capacity was finished a few years ago, the records of this court remain to attest that his work was well and conscientiously done. I have read numerous opinions written by him and they are all clear cut, conclusive and sound; they display such marked ability, legal learning and deep research that they constitute a lasting memory to their author. He was not influenced in his opinions by bias, prejudice or favoritism, and it is apparent from a study of them that he considered for his sole guide the application of the law as he found it and the administration of justice; that he had as his great aim of life to maintain in public estimation the high position he had been called upon by his fellow citizens to occupy. I know that he enjoyed his years of service on the bench and recalled them with the knowledge that he had served to the best of his ability and to the satisfaction of his constituents and of himself.

Upon his retirement from the bench he reentered the practice of law. Endowed by nature, as he was, with a strong physical personality, a clear, analytical and vigorous mind, and regardless of his advanced years, he again became a leader of the bar. He was a strong and able lawyer, and while fighting vigorously for the rights of his clients he always retained the respect and admiration of opposing counsel. He had the highest regard for the ethics of the profession and his every move was directed in an effort to see that they were maintained on a high level. His practice again became extensive—he once told me that he had tried cases in seventy-eight of the counties of this state—and he enjoyed an exceptionally large acquaintance and friendship among the lawyers of this and other states.

He had been successful in the accumulation of a reasonable share of world's goods, sufficient to enable him to spend his remaining years in leisure. During his many years of activity there had however been established within him such a desire for work that he found it impossible in his closing years to completely retire and enjoy what would have been a well earned rest. The calls upon him for consultation and advice were numerous, and he con-

tinued in his work until a relatively short time prior to his death.

Although Judge Fawcett was permitted to live full measure of a useful life, which was for the most part filled with happiness, yet sorrow often entered his heart. From what he has told me I know that his greatest sorrow was the loss of his beloved wife whom he always affectionately referred to as "Mother." In late years he fully realized that his days upon this earth were numbered; that the time alloted him here was fast coming to a close, and that the Grim Reaper, before whom we all must bow, would soon overtake him. Yet I know that he was happy in the belief that in that Land beyond the grave he would again join the one who had been his companion and helpmeet for so many years, and that he passed with that happy thought before him. Those of us who knew him best will be his most sincere mourners.

Honorable Dan J. Riley:

May it Please the Court: I feel that I would be untrue to a quarter of a century of as delightful an association and as splendid a friendship as has been given man to know, were I to let this occasion pass without paying the tribute of my words, feeble though they be, to the memory of Jacob Fawcett. Yet I must needs speak with hesitation. For what words of mine can add one cubit to his stature or increase in the minds of those present by one jot or one tittle that reputation so justly his.

When from dust was fashioned and with the spirit of life endowed that form which was to be known as Jacob Fawcett, nature and nature's God dealt with lavish hand. For to comliness of feature, symmetry of form and strength of body were added indominance of will, vigor of mind and loftiness of soul.

Born amid rough surroundings, at a tender age deprived by death of a mother's care, his early youth spent in rough mining villages, what were more natural than that Jacob Fawcett should not rise above the lower strata? But of

no ordinary fibre was this youth made. The difficulties of environment and apparent lack of opportunity, things which were to others unsurmountable, were to him but the stepping stones upon which he rose. The years which youths are accustomed to give to ordinary schooling he gave to war. The one big deceit in the life of Jacob Fawcett came when the fourteen year old youth slipped by the recruiting officer to enter the army, as has been aptly said, as a crusader for his country. Something of the sturdy hardiness and innate sense of freedom of forefathers fighting at Runnymede we see in the boy of fourteen standing unflinching on the all but broken line at Shiloh and in the war-torn youth lying in agony on the dock after Shiloh's awful shambles awaiting the coming of the relief boat. And the next day was to mark the fifteenth anniversary of his birth. Twice was he invalided home, each time at his own instance to revert to his field of duty. With the close of the conflict he returned from the scenes of war to life in mining villages. Later he was to become a blacksmith. But not for such as this was young Fawcett born. The youth was destined to create and not to be the victim of his environment. Working at the forge he was not chained to it; he yet found time to fit himself for the calling of law and was admitted to the bar. And so commenced his legal career. First, he became practicing lawyer, shortly after probate judge, both of these in Illinois. He resumed private practice in Nebraska, to be elevated to the district bench, again to resume private practice, to be named as a commissioner and subsequently to become a judge of this court and later its chief justice, once again to reenter private practice.

Skilful pleader at the bar, wise counsellor, able advocate, probate judge, district judge, for a decade member of this court, he touched practically every line of endeavor it is given the lawyer to know and no phase touched which he did not adorn.

His memory was marvelous. Upon needed occasion he could talk for hour after hour upon legal questions, citing case after case, telling without consultation of memoranda

titles of cases, quoting not only the volume and page where they appeared in the original report, but giving also where they might be found in collections of selected cases or in reporter systems, often telling the page where commented upon by textwriters. I have often seen his attention directed to a decision. Weeks after, having use for the case cited, he would recall the case, the volume of the report where found, making use of the index only to determine the page. I doubt if there was an insurance case in the first seventy-five volumes of the Nebraska Reports to which he could not cite you by book and page.

He loved life and the good things of life. He was a genial companion, a splendid conversationalist, most excellent company. He knew not what it was to be uneasy in any man's presence nor need any man feel uncomfortable in his.

He loved Nature and God's great out-of-doors and was an ardent devotee of those sports which drew him close to nature.

Withal he was an indefatigable worker; he tolerated no distraction as he labored. He worked without ostentation, without fuss or flurry. Work was not allowed to accumulate. Though perhaps he may never have heard the phrase, he was a believer in the gospel of the clean desk. There was no putting off until the morrow what he could do today. As a practitioner when a case came into his office he was immediately hard at it and he mastered its every detail. There was no waiting for the exigencies of trial to disclose something favorable. He left nothing to chance. He prepared his cases. On the bench there was no holding up of opinions for additional time to work or to ruminate. There was with him no keeping indefinitely under advisement. He did not malinger over cases. He seized the day. He faced his cases, he mastered them, he decided them.

The opinions of Judge Fawcett as they appear in the published reports of this court are an index at once of the processes of his mind and of his character. As his mind was direct, so are his opinions direct. There is no fumb-

ling about either for facts or for law. Facts as shown in the record of the case were his and the application of the law direct. With a clarity of logic he applied the law to the facts and when all was said and done there could be no doubt in the mind of one who reads as to just what precisely the decision was and the reasons leading thereto. His opinions are stripped of verbiage; they carry no dead weight, they are not cluttered with extraneous matter. They are clear, cogent, straightforward, unequivocal. He was well grounded in the broad principles of the law. While no one knew better than he law's refinements and technicalities, somehow it rarely seemed necessary for him to make use of them. He knew the letter which killeth, yet seemed ever to make manifest the spirit which giveth life. There was no striving to attain what is known as "substantial justice;" yet in the reading of practically all his opinions there comes to one a feeling that right has been vindicated. Something there is about his opinions which reflects the man, honest, square and upright, a keen sense of justice running through all, pervading all, dominating all.

His work in this court is his most enduring monument.

Boy warrior, loyal citizen, earnest advocate, able and conscientious judge, it is but fitting that this court should pause from its labors to pay tribute to his memory. It is but fitting that record be here made of his life, his service and his virtues. I deem it a duty, an honor, an exalted privilege, a labor of love to join in the presentation of these resolutions. May it please the court, I unite in the motion for their adoption.

Judge Charles B. Letton:

May it Please the Court: I deem it my duty, both as a friend of Judge Fawcett of many years standing and as the sole survivor of the three judges who constituted this court at the time Judge Fawcett was appointed supreme court commissioner, to add my tribute of affection and esteem to the words so well spoken by the gentlemen who have preceded me.

I first became acquainted with Judge Fawcett nearly forty years ago at a time when he was a practicing lawyer at the Douglas county bar. In the winter of 1895, at the fall term of the district court for Jefferson county, three of the lawyers attending the session had just been elected to the office of judge of the district court in their respective districts. One was Judge Fawcett, another was former Judge Benjamin S. Baker, of Omaha, and I was the third. Each entered upon the discharge of his judicial duties in January, 1896. After serving as judge of the district court in Douglas county acceptably and well, and on account of his high character and standing as a lawyer and his experience and ability as a judge, the supreme court appointed Judge Fawcett as a commissioner of the court. He served with distinction as a commissioner and when the court was by an amendment to the Constitution increased from three to seven judges, Judge Fawcett, then commissioner, was appointed as one of the four judges added to the court.

On this court he served with diligence and discrimination. He possessed one of the chief virtues of a good judge in that he had an open mind. As sometimes happened, though but seldom, he might come to the consultation room with a prepared opinion, but if after conference, discussion, due deliberation and study he became convinced that he had been mistaken in some respects and that the opinion should be modified or changed, if the proposed change accorded with his judgment, he was always ready and willing to comply with the wishes of the majority and join in a unanimous opinion. In the consultation room he was always affable and courteous. His long practice as a lawyer and his experience as a trial judge, as well as his habits of study, made him a valuable member of this court. His opinions as commissioner and judge are scattered through twenty-two consecutive volumes of the reports of this court, and are clear, logical and persuasive.

Judge Fawcett had always a kindly feeling for, and loved to associate with, the veterans of the Civil War, his old comrades of the Grand Army of the Republic, a number

of whom are in this room today. So highly were his abilities regarded by the state of Wisconsin that he was appointed to deliver the dedicatory address at the unveiling of the monument erected by that state on the battlefield of Shiloh in memory of the soldiers of Wisconsin who fell at that battle. He there delivered an eloquent tribute to their memories.

I fully concur in all that has been said in the resolutions which have been presented by the committee and also in the glowing tributes to my lamented friend which have been uttered by those who have preceded me.

Chief Justice Charles A. Goss:

It was my good fortune to become acquainted with Jacob Fawcett about a year before he moved to Omaha from Galena. From the time he became a citizen of Nebraska, in 1887, until his death a few months ago, our friendship persisted. I practiced with him at the Omaha bar and before him as a judge of the district court. I had the experience of presenting cases before him as a commissioner of this court and later as a member of the supreme court for seven or eight years. As a friend and neighbor, I received much profit from frequent visits with him during the months of his last illness.

As you have gathered from the memorial to him, his whole life was an exemplification of tremendous physical and intellectual energy, and of devotion to his family, his country and his Maker. His perceptions were quick. He was alert, shrewd and farseeing. He was a painstaking investigator of facts and of law. He formed convictions, based on knowledge, and expressed them in words whose meaning was clear. He was an honest lawyer, a just judge and a good citizen. He was a Christian gentleman. He has left to his fine family of children a name and reputation to be chosen above great riches.

The memorial and the testimonials to him here today will be spread upon the records of this court and will be printed in the current volume of the Nebraska Reports.

IN MEMORIAM

GEORGE A. DAY

At the session of the Supreme Court of the State of Nebraska, March 5, 1928, there being present Honorable Charles A. Goss, Chief Justice, Honorable William B. Rose, Honorable James R. Dean, Honorable Edward E. Good, Honorable William H. Thompson, Honorable George A. Eberly, and Honorable Francis S. Howell, Associate Justices, the following proceedings were had:

To the Honorable, the Supreme Court of the State of Nebraska:

Your Committee, appointed to submit suitable and appropriate resolutions on the death of the late Justice George A. Day, respectfully submit the following:

George Armstrong Day, for many years a member of the judicial department of the government of the state of Nebraska, departed this life at his home in Lincoln on December 20, 1927. With the closing of his book of life, this court lost a valuable and much beloved member; the legal profession of our state lost one who had brought honor to it; and the state of Nebraska lost a citizen who for more than forty years, in both public and private life, had brought credit to the state in which he lived.

George Armstrong Day was born in Afton, Iowa, on November 10, 1859, his parents soon thereafter moving to Page county, Iowa. He was educated in the country schools of Page county, Iowa, graduated from Tabor College in 1882, and from the law department of the state university of the state of Iowa in 1884. Immediately after being admitted to the bar, he came to the city of Omaha, and became a member of the firm of Gregory, Day & Day, a firm that took rank with the best at the Omaha bar, and it was as a member of this firm that he did his most active work in private practice.

In January, 1895, he became deputy attorney general of

the state of Nebraska, serving under the Honorable A. S. Churchill, then attorney general. For two years he filled that position with credit to himself and to the state of Nebraska. Soon after the expiration of his term in that office, he was appointed a supreme court commissioner, which position he later resigned to accept an appointment as judge of the district court of Douglas county. He served continuously as a judge of that court until his appointment to fill a vacancy on this bench, which appointment was on January 10, 1920. He did not, however, qualify and take his position on this bench until February 9, 1920. At the time of his appointment he was serving with two other district judges of this state, one the Honorable William V. Allen, now deceased, and the other, Honorable E. E. Good, a member of this court, the three of them being engaged under an appointment from this court in rendering a most arduous but valuable service to the city of Omaha involving the appraised value of one of Omaha's public utilities.

Upon assuming his duties on this bench, the first case that he was called upon to consider was the case of State of Nebraska v. Cole and Grammer, homicide cases that had received much publicity in our state and had engaged the attention of this court and of the trial court on a number of occasions with varying results. The first opinion written by Judge Day after becoming a member of this court was that of State, ex rel. Ayres, v. Amsberry, Secretary of State, reported in 104 Neb. 279. That case involved the validity and construction of the initiative and referendum law recently theretofore adopted by our legislature. An opinion of this court had been filed in that case, but, evidently not satisfied with the conclusion reached, this court had ordered a reargument on certain branches of the case involving the jurisdiction of the court. This rehearing was ordered on the court's own motion. Judge Day wrote the opinion on rehearing, which was concurred in by a majority of the court reaching a different conclusion than that which had been arrived at in the former opinion. A vigorous and well-reasoned dissenting opinion was filed, but

the conclusions announced in the opinion of Judge Day have remained the law on that subject down to the present time.

Those who have kept in touch with the decisions of this court during the period that Judge Day served upon this bench have not failed to notice his independence of thought, his tenacity of conviction, and the fearlessness with which he voiced his conclusions, as many times expressed in dissenting opinions. The many opinions written by him, as disclosed by the reported decisions, are characterized by their brevity, their clearness of expression and evidence of careful investigation of the record, that every question vital to the case should be met, analyzed and determined.

We would not proclaim Judge Day as having been the greatest jurist that ever sat upon this bench. We would not say that he was the most profound lawyer that has ever sat upon this bench. He would not have us use any such language; but we think all who knew him and all those who are familiar with his work upon this bench, as well as upon the district bench where he served so many years, will agree with us when we say that no man ever served upon the district or the supreme bench of the state of Nebraska and performed the duties that fell to him more faithfully, more conscientiously, or with a higher sense of judicial integrity than did George A. Day. He was exceedingly studious, patient to a high degree, at all times sensitive and apprehensive lest there might be some right on the part of the defeated litigant that had escaped his attention when rendering a decision. Lawyers who have presented their cases to this court, the final opinion in which was written by Judge Day, may have felt that an erroneous conclusion was reached, but we think we speak the truth when we say no lawyer ever went out of Judge Day's courtroom, even though defeated, where he felt he ought to prevail, feeling that he had not received the honest, conscientious judgment of a judge who desired to weigh with impartiality and decide as his best judgment told him was right.

Judge Day possessed, and his every day life was governed by, the highest standard of morals, the highest conception of the ethics that should be observed by members of the legal profession, and his standard of official integrity, whether judicial or otherwise, was the highest. He was modest and retiring, and when associated with others, either in private or public life, was disposed to plan and labor in the background, leaving to his associates the limelight and the public approbation that came from the common effort. The consciousness of a work well done and a duty honestly performed were for him sufficient reward.

George A. Day was essentially a religious man. His religion was of the kind that became a part and parcel of his quiet, unassuming, every-day life. His charities were numerous and well applied. He never paraded his charities, and the beneficiaries of his kindly disposition and his desire to help those who were unfortunate were known in full only to himself.

Judge Day was survived only by his life partner, a frail, sweet-dispositioned, kindly-hearted, beloved wife. To this woman, for many years in ill health and an object of constant care and attention, Judge Day devoted the best part of his life. His love and affection and constant care bestowed upon her were known only to those who for years mingled with them in their every-day life. With the passing of Judge Day and the deprivation of that care, attention and deep devotion, Mrs. Day lost that without which she could not survive, and she followed him on that unknown journey and departed this life on the 15th day of February, 1928.

Your committee feel that the life of George Armstrong Day, both as a member of the judiciary of the state of Nebraska and as a private citizen, were such that a permanent record of his qualities as a man and citizen, as a lawyer, and as judge upon the bench of the state of Nebraska, should be preserved as a part of the records of the history of this state. As a mark of our affection for him and our appreciation of the work he did as a member of

the judicial branch of our state government, we move that this memorial be filed with and made a part of the permanent records of this court.

EDWARD P. SMITH
WILLIAM A. REDICK
FRED A. WRIGHT
MAX V. BEGHTOL
P. W. SCOTT
Committee

Honorable Edward P. Smith:

May it Please the Court: I cannot refrain from adding a brief, personal tribute to the life and character of George A. Day as I knew him.

For nearly forty years, he was my personal friend. For many, many years, he was one of my closest neighbors, and at all times he was one whom I delighted to welcome within the precincts of my own home.

Judge Day was born and raised within the environments of the judiciary. His father, James G. Day, was a pioneer lawyer of southwestern Iowa, coming to the state of Iowa from Ohio in the early fifties. This son, George A. Day, was born in 1859. Soon thereafter, and while this son was still an infant, his father responded to the call of Abraham Lincoln and enlisted in the military service to defend the flag of that country whose Constitution as a lawyer he had sworn to support. His father soon rose to the rank of captain, was severely wounded in the battle of Shiloh, later was mustered out because of those wounds, and returned to his home at Sidney, Iowa, there to take up anew the duties of civil life. Shortly thereafter, his father was elected judge of the district court of that judicial district, where he served until he was elected to the supreme bench of the state of Iowa, where he served with distinction for fourteen years. So, it will be seen that George A. Day was born and raised in the environment of lawyers and judges and courts..

After graduating from the law department of the state

university of Iowa City, he became a member of the bar in Omaha in 1884. At that time, the bar of Douglas county numbered among its outstanding men such distinguished lawyers as James M. Woolworth, Andrew J. Poppleton, John I. Redick, James W. Savage, General John C. Cowin, and John M. Thurston, giants of the Nebraska bar, peers of the legal profession in any state, and such distinguished judges as Judge Lake, Judge Wakeley, Judge Doane, and Judge Groff. It was with these outstanding members of the legal profession that, as a young man, George A. Day had to assert the cause of his client. I can pay him no greater tribute as a trial lawyer than to say that he won the confidence, respect and esteem of those great lawyers because of his ability and the clearness of his thought.

But it was while on the district bench of Douglas county that Judge Day rendered his greatest service and made for himself an abiding place in the esteem and the confidence of the people of that judicial district both among lawyers and laymen. He possessed to a high degree the qualities which we all admire in a trial judge—kindly dispositioned, patient, honest, impartial, extremely anxious to get the point of view of each of the contending parties, especially indulgent with younger members of the bar, dignified but not austere, fearless to do the right as his honest judgment in its final analysis told him was the right.

I think I speak the truth when I say Judge Day while on the district bench shrunk from service on the criminal bench. He abhorred crime, but his heart went out with sympathy, especially for the young men charged with crime. I have heard him say the hardest and most painful duty he was called upon to perform while on the district bench was the imposing of sentence on young men to penal servitude. He realized fully that society had to be protected and criminals punished, but he always felt that possibly there were mitigating or extenuating circumstances not disclosed by the record that ought to be taken into account. Was human society wholly blameless? Had environment, associates, early training or lack of training, causes over which the defendant did not have entire con-

trol, contributed to the downfall of the defendant? All these and other inquiries forced themselves upon the mind of Judge Day and caused him to show mercy in some cases where others thought greater severity would have been appropriate. But Judge Day, in dealing with youthful criminals, breathed the spirit of the prayer—"That mercy I to others show, that mercy show to me."

As stated by the resolutions, Judge Day was a deeply religious man. As still water proverbially runs deep, so his religion was in no sense a lip service. It was a part of his every-day, seven days in the week, life. For many years, it was his custom to stand at the door of his favorite church in Omaha, there to extend a kindly greeting to the regular attendant and a hand of genuine welcome to the stranger who came to its doors.

It was my privilege and my pleasure to live as a close neighbor to him for many years. Our families were close, intimate, personal friends. Having no children of his own, he lavished his affection for children upon those in the immediate neighborhood, and I think I can truthfully say his love for my own children was almost as great as my own. Our families spent hours together in his home or in my own. He loved his neighbors and they loved him. It was when the cares of the day were forgotten, when the constant grind of the daily toil was over and he met with his neighbors and friends, both young and old, then it was that the splendor of his character, the kindly but jovial disposition, the deep interest he had in the health, the happiness and the welfare of his fellowmen was so clearly manifested.

I cannot refrain from saying a word of Judge Day's care and devotion to his invalid wife. For twenty years, Mrs. Day was in ill health. She needed his constant care and attention to a marked degree. He lavished upon her that degree of care, constant attention and deep devotion seldom witnessed and fully known only to those who knew of the every-day life of Judge Day and his wife. It was a kind and merciful Providence that caused her to soon

follow him into that land from which no human traveler has yet returned. Such was the Judge Day as I knew him. But he is gone — gone.

Is that all there is to be of Judge Day? The human soul cries out in protest against the suggestion. I have no clear understanding, much less such an understanding that I could impart to others of that which we call life. I have no well-defined views, much less such views as I can impart to others of that incident which for the want of a better word we call death. And so I have no adequate conception of that great uncharted sea out upon which the soul of Judge Day has taken its flight. But, I have faith to believe there are beacon lights along the course and a safe harbor at the end of the journey for those who have led the life and performed great services to humanity as has Judge Day.

Judge William A. Redick:

May it Please your Honors: It is with deep regret I find myself now having an opportunity, the first in twenty years, to address this Honorable Court, on account of the occasion which gave rise to the opportunity. I feel, however, that I should say some of those things which are in my heart about our friend who has left us.

I am in hearty sympathy and agree with everything that has been said, both in the resolutions and in the remarks of the chairman. There are some matters, however, which have not been referred to by him and which I consider much too important, upon an occasion of this kind, to overlook. And the first to which I desire to call attention is the unfailing sense of humor of our friend who has departed. He never was happier than when he could call attention in a humorous and friendly way to the idiosyncrasies, if I may so call them, of some of his friends. His wit, however, was never of a cutting nature. His humor was of a bland and caressing nature that seemed to make the subject of it feel that, after all, the idiosyncrasy to which attention was called was more of a virtue than a vice. He

never exercised his humor in such a way as to hazard the friendship of its subject. He thought more of his friends than he did of his jest. But, nevertheless, those of them who were the subjects of his humor, after the laughing and amusement was over, had the same kind of feeling toward him as they did before.

And that brings me to the second point, and which has been mentioned in the resolutions; that is, the unwavering friendship, the fidelity to his friends, which characterized Judge Day. I had the good fortune to collaborate with him both upon the district bench and, by the courtesy of this court, upon this bench, and I know that he never rendered a decision which did not have the full support of his conscience and his ideas of the right of the matter. He was a strong believer that hard cases make bad law, and therefore he paid no attention to what might be the results to the litigants in the case, but he looked at the principles of the law which would govern the decision and then rendered his judgment.

I can add nothing to what the resolutions have said, it seems to me, upon his character as a judge. While his friendships were strong, he had no friends when sitting upon the bench, and he had no enemies; he passed judgment as he believed the right of the case, according to his own conscience.

Honorable Fred A. Wright:

May it Please the Court: I stand before you able to express only to a small degree the respect and reverence I have for the man who has been taken.

I remember George A. Day first when he was a student in Tabor College, a small struggling school in southwestern Iowa; even then he had the same traits of character, the same sincerity, the same gentle, unselfish spirit which afterwards enabled him to achieve the success and render the service we now recognize and for which we now seek to do him honor.

That his life has been a success no one doubts, a suc-

cess not in wealth as it relates to material things, for the accumulation of wealth for the mere sake of accumulating was never his ambition, but far greater, his was a success of service, a success rich in achievement in those things that have made the world better.

With a character inherited from intelligent, sincere and God-fearing parents whose every ambition was ennobling, reared in an atmosphere of righteousness, his ideals were of necessity those of service to his fellows, and to this purpose has his life been devoted.

He has contributed much to the administration of the laws of his state, and his kind, bright, gentle spirit has been all along a constant benediction to those within the sphere of his influence. Truly, it may be said of him that his life was a success, for he served well.

In his going I am reminded of those lines that read:

> "For some we loved, the loveliest and the best
> That from his vintage rolling time hath prest,
> Have drunk their cup a round or two before
> And one by one crept silently to rest."

Honorable Max V. Beghtol:

May it Please the Court: Although I have often appeared before Judge Day while he was district judge and during his service as a member of this court, my acquaintance with him was more social than professional. He exposed to me through a reticence, always marked, a broad and liberal philosophy of life. He was one of those fortunate men who was permitted to believe in the immortality of the soul. He had none of the habits nor appetites which control and annoy most of us, yet he was tolerant. He occupied this bench, than which there is no more arduous task in government, performing his duties with painstaking care and scrupulous honesty. He was among the chief men of his time. Such a record, your Honors, and such a man, deserve all the eulogies this day given, and

permit me to say that as long as this court exists, when the names of those who have composed it are recalled, the influence and memory of this man will never be forgotten.

Judge Leonard A. Flansburg:

May it Please the Court: I have been hesitant to attempt to make any remarks at this time, for I know that my words will but poorly express the thoughts and sentiments which I feel.

While I was a member of the court I had a very close association with Judge Day. Our offices were next to each other. We were constantly going back and forth. Every morning when I passed his door and looked in to greet him, he was bending over his desk; every evening when I left he would still be there, bending over his desk or getting books from the shelves, or pacing back and forth in his room trying to solve some problem.

He was a prodigious worker; very much concerned about his cases and tremendously anxious to get his opinions exact and correct in every way. His whole nature rebelled against hurting any one. He was always mindful of the effect of his decisions upon the parties, but was carefully scrupulous to decide his cases according to the requirements of the law. Judge Day was a fine lawyer, and as a jurist he was able, upright, careful, just and merciful.

Judge Day put the whole energy of his life into his work, and what sustained him in his arduous and tedious labors was his sense of humor. In everything he saw something humorous. That gave him relaxation. His wit and humor made him a delightful companion. As a man he was charming; he was modest; unselfish, in fact, to an extreme degree, generous; and he had a consideration and a warmth of feeling toward his fellow man, the equal of which is rarely to be found.

Judge Day was honored by all; he was loved by those who were acquainted with him; he was one of the finest men that I have ever known. It may be truly said that he was one of God's noblemen.

Honorable John N. Dryden:

May it Please the Court: I cannot on this occasion withhold my tribute of affection and of respect for a man whom I regarded as a great lawyer, if by that term we mean that he maintained the honorable traditions of his profession and that he served with supreme usefulness his day and generation.

The outline of his life, as given in the historic details we have heard today, gives us little information as to the service he rendered to his fellow men as a lawyer and judge. I suppose it will always be true that we do not appreciate our judges until they are dead. We cannot know the anxious, painstaking care with which for a generation this man sought to resolve the controversies of men in accordance with the Sermon on the Mount. His philosophy of life and death and immortality was wholesome and practical and involved the compensations of a life lived largely and to noble ends.

On an occasion like this I am reminded of America's great poet, William Cullen Bryant. At a very early age he wrote Thanatopsis. In this poem, in referring to the destiny of man, he said.

> "Earth, that nourished thee,
> Shall claim
> Thy growth, to be resolved to earth again;
> And, lost each human trace, surrendering up
> Thine individual being, shalt thou go
> To mix forever with the elements;
> To be a brother to the insensible rock,
> And to the sluggish clod, which the rude swain
> Turns with his share, and treads upon. The oak
> Shall send his roots abroad, and pierce thy mould."

But Thanatopsis was a most depressing note, essentially a message of despair. The brilliant young philosopher gave no hope. A generation went by and almost the great poet's last word to the race was the "Flood of Years." He spoke of the engulfing of all human kind in the whelming flood; the artisan from his bench, the student from his engrossing ambition, the scholar from his cloister, the

young mother with her first maternal hope, all were engulfed with the Flood of Years pushed forth by "a Mighty Hand, from an exhaustless Urn."

> "Further on
> A belt of darkness seems to bar the way,
> Long, low and distant, where the Life that is
> Touches the Life to come."

The poetic fancy now discerns a radiance beyond the darkness,

> "Beyond that belt of darkness still the years roll on
> More gently, but with not less mighty sweep.
> They gather up again and softly bear
> All the sweet lives that late were overwhelmed."

George Day's life was an exemplification of this larger hope.

Today, we say farewell to this man, a sincere friend, an upright judge, a lawyer, a Christian lawyer, a Christian gentleman. It is not too much to say of him "God's gentleman."

Chief Justice Charles A. Goss:

George A. Day came to the bar four or five years earlier than I. He spent more than half of his professional life in public service—as assistant attorney general, district judge, supreme court commissioner and supreme judge. For a generation I either practiced at the Omaha bar with him or before him as a district judge. We ate our luncheons at the same table, played games requiring manual skill, were much in the outdoors together and called each other by our first names. I succeeded him as district judge when he was promoted to this court eight years ago and, at my request, I was permitted to be sworn in by him a moment after he had taken the oath of office as a supreme judge. Seven years later I followed him to this court and had a year of fine fellowship with him here.

He had a family background of achievement for genera-

tions, of which he was proud but not boastful; for he won his own place by his ability and character. His medium size and erect figure, his dark skin and luminous brown eyes, his kindness of manner and his charm of speech, made him an attractive man. He had a sense of humor and a power to depict it. He was the best story teller of any group. Often he relieved a tense situation with a sentence or an illustration that would bring laughter and good feeling. He had the delicacy and modesty of a lily and the courage and power of a lion. While he disliked to fuss with small spirits over nonessentials, yet he would fight tenaciously for a principle. He listened closely, he investigated carefully, he thought lucidly, he reasoned logically, he wrote clearly. His opinions impress the reader as those of a just and able judge who is trying intelligently to find the truth and to subject it to the applicable principles of the law. For the work he accomplished, we praise him; for what he was, we love him.

The memorial presented by the committee is ordered spread upon the journal of this court and, with the remarks made on this occasion, will be printed in the current Nebraska Report. Permanent record will thus be made of the things we have said here in tribute to the memory of our departed brother. But our words are poor measures of the things we feel and lack the power to say.

During the period covered by these reports, in addition to the cases reported in this volume, there were 97 cases affirmed by the court without opinion.

TABLE OF CASES REPORTED

American Ins. Co., Norfolk Packing Co. v. 118
Andersen v. Omaha & C. B. Street R. Co. 487
Anderson, Conservative Savings & Loan Ass'n v. 627
Anderson, Dietz Lumber Co. v. 205
Arner v. Sioux County 394
Austin v. Chalfant 137
Austin, In re Estate of 137
Axtell Lumber Co., Green v. 603

Bailey v. Randall 328
Baney v. Chicago, B. & Q. R. Co. 615
Bankers Fire Ins. Co., Norton v. 499
Banking House of A. Castetter, State v. 610
Barnts v. State 363
Bayer, Hamilton v. 670
Bayer, In re Estate of 670
Benzon v. Johnson 686
Berggren v. Hannon, O'Dell & Van Brunt 18
Berlin v. Schwartz 254
Beselin & Son, Elson & Co. v. 729
Big Horn Collieries Co. v. Roland 846
Bliss, Stuart v. 305
Blue River Power Co. v. Hronik 405
Blue Valley State Bank v. Milburn 131
Board of Commissioners, State v. 261
Board of County Commissioners, Sommerville v. 282
Boomer v. Lancaster County 718
Boring v. Dodd 366
Bourne v. State 141
Brogan, Keedick v. 339
Bronzynski, In re Estate of 196
Browne, Lexington Mill & Elevator Co. v. 753
Bullock v. City of Lincoln 67
Burgess-Nash Bldg. Co. v. City of Omaha 862

Carl v. Wentz 880
Chalfant, Austin v. 137
Chicago, B. & Q. R. Co., Baney v. 615
Chicago, B. & Q. R. Co., Ramirez v. 740
Chicago & N. W. R. Co., Tomjack v. 413
Chitwood, Donovan v. 683
Citizens State Bank, State v. 852

City of Lincoln, Bullock v. 67
City of Omaha, Burgess-Nash Bldg. Co. v. 862
City of Pierce v. Schramm 263
Claridge, Folda v. 610
Clinton State Bank, State v. 482
Clinton State Bank, State v. 484
Clinton State Bank, State v. 510
Colling v. State 308
Concord State Bank v. Jaeger 436
Conservative Savings & Loan Ass'n v. Anderson 627
Cowen, Laflin v. 1
Coxbill v. State 604
Craft, Marvel v. 802
Craig v. Westerhoff 764
Crawford v. State 125
Crawford v. State 629

Dafoe v. Lyell 827
Daily News Publishing Co., Fitch v. 474
Davis, Independent Elevators v. 397
Davis v. State 90
Dawson County State Bank v. Temple 727
De Griselles v. Gans 835
Delatour v. Smith 695
De Matteo v. Lapidus 549
Denesia v. Denesia 789
Deutsch, In re Guardianship of 591
Deutsch, Moran v. 591
DeVore, Salyers Auto Co. v. 317
Diamond, Ross v. 241
Dickinson, Walter v. 352
Dietz Lumber Co. v. Anderson 205
Dodd, Boring v. 366
Donovan v. Chitwood 683
Douglas County, Kelkenny Realty Co. v. 796
Dovey v. State 533
Driver v. State 666
Dunlap v. State 313
Dwyer v. Weyant 485

Edney v. Jensen 242
Elkhorn River Drainage District, Idlewild Farm Co. v. 300
Elson & Co. v. Beselin & Son 729
Emerson v. Western Seed & Irrigation Co. 180
Enyart, In re Estate of 450
Estate of Bronzynski, Wayne County v. 196

Fagin, Shepherdson v. 806
Farmers Bank, State v. 445
Farmers Irrigation District, State v. 373
Farmers & Merchants Telephone Co. v. Orleans Community Club 633
Farmers State Bank, La Borde v. 33
Farmers State Bank v. Nelson 541
Farmers Union Milling & Grain Co., Schueth v. 14
Farrington v. State 712
Federal Land Bank v. Tuma 99
Feekin, Schultz v. 873
Fenton v. Gilmore 60
Finzer, Peter v. 380
First Nat. Bank, Harrison State Bank v. 456
First Nat. Bank v. Lincoln Grain Co. 809
First State Bank v. Niklasson 713
Fitch v. Daily News Publishing Co. 474
Fitzsimmons v. State 440
Folda v. Claridge 610

Gans, De Griselles v. 835
Gilmore, Fenton v. 60
Gordon v. Lowry 359
Green v. Axtell Lumber Co. 603
Green v. State 635

Halbert v. State 1
Hamilton v. Bayer 670
Hampton, O'Shea v. 222
Hampton v. O'Shea 230
Hannon, O'Dell & Van Brunt, Berggren v. 18
Harrison State Bank v. First Nat. Bank 456
Hartman Furniture & Carpet Co., Tralle v. 418
Henefin v. Live Stock Nat. Bank 331
Hill v. State 73
Hiller v. State 582
Hoferer, In re Estate of 254
Holst v. Warner 208
Hord Grain Co., Sindelar v. 776
Hronik, Blue River Power Co. v. 405

Idlewild Farm Co. v. Elkhorn River Drainage District 300
Independent Elevators v. Davis 397
In re Appeal of Wilkins 748
In re Estate of Austin 137
In re Estate of Bayer 670
In re Estate of Bronzynski 196

In re Estate of Enyart 450
In re Estate of Hoferer 254
In re Estate of Johnson 686
In re Estate of Koller 764
In re Estate of Lyell 827
In re Estate of Waller 352
In re Guardianship of Deutsch 591
In re Guardianship of Strelow 873

Jaeger, Concord State Bank v. 436
Jensen, Edney v. 242
Johnson, Benzon v. 686
Johnson v. Samuelson 297
Johnson, State v. 249
Johnson, In re Estate of 686

Keedick v. Brogan 339
Kelkenny Realty Co. v. Douglas County 796
Kennedy, State v. 854
Kildow, Richardson v. 648
Kleinschmidt v. State 577
Knies v. Lang 387
Koller, In re Estate of 764
Koser, Marnell v. 450
Krug v. State 185

La Borde v. Farmers State Bank 33
Laflin v. Cowen 1
Lancaster County, Boomer v. 718
Lang, Knies v. 387
Lapidus, De Matteo v. 549
Lexington Mill & Elevator Co. v. Browne 753
Lincoln, City of, Bullock v. 67
Lincoln Grain Co., First Nat. Bank v. 809
Lincoln Life Co. v. McLennan 466
Linder, Rivett Lumber & Coal Co. v. 463
Live Stock Nat. Bank, Henefin v. 331
Long, Watts v. 656
Losey, Spangenberg v. 112
Lowry, Gordon v. 359
Lyell, Dafoe v. 827
Lyell, In re Estate of 827
Lynch v. Rohan 820

McColley v. State 512
McIntyre v. State 600

McLaughlin, Pantorium v. 61
McLennan, Lincoln Life Co. v. 466
McLennan, Weaverling v. 466
Marnell v. Koser 450
Marshall v. State 45
Marvel v. Craft 802
Milburn, Blue Valley State Bank v. 131
Miller v. State 702
Miller, United States Trust Co. v. 25
Mitchell v. State 666
Moffitt v. Williams 785
Moran v. Deutsch 591
Myers v. State 287

National Casualty Co., Patterson v. 61
National Surety Co., Rogers v. 170
National Surety Co., Rogers v. 179
Nebraska Wesleyan University v. Thompson 291
Neligh State Bank, State v. 858
Nelson, Farmers State Bank v. 541
Nelson v. State 219
Niklasson, First State Bank v. 713
Norfolk Packing Co. v. American Ins. Co. 118
Norton v. Bankers Fire Ins. Co. 499
Novotny, Quesner v. 84

Octavia State Bank, State v. 825
Omaha, City of, Burgess-Nash Bldg. Co. v. 862
Omaha & C. B. Street R. Co., Andersen v. 487
Omaha & S. I. R. Co., Sarpy County v. 516
Orleans Community Club, Farmers & Merchants Telephone Co. v. 633
O'Shea v. Hampton 222
O'Shea, Hampton v. 230

Pantorium v. McLaughlin 61
Patterson v. National Casualty Co. 61
Peter v. Finzer 380
Peterson v. Schaberg 346
Peterson v. State 268
Pierce, City of, v. Schramm 263
Pratt v. Western Bridge & Construction Co. 553
Prudential Ins. Co. v. Qualset 706

Qualset, Prudential Ins. Co. v. 706
Quesner v. Novotny 84

Ramirez v. Chicago, B. & Q. R. Co. 740
Randall, Bailey v. 328
Regan v. State 723
Reuter v. Reuter 428
Reuter v. Reuter 434
Richardson v. Kildow 648
Rivett Lumber & Coal Co. v. Linder 463
Rogers v. National Surety Co. 170
Rogers v. National Surety Co. 179
Rohan, Lynch v. 820
Roland, Big Horn Collieries Co. v. 846
Ross v. Diamond 241
Runyan v. State 191

Salisbury v. State 273
Salyers Auto Co. v. DeVore 317
Samuelson, Johnson v. 297
Sarpy County v. Omaha & S. I. R. Co. 516
Schaberg, Peterson v. 346
School District No. 2, State v. 202
Schramm, City of Pierce v. 263
Schueth v. Farmers Union Milling & Grain Co. 14
Schultz v. Feekin 873
Schwartz, Berlin v. 254
Security State Bank, State v. 165
Security State Bank, State v. 223
Security State Bank, State v. 521
Security State Bank, State v. 526
Security State Bank, State v. 530
Shepherdson v. Fagin 806
Sindelar v. Hord Grain Co. 776
Sioux County, Arner v. 394
Smith, Delatour v. 695
Sommerville v. Board of County Commissioners 282
Spangenberg v. Losey 112
State, Barnts v. 363
State, Bourne v. 141
State, Colling v. 308
State, Coxbill v. 604
State, Crawford v. 125
State, Crawford v. 629
State, Davis v. 90
State, Dovey v. 533
State, Driver v. 666
State, Dunlap v. 313
State, Farrington v. 712

State, Fitzsimmons v. 440
State, Green v. 635
State, Halbert v. 1
State, Hill v. 73
State, Hiller v. 582
State v. Kennedy 854
State, Kleinschmidt v. 577
State, Krug v. 185
State, McColley v. 512
State, McIntyre v. 600
State, Marshall v. 45
State, Miller v. 702
State, Mitchell v. 666
State, Myers v. 287
State, Nelson v. 219
State, Peterson v. 268
State, Regan v. 723
State, Runyan v. 191
State, Salisbury v. 273
State, Styskal v. 8
State, Swogger v. 563
State, Wehenkel v. 493
State, Wilkins v. 748
State, ex rel. Davis, v. Banking House of A. Castetter 610
State, ex rel. Davis, v. Octavia State Bank 825
State, ex rel. Keith County, v. Western Irrigation District Ditch Co. v. 736
State, ex rel. Liberty High School District, v. Johnson 249
State, ex rel. O'Brien, v. Board of Commissioners 261
State, ex rel. Read, v. Farmers Irrigation District 373
State, ex rel. School District No. 67, v. School District No. 2 202
State, ex rel. Spillman, v. Citizens State Bank 852
State, ex rel. Spillman, v. Clinton State Bank 482
State, ex rel. Spillman, v. Clinton State Bank 484
State, ex rel. Spillman, v. Clinton State Bank 510
State, ex rel. Spillman, v. Farmers Bank 445
State, ex rel. Spillman, v. Neligh State Bank 858
State, ex rel. Spillman, v. Security State Bank 165
State, ex rel. Spillman, v. Security State Bank 223
State, ex rel. Spillman, v. Security State Bank 521
State, ex rel. Spillman, v. Security State Bank 526
State, ex rel. Spillman, v. Security State Bank 530
Strelow, In re Guardianship of 873
Stuart v. Bliss 305
Styskal v. State 8
Swogger v. State 563

Temple, Dawson County State Bank v. 727
Thompson, Nebraska Wesleyan University v. 291
Tomjack v. Chicago & N. W. R. Co. 413
Tralle v. Hartman Furniture & Carpet Co. 418
Tuma, Federal Land Bank v. 99

United States Trust Co. v. Miller 25

Waller v. Dickinson 352
Waller, In re Estate of 352
Warner, Holst v. 208
Watts v. Long 656
Wayne County v. Estate of Bronzynski 196
Weaverling v. McLennan 466
Wehenkel v. State 493
Wentz, Carl v. 880
Westerhoff, Craig v. 764
Western Bridge & Construction Co., Pratt v. 553
Western Irrigation District Ditch Co., State v. 736
Western Seed & Irrigation Co., Emerson v. 180
Weyant, Dwyer v. 485
Wilkins, In re Appeal of 748
Wilkins v. State 748
Williams, Moffitt v. 785

CASES CITED BY THE COURT

Cases Marked * are Overruled in this Volume
Cases Marked † are Distinguished in this Volume
Cases Marked ‡ are Disapproved in this Volume
Cases Marked § are Superseded in this Volume

Abbott v. Abbott, 67 Me. 304 183
Abbott v. Johnston, 93 Neb. 726 123
Abbott v. State, 113 Neb. 524, 527 ..... 568, 577
Aber v. Twitchell, 17 N. Dak. 229 390
Adler v. Royal Neighbors of America, 90 Neb. 56 389
Aguilar v. Territory of New Mexico, 8 N. M. 496 164
Alabama State Bank v. Barnes, 82 Ala. 607 816
Albertson v. State, 9 Neb. 429 325
Albin v. Parmele, 70 Neb. 740 431
Aldritt v. Fleischauer, 74 Neb. 66 304
Alexander v. Pollock & Co., 72 Ala. 137 327
Allen v. Public Administrator, 1 Bradf. Sur. (N. Y.) 221 680
Allen v. Trester, 112 Neb. 515 140
Aller v. State, 114 Neb. 59 ..... 189, 272
Altis v. State, 107 Neb. 540 312
Ammons v. State, 65 Fla. 166 514
Anderson v Cusack, 115 Neb. 643 86
Anderson v. Griswold, 87 Neb. 578 804
Anderson v. Hall, 4 Neb. (Unof.) 494 178
Anderson v. Jarrett Chambers Co., 206 N. Y. Supp. 458 663
Andrews v. Hastings, 85 Neb. 548 1
Andrews v. Pond, 13 Pet. (U. S.) *65 662
Andrus v. Bay Creek R. Co., 60 N. J. Law, 10 411
Ansley v. Bank of Piedmont, 113 Ala. 467 167
Armann v. Buel, 40 Neb. 803 211
Armstrong v. Mayer, 60 Neb. 423 140
Arnold v. State, 38 Neb. 752 703
Arnold's Estate, 83 Pa. Super. Ct. 264 198
Arthur v. Glover, 82 Neb. 528 304
Atchison, T. & S. F. R. Co. v. Meyer, 62 Kan. 696 655
Atchley v. Rimmer, 148 Tenn. 303 295
Aultman, Taylor & Co. v. Obermeyer, 6 Neb. 260 182
Austin v. Austin, 136 Miss. 61 183
Ayres v. West, 86 Neb. 297 178

Baker v. State, 112 Neb. 654 270
Bambrick v. Bambrick Bros. Construction Co. 152 Mo. App. 69 .. 327

Bandfield v. Bandfield, 117 Mich. 80 183
Bank of California v. Richardson, 248 U. S. 476 545
Bank of Commerce & Savings v. Randell, 107 Neb. 332 384
Banks v. Uhl, 6 Neb. 145 409
Barker v. Wheeler, 71 Neb. 740 379
Barr v. Post, 56 Neb. 698 670
Barr v. State, 45 Neb. 458 601
Barry v. Wachosky, 57 Neb. 534 178
Bartlett v. Cheesbrough, 23 Neb. 767 40
Bartlett v. State, 115 Neb. 148 82
Batty v. City of Hastings, 69 Neb. 511 543
Baysinger v. State, 77 Ala. 63 51
Beals, Torrey & Co. v. Western Union Telegraph Co., 53 Neb. 601 .. 409
Beber v. Brotherhood of Railroad Trainmen, 75 Neb. 183 61
Beckman v. Lincoln & N. W. R. Co., 85 Neb. 228 127
Bedell v. Harbine Bank, 62 Neb. 339 334
Bedford v. Ruby, 17 Neb. 97 403
Bee Publishing Co. v. World Publishing Co., 59 Neb. 713 733
Beebe v. Bahr, 84 Neb. 191 711
Beesley v. Badger, 66 Utah, 194 822
Benedict v. Minton, 83 Neb. 782 431
Bennet v. Hargus, 1 Neb. 419 225
Beuttell v. Magone, 157 U. S. 154 390
Bianki v. Greater American Exposition, 3 Neb. (Unof.) 656 427
Bird v. Murphy, 256 Pac. (Cal. App.) 258 822
Birdsong v. Brooks, 7 Ga. 88 362
Bixby v. Bruce, 69 Neb. 78 462
Black v. Zacharie & Co., 3 How. (U. S.) *483 324
Blackburn v. Crawfords, 3 Wall. (U. S.) 175 675
Blair v. State, 72 Neb. 501 271
Blue Grass Traction Co. v. Grover, 135 Ky. 685 560
Blue Grass Traction Co. v. Ingles, 140 Ky. 488 281
Board of Directors of Alfalfa Irrigation District v. Collins, 46 Neb. 411 378
Bohn Sash & Door Co. v. Case, 42 Neb. 281 709
Bohner v. Bohner, 46 Neb. 204 182
Boomer v. Lancaster County, 115 Neb. 295 719
Borland v. Lenz, 196 Ia. 1148 844
Botsch v. State, 43 Neb. 501 195
Boughn v. State, 44 Neb. 889 310
Bourne v. State, 116 Neb. 141 278
Bowen v. Chase, 98 U. S. 254 390
Brenton v. Territory, 15 Okla. 6 575
Broadwell v. Howard, 77 Ill. 305 816
Brooks v. Kauffman, 93 Neb. 682 281
Brown v. Brown, 77 Neb. 125 675

Brown v. Brown, 88 Conn. 42 183
Brown v. Commonwealth, 117 Ky. 766 163
Brown v. Globe Printing Co., 213 Mo. 611 478
Brown v. State, 111 Neb. 486 314
Brugman v. Brugman, 93 Neb. 408 339
Bryon v. Durrie, 6 Abb. New Cas. (N. Y.) 135 409
Building & Loan Ass'n v. Walker, 59 Neb. 456 718
Bump v. Augustine, 163 Ia. 307 327
Burlingim v. State, 61 Neb. 276 52
Burlington & M. R. R. Co. v. Seward County, 10 Neb. 211 702
Bursow v. Doerr, 96 Neb. 219 817
Burton v. Farinholt, 86 N. Car. 260 44
Butera v. Mardis Co., 99 Neb. 815 425
Butler v. Fayerweather, 91 Fed. 458 681
Butler v. Greene, 49 Neb. 280 298
Button v. Frink, 51 Conn. 342 281
Byington v. Chicago, R. I. & P. R. Co., 96 Neb. 584 635

Callaghan v. Pocasset Mfg. Co., 119 Mass. 173 327
Campbell v. Youngson, 80 Neb. 322 678
Cargill v. Minnesota, 180 U. S. 452 814
Carlson v. Jordan, 4 Neb. (Unof.) 359 509
Carnahan v. Cummings, 105 Neb. 337 1
Carpenter v. State, 106 Neb. 742 364
Carr v. State, 23 Neb. 749 590
Carson v. Stevens, 40 Neb. 112 40
Carter v. Root, 84 Neb. 723 735
Case Threshing Co. v. Meyers, 78 Neb. 685 339
Casey v. State, 20 Neb. 138 164
Cassady v. Old Colony Street R. Co., 184 Mass. 156 391
Casteel v. State, 151 Ark. 69 645
Cellers v. Meachem, 49 Or. 186 387
Chadron Loan & Building Ass'n v. O'Linn, 1 Neb. (Unof.) 1 86
Chapman v. City of Lincoln, 84 Neb. 534 266
Chesley v. Rocheford & Gould, 4 Neb. (Unof.) 768 ..... 746, 783
Chicago, K. & N. R. Co. v. Wiebe, 25 Neb. 542 298
Chippendale v. North Adams Savings Bank, 222 Mass. 499 692
Chrystie v. Foster, 61 Fed. 551 390
Citizens State Bank v. Petersen, 114 Neb. 809 ..... 242, 716
City of Brooklyn v. Brooklyn City R. Co., 47 N. Y. 475 560
City of Lincoln v. McLaughlin, 79 Neb. 74 850
City of South Omaha v. Fennell, 4 Neb. (Unof.) 427 298
City Trust Co. v. Douglas County, 101 Neb. 792 800
Cizek v. Cizek, 69 Neb. 800 372
Clampitt v. Johnson & Miller, 17 Tex. Civ. App. 281 699
Clancy v. Barker, 71 Neb. 83 22

Clark v. Holmes, 109 Neb. 213 344
Clark v. State, 102 Neb. 728 493
Clearwater Bank v. Kurkonski, 45 Neb. 1 543
Cleland v. Anderson, 66 Neb. 252 22
Clem v. Chapman, 262 S. W. (Tex. Civ. App.) 168, 278 S. W. (Tex. Civ. App.) 1114 387
Cleveland Nat. Bank v. Bickel, 59 Okla. 279 386
Cockrill v. Joyce, 62 Ark. 216 462
Coffey v. Harlan County, 204 U. S. 659 538
Coffman v. Malone, 98 Neb. 819 116
Coller v. Knox, 222 Pa. St. 362 281
Collins v. Collins, 110 Ohio St. 105 682
Commissioners v. Clark, 94 U. S. 278 783
Commonwealth v. Baldi, 250 Mass. 528 609
Commonwealth v. Campopiano, 254 Mass. 560 608
Commonwealth v. D'Amico, 254 Mass. 512 609
Commonwealth v. McDermott, 224 Pa. St. 363 221
Commonwealth v. Newell, 7 Mass. 245 587
Commonwealth v. Rosenthal, 211 Mass. 50 608
Commonwealth v. Slavski, 245 Mass. 405 608
Commonwealth v. Webster, 5 Cush. (Mass.) 295 590
Conklin v. City of Dubuque, 54 Ia. 571 552
Conley Camera Co. v. Multiscope & Film Co., 216 Fed. 892 734
Cook v. Monroe, 45 Neb. 355 506
Cook County Nat. Bank v. United States, 107 U. S. 445 458
Cooper v. Foss, 15 Neb. 515 307
Cooper v. Skeel, 14 Ia. 578, 581 160
Cooper v. State, 12 Ga. App. 561 647
Cowan v. Ramsey, 15 Ariz. 533 386
Cowan v. State, 22 Neb. 519 589
Cowley v. Pulsifer, 137 Mass. 392 478
Cowley County Nat. Bank v. Rawlins-Dobbs Elevator Co., 96 Kan. 46 816
Cox v. Kee, 107 Neb. 587 671
Coxbill v. State, 115 Neb. 634 ..... 315, 444, 632
Craig v. Chicago, St. P., M. & O. R. Co., 97 Neb. 586 491
Crane v. Leonard, Crossette & Riley, 214 Mich. 218 662
Creamer v. McIlvain, 89 Md. 343 281
Creighton Nat. Bank v. Knox County, 108 Neb. 610 799
Crilly v. Ruyle, 87 Neb. 367 335
Crowell v. Crowell, 181 N. Car. 66 183
Cubbison v. Beemer, 81 Neb. 824 49
Cunningham v. Belknap & Co., 22 Ky. Law Rep. 1580 281
Curran v. Wilcox, 10 Neb. 449 123
Curtis v. State, 97 Neb. 397 601

Daggett v. State, 114 Neb. 238 315
Dahlberg v. People, 225 Ill. 485 588
Daniel v. Daniel, 39 Pa. St. 191 675
Darr v. Dawson County, 93 Neb. 93 702
Darr v. Donovan, 73 Neb. 424 298
Darwin v. State, 107 Neb. 177 272
Davis v. Murphy, 105 Neb. 839 795
Davis v. State, 116 Neb. 90 164
Davis v. Sterns, 85 Neb. 121 113
Davison v. Land, 89 Neb. 58 389
Dawson v. State, 96 Neb. 777 ..... 189, 576
Day v. Metropolitan Utilities District, 115 Neb. 711 98
Dayton Spice Mills Co. v. Sloan, 49 Neb. 622 182
Denning v. Butcher, 91 Ia. 425 675
Dennison v. Soper, 33 Ia. 183 324
Denver & R. G. R. Co. v. Loveland, 16 Colo. App. 146 403
Diamond v. Rotan, 58 Tex. Civ. App. 263 787
Dibello v. United States, 19 Fed. (2d) 749 648
Diel's Admr. v. Merchants & Mechanics Savings Bank, 120 Va. 297 691
Diemer & Guilfoil v. Grant County, 76 Neb. 78 698
Dinslage v. Stratman, 105 Neb. 274 691
Dirks v. Ensign Omnibus & Transfer Co., 107 Neb. 556 24
Dobbins v. West End Street R. Co., 168 Mass. 556 560
Dodds v. Omaha & C. B. Street R. Co., 104 Neb. 692 844
Doherty v. O'Callaghan, 157 Mass. 90 677
‡Dolan v. State, 44 Neb. 643 600
Donahue v. State, 70 Neb. 72 379
Donohue v. Robertson Co., 205 App. Div. (N. Y.) 176 663
Doremus v. Root, 23 Wash. 710 184
Dorr v. United States, 195 U. S. 138 478
Dorsey v. State, 25 Ariz. 139 646
Drawbridge v. State, 115 Neb. 535 ..... 291, 315, 609
Drew v. Mumford, 114 Neb. 100 253
Dunafon v. Barber, 3 Neb. (Unof.) 613 23
Dunbar v. United States, 156 U. S. 185, 199 590
Dunlap v. State, 116 Neb. 313 ..... 581, 636
Dunn v. Bozarth, 59 Neb. 244 182
Dunn v. State, 58 Neb. 807 189

Easton v. Iowa, 188 U. S. 220 539
Edbrooke v. First Nat. Bank, 110 Neb. 134 98
Edwards v. Allouez Mining Co., 38 Mich. 46 655
Egbert v. State, 112 Neb. 129 194
Eggers v. National Bank of Commerce, 40 Minn. 182 816
Eller v. National Motor Vehicle Co., 181 Ia. 679 327

Elliott v. Knott, 14 Md. 121 53
Elliott v. State, 34 Neb. 48 314
Enterprise Ditch Co. v. Moffitt, 58 Neb. 642 14
Erskine v. Chevrolet Motors Co., 185 N. Car. 479 735
Estate of Fitzgerald v. First Nat. Bank, 64 Neb. 260 260
Etheredge v. Chicago, B. & Q. R. Co., 105 Neb. 778 711
Evers v. State, 84 Neb. 708 576
Ewing v. Howard, 7 Wall. (U. S.) 499 167
Exchange Bank v. Clay Center State Bank, 91 Neb. 835 116

Fager v. State, 22 Neb. 332 ..... 189, 268
Farmers State Bank v. Butler, 101 Neb. 635 784
Farmers State Bank v. Forsstrom, 89 Or. 97 387
Ferber v. Leise, 97 Neb. 795, 101 Neb. 374 123
Ferguson v. Herr, 64 Neb. 659 453
Fiedler v. Fiedler, 42 Okla. 124 183
Field v. Schieffelin, 7 Johns Ch. (N. Y.) *150 106
Fimple v. State, 104 Neb. 471 674
Finegold v. Union Outfitting Co., 110 Neb. 202 24
First Baptist Church v. Harper, 191 Mass. 196 404
First Nat. Bank v. Anderson, 269 U. S. 341 549
First Nat. Bank of Blue Hill v. Webster County, 77 Neb. 813 546
First Nat. Bank v. Burney, 91 Neb. 269 116
First Nat. Bank v. Chahalis County, 166 U. S. 440 543
First Nat. Bank of Chicago v. Selden, 120 Fed. 212 ..... 458, 462
First Nat. Bank of Hastings v. Farmers & Merchants Bank, 56 Neb. 149 462
First Nat. Bank v. Havlik, 51 Neb. 668 182
First Nat. Bank v. Miller, 37 Neb. 500 334
First Nat. Bank v. Missouri, 263 U. S. 640 ..... 533, 539
First Nat. Bank v. Sprague, 34 Neb. 318 334
First State Bank v. Williams, 164 Ky. 143 386
First Trust Co. v. Lancaster County, 93 Neb. 792 799
Fisher v. Herron, 22 Neb. 183 40
Fitzgerald v. Meyer, 37 Neb. 50 298
Flege v. State, 90 Neb. 390 194
Flege v. State, 93 Neb. 610 568
Flesner v. Steinbruck, 89 Neb. 129 304
Flint v. Stone Tracy Co., 220 U. S. 108 64
Florey's Executors v. Florey, 24 Ala. 241 772
Foley v. Holtry, 43 Neb. 133 349
Ford v. Board of Park Commissioners, 148 Ia. 1 412
Ford v. State, 106 Neb. 439 315
Foster v. Singer, 69 Wis. 392 324
Fourth Nat. Bank v. Bank Commissioner, 110 Kan. 380 228
Fourth Street Bank v. Yardley, 165 U. S. 634 462

Fox v. Terre Haute Nat. Bank, 78 Ind. App. 666 386
Franklin County v. Wilt & Polly, 87 Neb. 132 739
Freethy v. Freethy, 42 Barb. (N. Y.) 641 183
Frey v. State, 109 Neb. 483 365
Frickel v. Lancaster County, 115 Neb. 506 ..... 559, 718
Friedman Bros. v. Fennell, 94 Ala. 570 44

Gainsforth v. Peterson, 114 Neb. 442 123
Gale Sulky Harrow Co. v. Laughlin, 31 Neb. 103 22
‡Gandy v. Estate of Bissell, 81 Neb. 102 836
Ganley v. City of Pipestone, 154 Minn. 193 528
Gannon v. Phelan, 64 Neb. 220, 224 878
Gardner v. Kleinke, 46 N. J. Eq. 90 851
Garrison v. People, 6 Neb. 274 572
Gartner v. State, 36 Neb. 280 713
Gasper v. Security State Bank, 109 Neb. 495 462
Gaster v. Hinkley, 258 Pac. (Cal. App.) 988 552
Georgis v. State, 110 Neb. 352 ..... 46, 55
Gibbard v. Cursan, 225 Mich. 311 22
Gilman v. Gilman, 78 N. H. 4 183
Gilmore v. Bort, 134 Fed. 658 412
Giltner State Bank v. Talich, 115 Neb. 236 208
Ginsburg v. Byers, 171 Minn. 366 663
Glass v. Zutavern, 43 Neb. 334 40
*Globe Publishing Co. v. State Bank of Nebraska, 41 Neb. 175 223
Godfrey v. Megahan, 38 Neb. 748 182
Goemann v. State, 100 Neb. 772 589
Goff v. Goff, 60 W. Va. 9 822
Goken v. Dallugge, 72 Neb. 16 183
Goldsberry v. State, 66 Neb. 312 ..... 52, 270
Gooden v. State, 55 Ala. 178 51
Goodrich v. Equitable Life Assurance Society, 111 Neb. 616 39
Gordon v. Toler, 83 N. J. Eq. 25 694
Graham v. Chubb, 39 Mich. 417 167
Graham v. Shepherd, 136 Tenn. 418 387
Grant v. Hover, 103 Neb. 730 785
Graves v. Wheeler, 180 Ala. 412 787
Gray v. Tompkins, 15 N. Y. Supp. 953 281
Greene v. Greene, 42 Neb. 634 182
Greusel v. Payne, 107 Neb. 84 ..... 358, 472 709
Griffith v. State, 94 Neb. 55 3
Grinnell v. Wilkinson, 39 R. I. 447 662
†Gruenther v. Bank of Monroe, 90 Neb. 280 456
Guthrie v. Harkness, 199 U. S. 148 539

Hager v. Hagerstown Bank, 138 Md. 252 386

Hajsek v. Chicago, B. & Q. R. Co., 68 Neb. 539 487
Hall v. Cordell, 142 U. S. 116 662
Hall v. Farmers Bank, 74 Colo. 165 386
Hall v. State, 55 Tex. Cr. Rep. 267 52
Hammond v. State, 39 Neb. 252 272
Hampton v. O'Shea, 116 Neb. 230 222
Harrison's Appeal, 48 Conn. 202 772
Harvey v. Harvey, 239 Mich. 142 183
Hawes v. State of Georgia, 258 U. S. 1 646
Hayden v. Lauffenburger, 157 Mo. 88 248
Heidelbaugh v. State, 79 Neb. 499 646
Henton v. Sovereign Camp, W. O. W., 87 Neb. 552 389
Herman v. Beck, 68 Neb. 566 879
Herrick v. Barnes, 87 Minn. 475 816
Heyman v. Heyman, 19 Ga. App. 634 183
Hiatt v. Kinkaid, 40 Neb. 178 211
Hill v. Gray, 160 Ala. 273 787
Hill v. Hill, 90 Neb. 43 786
Hofeldt v. Elkhorn Valley Drainage District, 115 Neb. 539 304
Holland v. Chicago, B. & Q. R. Co., 52 Neb. 100 123
Holmberg v. Holmberg, 106 Neb. 717 357
Holmes v. Campbell College, 87 Kan. 597 772
Holmes v. State, 82 Neb. 406 587
Hooper Telephone Co. v. Nebraska Telephone Co., 96 Neb. 245 634
Hoopes v. Creighton, 100 Neb. 510 425
Hopper v. Elkhorn Valley Drainage District, 108 Neb. 550 303
Hopperton v. State, 110 Neb. 660 602
Hopt v. Utah, 120 U. S. 430 514
Horbach v. Tyrrell, 48 Neb. 514 86
Horton v. State, 63 Neb. 34 407
Howell v. Boman, 89 Neb. 389 389
Howells State Bank v. Hekrdle, 113 Neb. 561 529
†Huber Mfg. Co. v. Silvers, 85 Neb. 760 381
Huette v. State, 87 Neb. 798 638

Iams v. Farmers State Bank, 101 Neb. 778 227
Idlewild Farm Co. v. Elkhorn River Drainage District, 114 Neb. 134 302
In re Butler, 101 N. Y. 309 408
In re Estate of Austin, 116 Neb. 137 ..... 377, 629
In re Estate of Belgard, 202 Ia. 1356 691
In re Estate of Enyart, 100 Neb. 337 357
In re Estate of Griswold, 113 Neb. 256 792
In re Estate of Kamrath, 114 Neb. 230 688
In re Estate of McCormick, 100 Neb. 669 182
In re Estate of Sweeney, 94 Neb. 834 672

In re Jones' Estate, 120 N. Y. Supp. 862 198
In re Lower's Estate, 48 S. Dak. 173 688
In re McCarthy's Will, 20 N. Y. Supp. 581 681
In re Nielsen, 131 U. S. 176 372
In re Opinion of Justices, 123 Me. 573 66
In re Rehfeld's Estate, 198 Mich. 249 694
In re Sadler's Estate, 201 Mich. 281 694
In re Sharer's Estate, 73 N. Y. Supp. 1057 198
In re Skinner & Eddy Corporation, 265 U. S. 86 379
In re Smith v. Heine Safety Boiler Co., 224 N. Y. 9 663
In re Vogland, 48 Neb. 37 49
In re Walsh, 37 Neb. 454 46
In re Waverly Water-Works Co., 85 N. Y. 478 410
In re Will of Coleman, 111 N. Y. 220 675
In re Young's Estate, 33 Utah, 382 677
Ionia County Savings Bank v. McLean, 84 Mich. 625 44
Isaacs v. Isaacs, 115 Va. 562 822

Jamesson v. Citizens Nat. Bank, 130 Md. 75 386
Jandt v. Sioux County, 73 Neb. 381 699
Janike v. Butler County, 103 Neb. 865 702
Jansen v. Lewis, 52 Neb. 556 40
Jayne v. Hymer, 66 Neb. 785 848
Jaynes v. People, 44 Colo. 535 644
Jewel v. Parr, 13 C. B. (Eng.) 909 783
Johnson v. Harmon, 94 U. S. 371 343
Johnson v. Johnson, 201 Ala. 41 183
Johnson v. Milwaukee & Wyoming Investment Co., 46 Neb. 480 784
Johnson v. Nelson, 128 Minn. 158 663
Johnson Loan & Trust Co. v. Burr, 7 Kan. App. 703 403
Jones v. Pulitzer Pub. Co., 240 Mo. 200 481
Jones v. State, 13 Ala. App. 10 163

Kaufman v. Edwards, 92 N. J. Eq. 554 692
Kaufmann v. State, 112 Neb. 718 60
Kazebeer v. Nunemaker, 82 Neb. 732 105
Keister v. Keister, 123 Va. 157 183
Kelly v. Rhoades, 9 Wyo. 352 700
Kelly v. Snow, 185 Mass. 288 692
Kemper v. Calhoun, 111 Va. 428 412
Kenney v. Village of Dorchester, 101 Neb. 425 264
Kennison v. State, 80 Neb. 688 194
Kennison v. State, 83 Neb. 391 704
Kepler v. Chicago, St. P. M. & O. R. Co., 111 Neb. 273 844
Kerner v. McDonald, 60 Neb. 663 182
Kessner v. Phillips, 189 Mo. 515 787

Kettenhofen v. Globe Transfer & Storage Co., 70 Wash. 645 764
Kimball v. Post Publishing Co., 199 Mass. 248 479
Kinnan v. State, 86 Neb. 234 645
Kirchman v. Kratky, 51 Neb. 191 40
Kloke v. Gardels, 52 Neb. 117 307
Knepper v. Knepper, Exr., 103 Ohio St. 529 675
Knothe v. State, 115 Neb. 119 ..... 290, 315, 609
Knowlson v. Piehl, 130 Mich. 597 735
Koehler v. Reed, 1 Neb. (Unof.) 836 405
Koehn v. City of Hastings, 114 Neb. 106 487
Kraus v. State, 102 Neb. 690 163
Krause v. Long, 109 Neb. 846 123
Kuhle v. Farmers State Bank of Cotesfield, 115 Neb. 648 229
Kulhanek v. Kulhanek, 106 Neb. 595 123

LaBorde v. Farmers State Bank, 116 Neb. 33 287
Lackey v. Yekel, 113 Neb. 382 233
Laclede Bank v. Schuler, 120 U. S. 511 462
Laing v. Rigney, 160 U. S. 531 390
Lamb v. Finch, 87 Neb. 565 323
Lampton v. Davis Standard Bread Co., 48 Cal. App. 116 22
Lane v. Morton, 81 N. Car. 38 409
Langdon v. People, 133 Ill. 382 53
Larsen v. State, 190 Wis. 606 646
Larson v. Calder, 16 N. Dak. 248 390
Larson v. Hafer, 105 Neb. 257 131
Lasater & Noble v. Green, 10 Okla. 335 701
Leader Specialty Co. v. Chapman, 85 Ind. App. 296 662
Leahy v. State, 31 Neb. 566 568
Leedom v. State, 81 Neb. 585 ..... 188, 566
Lewis v. State, 115 Neb. 659 272
Lillienkamp v. Rippetoe, 133 Tenn. 57 183
Lilly v. Tobbein, 103 Mo. 477 773
Lincoln Traction Co. v. Shepherd, 74 Neb. 369 390
Linscott v. Lamart, 46 Ia. 312 248
Little v. State, 60 Neb. 749 678
Livingstain v. Columbian Banking & Trust Co., 77 S. Car. 305 462
Loder v. Whelpley, 111 N. Y. 239 674
London Assurance v. Companhia De Moagens, 167 U. S. 149 662
Long v. State, 17 Okla. Cr. Rep. 672 221
Longendyke v. Longendyke, 44 Barb. (N. Y.) 366 183
Longman v. Pope, 111 Neb. 838 98
Loosing v. Loosing, 85 Neb. 66 432
Lovett v. Scott, 232 Mass. 541 844
Lowe v. State, 110 Neb. 325 164
Lower v. State, 109 Neb. 590 223

Lucas v. State, 78 Neb. 454 194
Ludwig v. Bruner, 203 Mich. 556 694
Lumberman's Nat. Bank v. Campbell, 61 Or. 123 387
Lundin v. Post Publishing Co., 217 Mass. 213 480
Luse v. Rankin, 57 Neb. 632 263

McAlester v. State, 16 Okla. Cr. Rep. 70 221
McAnany v. Shipley, 189 Mo. App. 396 391
McBee v. Fulton, 47 Md. 403 481
McCann v. McLennan, 2 Neb. 286 325
McCarthy v. Village of Ravenna, 99 Neb. 674 ..... 298, 425
McCarty v. Hopkins, 61 Neb. 550 704
McClellan v. Chipman, 164 U. S. 347 539
McCord-Collins Co. v. Pritchard, 37 Tex. Civ. App. 418 404
McCready v. Rio Grande W. R. Co., 30 Utah, 1 408
McDonald v. Bowman, 40 Neb. 269 211
McElroy v. Albany Savings Bank, 40 N. Y. Supp. 422 691
McGahie v. McClennen, 86 App. Div. (N. Y.) 263 281
McGuire v. Phelan-Shirley Co., 111 Neb. 609 661
McIntosh v. Johnson, 51 Neb. 33 813
McLaughlin v. Armfield, 12 N. Y. Supp. 164 425
McLaughlin v. Nelson, 113 Neb. 308 246
McLeod v. Hennepin County Savings Bank, 145 Minn. 299 688
McMaster v. Scriven, 85 Wis. 162 675
Mahoney v. Natick & C. Street R. Co., 173 Mass. 587 559
Main v. Main, 46 Ill. App. 106 183
Maine v. Maine & Sons Co. 198 Ia. 1278 183
Male v. Wink, 61 Neb. 748 718
Manfull v. Graham, 55 Neb. 645 105
Mansfield v. Hill, 56 Or. 400 822
Mares v. State, 112 Neb. 619 3
Marino v. State, 111 Neb. 623 704
Marquis v. Polk County Telephone Co., 100 Neb. 140 634
Marron v. United States, 48 Sup. Ct. Rep. 74 580
Martin v. Long, 53 Neb. 694 455
Mathews v. Jones, 47 Neb. 616 246
Mathews v. Mulford, 53 Neb. 252 123
Mathews v. State, 19 Neb. 330 572
Mathews v. State, 111 Neb. 593 73
Mathewson v. Mathewson, 79 Conn. 23 183
Matter of Low, 103 App. Div. (N. Y.) 530 412
Matter of Lydig, 113 Misc. Rep. (N. Y.) 263 693
Mattern v. McCarthy, 73 Neb. 228 211
Matters v. United States, 244 Fed. 736 567
Matteson v. Creighton University, 105 Neb. 219 123
Meeker v. Larsen, 65 Neb. 158 710

Merchants & Manufacturers Bank of Detroit v. Hibbard, 48 Mich. 118 815
§ Merriam v. Miles, 54 Neb. 566 381
Merrick v. Kennedy, 46 Neb. 264 325
Michaelson v. Beemer, 72 Neb. 761 704
Miller v. Drainage District, 112 Neb. 206 734
Miller v. Finn, 1 Neb. 254 246
Miller v. Hurford, 11 Neb. 377 140
Miller v. State, 112 Neb. 243 ..... 188, 272
Millet v. Blake, 81 Me. 531 53
Milton v. State, 6 Neb. 136 161
Mirage Irrigation Co. v. Sturgeon, 77 Neb. 175 16
Moline v. Carlson, 92 Neb. 419 794
Monson v. Drakely, 40 Conn. 552 179
Moore v. Scott, 47 Neb. 346 352
Moore v. Waddington, 69 Neb. 615 407
Moores v. State, 71 Neb. 522 379
Moran v. Moran, 101 Neb. 386 431
Moran v. Omaha & C. B. Street R. Co., 108 Neb. 788 487
Morgan v. State, 51 Neb. 672 ..... 96, 127
Morris v. Stokes, 21 Ga. 552 773
Morris Canal & Banking Co. v. State, 24 N. J. Law, 62 739
Morrison v. Scotts Bluff County, 104 Neb. 254 ..... 417, 556
Morse v. Stanley County, 26 S. Dak. 313 700
Mousseau's Will, 30 Minn. 202 673
Mowery v. Mast & Co., 9 Neb. 445 178
Moyer v. Koontz, 103 Wis. 22 321
Mueller Furnace Co. v. Burkhart, 149 Minn. 68 528
Muller v. Witte, 78 Conn. 495 183
Murphy v. Moyle, 17 Utah, 113 822
Murphy v. Panter, 62 Or. 522 387
Musser v. Musser, 92 Neb. 387 116
Myer v. Fegaly, 39 Pa. St. 429 53
Myers v. Myers, 109 Neb. 230 431
Myers v. State, 51 Neb. 517 568
Myers v. State, 52 Tex. Cr. Rep. 558 647
Myers v. State, 116 Neb. 287 315

Nale v. Herstein, 94 Okla. 263 552
National Bank v. Ferguson, 48 Kan. 732 539
National Bank of Commerce v. Seattle, 166 U. S. 463 543
National Exchange Bank of Hartford v. Wilder, 34 Minn. 149 815
National Life Ins. Co. v. Fitzgerald, 61 Neb. 692 89
Navassa Guano Co. v. Cockfield, 165 C. C. A. 363 44
Nebraska Railway Co. v. Van Dusen, 6 Neb. 160 678
Nelson v. State, 115 Neb. 26 638

Nelson v. Vanden, 99 Tenn. 224 851
Nemaha County Bank v. County Board, 103 Neb. 53 799
New Jersey Title Guarantee & Trust Co. v. Archibald, 91 N. J. Eq. 82 692
New Milford Water Co. v. Watson, 75 Conn. 237 412
New York County Nat. Bank v. Massey, 192 U. S. 138 462
Neyland v. Lanier, 273 S. W. (Tex. Civ. App.) 1022 387
Nichols v. State, 109 Neb. 335 93
Nickerson v. Nickerson, 65 Tex. 281 183
Nickolizack v. State, 75 Neb. 27 568
Nielson v. Central Nebraska Land & Investment Co., 87 Neb. 518 706
Niotaze State Bank v. Cooper, 99 Kan. 731 386
Noble State Bank v. Haskell, 219 U. S. 104 173
Noe v. Moutray, 170 Ill. 169 822
Nolan v. New York, N. H. & H. R. Co., 53 Conn. 461 559
Norton v. Bankers Fire Ins. Co., 115 Neb. 490 501
Norton v. Soule, 75 Me. 385 324
Nye-Schneider-Fowler Co. v. Boone County, 99 Neb. 383 702

Oakes v. Omaha & C. B. Street R. Co., 104 Neb. 788 489
O'Brien v. Miller, 60 Conn. 214 281
O'Brien v. Spalding, 102 Ga. 490 677
Ocobock v. Baker, 52 Neb. 447 717
O'Connell v. Sioux County, 94 Neb. 826 362
O'Donnell v. Baker Ice Machine Co., 114 Neb. 9 424
O'Donnell v. Baker Ice Machine Co., 203 N. W. (Neb.) 635 423
Ogden v. Greenleaf, 143 Mass. 349 773
Oken v. Oken, 44 R. I. 291 183
Oklahoma State Bank v. Seaton, 69 Okla. 99 386
Old Colony Trust Co. v. Bailey, 202 Mass. 283 773
Oleson v. State, 11 Neb. 276 190
Olney v. Omaha & C. B. Street R. Co., 78 Neb. 767 281
Omaha Street R. Co. v. Larson, 70 Neb. 591 489
Onn Lumber & Shingle Co. v. Powell Lumber Co., 94 Neb. 267 296
Osborne v. State, 115 Neb. 65 ..... 18, 54

Palmer v. Bradley, 142 Fed. 193 773
Palmer v. People, 4 Neb. 68 127
Park v. Detroit Free Press Co., 72 Mich. 560 478
Parks v. Hays, 11 Colo. App. 415 403
Parratt v. Hartsuff, 75 Neb. 706 307
Parrish v. State, 18 Neb. 405 162
Peete v. State, 2 Lea (Tenn.) 513 51
Penn Phonograph Co. v. Columbia Phonograph Co., 132 Fed. 808 412
Pennington County Bank v. Bauman, 81 Neb. 782 638
Pennoyer v. Neff, 95 U. S. 714 322

People v. Alden, 113 Cal. 264 51
People v. Barnes, 182 Mich. 179 279
People v. Burbank, 234 Mich. 600 646
People v. Collins, 166 Mich. 4 514
People v. Danks, 289 Ill. 542 199
People v. Furlong, 187 N. Y. 198 497
People v. Loper, 159 Cal. 6 514
People v. Shaffer, 291 Ill. 142 198
People v. Shutts, 305 Ill. 539 198
People v. Spoor, 235 Ill. 230 53
People v. Turner, 260 Ill. 84 272
People v. Weston, 3 Neb. 312 678
Perlman v. Brooklyn City R. Co., 191 N. Y. Supp. 891 183
Perry v. Leveroni, 252 Mass. 390 692
Peters v. Peters, 42 Ia. 182 183
Peters v. Peters, 156 Cal. 32 183
Phillips v. Chase, 201 Mass. 444 677
Phillips v. Jones, 12 Neb. 213 352
Pierce v. Bekins Van & Storage Co., 185 Ia. 1346 662
Pierce v. Lincoln Traction Co., 92 Neb. 797 489
Pill v. State, 43 Neb. 23 543
Pitsnogle v. Commonwealth, 91 Va. 808 53
Pittsburgh's Petition, 243 Pa. St. 392 412
Plummer v. Rummell, 26 Neb. 142 40
Policky v. State, 113 Neb. 858 366
Pollock v. Boyd, 36 Neb. 369 405
Pollock v. Pearson, 101 Neb. 284 783
Post v. Mason, 91 N. Y. 539 773
Pricer v. Lincoln Gas & Electric Light Co., 111 Neb. 209 626
Prosser v. Prosser, 114 S. Car. 45 183
Provost v. McEncroe, 102 N. Y. 650 390
Pullman's Palace Car Co. v. Central Transportation Co., 171 U. S. 138 413

Quesner v. Novotny, 113 Neb. 827 85

Randolph v. Lampkin, 90 Ky. 551 772
Read v. Huff, 40 N. J. Eq. 229 693
Redell v. Moores, 63 Neb. 219 678
Reed v. Good, 114 Neb. 777 711
Reed v. State, 66 Neb. 184 4
Reeves v. Territory, 2 Okla. Cr. Rep. 351 575
Reuter v. Reuter, 116 Neb. 428 436
Reynolds v. Dietz, 39 Neb. 180 307
Reynolds v. United States, 98 U. S. 145 514
Rhea v. State, 63 Neb. 461 ..... 97, 164

Richards v. Market Exchange Bank Co., 81 Ohio St. 348 386
Richardson County v. Drainage District, 92 Neb. 776 739
Richardson County v. Miles, 14 Neb. 311 325
Ridings v. State, 108 Neb. 804 365
Riley v. Missouri P. R. Co., 69 Neb. 82 390
Ritchey v. Seeley, 73 Neb. 164 123
Rivett Lumber & Coal Co. v. Linder, 113 Neb. 567 463
Robinson v. City of Omaha, 84 Neb. 642 98
Rocha v. Payne, 108 Neb. 246 298
Rockwell v. Blair Savings Bank, 31 Neb. 128 307
Rogers v. National Surety Co., 116 Neb. 170 ..... 179, 229
Rollins v. State, 22 Tex. App. 548 52
Ross v. Lipscomb, 83 S. Car. 136 34
Rowan v. State, 57 Tex. Cr. Rep. 344 53
Rowe v. Such, 134 Cal. 573 281
Rubio v. State, 50 Tex. Cr. Rep. 177 52
Rupert v. Penner, 35 Neb. 587 431
Russell v. Russell, 60 N. J. Eq. 282 357
Russell v. State, 66 Neb. 497 162
Rutherford v. Commonwealth, 13 Bush (Ky.) 608 163
Ryder v. Wombwell, L. R. 4 Exch. 32 782

St. Louis R. Co. v. Southern R. Co., 138 Mo. 591 411
Samuels v. State, 101 Neb. 383 365
Sanford v. First Nat. Bank, 94 Ia. 680 38
Santolini v. State, 6 Wyo. 110 53
Saxton v. Harrington, 68 Neb. 446 123
Schaffer v. State, 22 Neb. 557 92
Schlaifer v. Omaha & C. B. Street R. Co., 98 Neb. 207 551
Schley v. Horan, 82 Neb. 704 344
Schneier v. Cahill, 127 S. W. (Ky.) 143 558
Schrandt v. Young, 62 Neb. 254 98
Schroeder v. Hotel Commercial Co., 84 Wash. 685 404
Schultz v. Christopher, 65 Wash. 496 183
Schultz v. Wise, 93 Neb. 718 178
Sciolaro v. Asch, 198 N. Y. 77 427
Scovel v. Isham, 113 Neb. 238 349
Security Savings Bank v. Rhodes, 107 Neb. 223 116
Segear v. Westcott, 83 Neb. 515 389
Seven Valleys Bank v. Smith, 43 Neb. 237 713
Shafer v. Beatrice State Bank, 99 Neb. 317 353
Shallenberger v. First State Bank, 219 U. S. 114 173
Shalley v. Danbury & B. H. R. Co., 64 Conn. 381 560
Sharmer v. McIntosh, 43 Neb. 509 679
Sheedy v. McMurtry, 44 Neb. 499 409
Sheldon v. Bills, 102 Neb. 93 804

Sheridan County v. Hand, 114 Neb. 813 377
Shoemaker v. Commercial Union Assurance Co., 66 Neb. 252 22
Shold v. Van Treeck, 82 Neb. 99 804
Shonsey v. Clayton, 107 Neb. 695 789
Shults v. Chicago, B. & Q. R. Co., 83 Neb. 272, 91 Neb. 587 746
Simmons v. State, 111 Neb. 644 ..... 97, 164, 268, 587
Simpson Coal & Transfer Co. v. Hood, 215 Ala. 175 327
Sinclair v. City of Lincoln, 101 Neb. 163 140
Siren v. State, 78 Neb. 778 678
Smietanka v. First Trust & Savings Bank, 257 U. S. 602 64
Smith v. Allen, 72 Neb. 170 307
Smith v. Dean, 15 Neb. 432 183
Smith v. Minneapolis Threshing Machine Co., 89 Okla. 156 386
Smith v. Swan, 69 Ia. 412 248
Smith v. White, 62 Neb. 56 850
Snodgrass v. Smith, 42 Colo. 60 772
Snyder v. Collier, 85 Neb. 552 407
Sofield v. State, 61 Neb. 600 363
†Soppe v. Mechaley, 103 Neb. 264 456
Sorsby v. Benninghoven, 82 Or. 345 844
Southern Cotton Oil Co. v. Shore, 171 N. Car. 51 412
Spears v. Chicago, B. & Q. R. Co., 43 Neb. 720 390
Spence v. Polenski Bros., Shellak & Co., 110 Neb. 56 746
Spies v. Illinois, 123 U. S. 131 514
Spuck v. Logan & Uhl, 97 Md. 152 851
Stanford v. McGill, 6 N. Dak. 536 390
Stanglein v. State, 17 Ohio St. 453 363
Stanley and Nix v. Commonwealth, 184 Ky. 237 163
Stantons v. Thompson, 49 N. H. 272 248
Starr v. Bankers Union of the World, 81 Neb. 377 506
State v. Alberts, 199 Ia. 815 272
State v. Allen, 93 Neb. 826 883
State v. American Exchange Bank, 112 Neb. 834 449
State v. American Exchange Bank, 114 Neb. 626 449
State v. American State Bank, 108 Neb. 98 484
State v. American State Bank, 114 Neb. 740 549
State v. Atlas Bank, 114 Neb. 646 ..... 524, 532
State v. Atlas Bank, 114 Neb. 650 ..... 483, 511
State v. Babcock, 21 Neb. 599 653
State v. Banking House of A. Castetter, 110 Neb. 564 228
State v. Barton, 91 Neb. 357 140
State v. Board of County Commissioners, 116 Neb. 261 379
State v. Bowen, 54 Neb. 211 140
State v. Brown County Bank, 112 Neb. 642 484
State v. Burch, 195 Ia. 427 646
State v. Chance, 82 Kan. 388 45

State v. Cherry County, 58 Neb. 734 653
State v. Chicago, R. I. & P. R. Co., 93 Neb. 263 71
State v. Church, 199 Mo. 605 497
State v. Citizens State Bank, 114 Neb. 867 450
State v. City of Kearney, 49 Neb. 325 325
State v. Clinton State Bank, 116 Neb. 482 ..... 484, 511
State v. Corbit, 42 Tex. 88 50
State v. Cornell, 53 Neb. 556 325
State v. Cornell, 54 Neb. 72 ..... 140, 325
State v. Cosgrave, 85 Neb. 187 757
State v. Covington, 94 N. Car. 913 51
State v. Cowles, 90 Neb. 839 ..... 263, 379
State v. Crinklaw, 40 Neb. 759 704
State v. Crockett, 39 Or. 76 164
State v. Davis, 66 Neb. 333 362
State v. Dineen, 115 Neb. 174 315
State v. Farmers Bank, 110 Neb. 676 ..... 484, 511
State v. Farmers & Merchants Bank, 114 Neb. 378 ..... 225, 456
State v. Farmers State Bank, 103 Neb. 194 175
State v. Farmers State Bank, 111 Neb. 117 ..... 228, 483
State v. Farmers State Bank, 112 Neb. 380 228
State v. Farmers State Bank, 112 Neb. 788 450
State v. Farmers State Bank, 113 Neb. 497 ..... 175, 613
State v. Farmers State Bank, 113 Neb. 679 ..... 175, 613, 825
†State v. Farmers State Bank, 114 Neb. 826 223
State v. Farmers State Bank, 115 Neb. 574 ..... 524, 532
State v. First Nat. Bank, 2 S. Dak. 568 539
State v. Gardiner, Wright's Rep. (Ohio) 399 161
State v. Gaslin, 32 Neb. 291 123
State v. Gates, 52 N. Dak. 659 646
State v. Gryder, 44 La. Ann. 962 51
State v. Hevelone, 92 Neb. 748 140
State v. Holcomb, 46 Neb. 612 732
State v. Insurance Co. of North America, 71 Neb. 320 174
State v. Johnson, 116 Neb. 249 377
State v. Kilgore State Bank, 112 Neb. 856 175
State v. Kyle, 166 Mo. 287 50
State v. Lauth, 46 Or. 342 514
State v. Lipman, 163 Minn. 431 647
State v. McIlravy, 105 Neb. 651 379
State v. Moore, 45 Neb. 12 678
State v. Mueller, 38 Minn. 497 272
State v. Nolan, 71 Neb. 136 325
State v. Patterson, 24 N. Car. 346 53
State v. Pearce, 87 Kan. 457 514
State v. Peoples State Bank, 111 Neb. 126 228

State v. Petty, 32 Nev. 384 497
State v. Robb Lawrence Co., 17 N. Dak. 257 815
State v. Robertson, 55 Neb. 41 310
State v. Routzahn, 81 Neb. 133 645
State v. School District, 42 Neb. 499 203
State v. School District, 99 Neb. 338 678
State v. School District No. 24, 13 Neb. 78 204
State v. Seavey, 22 Neb. 454 325
State v. Security State Bank, 116 Neb. 521 ..... 529, 532
State v. Several Parcels of Land, 79 Neb. 638 325
State v. Smith, 114 Neb. 653 315
State v. Spangler, 92 Wash. 636 497
State v. State Bank, 114 Neb. 213 172
State v. State Bank of Gering, 114 Neb. 213 172
State v. Thompson, Wright's Rep. (Ohio) 623 161
State v. Tibbets, 52 Neb. 228 140
State v. Wayne County Bank, 112 Neb. 792 450
State v. White, 34 S. Car. 59 53
State v. Work, 47 S. Dak. 649 647
State Bank v. Carroll, 81 Neb. 484 337
State Bank v. Seward County, 95 Neb. 665 799
Steadman v. Steadman, 10 Sadler (Pa.) 539 773
Steenbock v. Omaha Country Club, 110 Neb. 794 424
Steiner v. Steiner, 97 Neb. 449 304
Stenger Benevolent Ass'n v. Stenger, 54 Neb. 427 182
Stetson v. Riggs, 37 Neb. 797 349
Stevens v. Luther, 105 Neb. 184 ..... 425, 491
Stevens v. Railroads, 4 Fed. 97 409
Stimpson v. Pease, 53 Ia. 572 248
Stocker v. Stocker, 112 Neb. 565 215
Stoppert v. Nierle, 45 Neb. 105 678
Stough v. Stefani, 19 Neb. 468 298
Strahl v. Miller, 97 Neb. 820 425
Strom v. Strom, 98 Minn. 427 183
Strong v. State, 63 Neb. 440 ..... 587, 601
Stuart v. Durland, 115 Neb. 211 ..... 85, 485, 727
Studebaker Bros. Mfg. Co. v. Welch, 51 Neb. 228 182
Sturmdorf v. Saunders, 102 N. Y. Supp. 1042 390
Sullivan v. Saunders, 66 W. Va. 350 248
Sund v. Smisek & Hrdlicka, 105 Neb. 602 844
Superior Nat. Bank v. National Bank of Commerce, 99 Neb. 833 462
Swetland v. Miles, 101 Ohio St. 501 681
Swift & Co. v. Holoubek, 60 Neb. 784 390
Swogger v. State, 115 Neb. 621 564
Swogger v. State, 116 Neb. 563 632
Sykes v. Speer, 112 S. W. (Tex. Civ. App.) 422 183

Tasich v. State, 110 Neb. 709 600
*Teske v. Dittberner, 63 Neb. 607, 70 Neb. 544 789
Teske v. Dittberner, 65 Neb. 607 793
Thompson v. State, 106 Neb. 395 96
Thompson v. Thompson, 218 U. S. 611 183
Thrapp v. Meyers, 114 Neb. 689 842
Town of Arlington v. Central R. Co., 127 Ga. 721 764
Trainor v. Maverick Loan & Trust Co., 92 Neb. 821 233
Trayer v. Setzer, 72 Neb. 845 182
Treat v. White, 181 U. S. 264 65
Trevett, Mattis & Baker Co. v. Reagor, 112 Neb. 470 86
Trimble v. State, 61 Neb. 604 ..... 48, 638
Trumble v. Trumble, 37 Neb. 340 140
Trumbull v. Trumbull, 71 Neb. 186 215
Tucker v. Draper, 62 Neb. 66 746
Tvedt v. Wheeler, 70 Minn. 161 425

Union Central Life Ins. Co. v. Saathoff, 115 Neb. 385 ..... 233, 305
Union P. R. Co. v. Gregory Coal Co., 103 Neb. 421 ..... 776, 784
Union Stock Yards Co. v. Nebraska State Railway Commission, 103 Neb. 224 870
Union Trust Co. v. McGinty, 212 Mass. 205 384
United States v. Bishop, 125 Fed. 181 390
United States v. Dickson, 127 Fed. 774 412
United States v. O'Brian, 27 Fed. Cas. 212 311
United States v. Smith, 173 Fed. 227 477
United States Trust Co. v. Miller, 116 Neb. 25 717

Vail v. Van Doren, 45 Neb. 450 169
Vanderford v. Farmers & Mechanics Nat. Bank, 105 Md. 164 386
Vanderveer v. Moran, 79 Neb. 431 425
Van Gundy v. Carrigan, 4 Ind. App. 333 404
Van Wanning v. Deeter, 78 Neb. 282, 284 739
Vernon Center State Bank v. Mangelsen, 166 Minn. 472 386
Vollmer v. State, 24 Neb. 838 194

Wait v. Pierce, 191 Wis. 202 183
Waite v. Dowley, 94 U. S. 527 539
Walker v. Irby, 238 S. W. (Tex.) 884 774
Walker v. Shepherd, 210 Ill. 100 787
Wallace v. State, 91 Neb. 158 274
Wamsley v. Cook and Hall, 3 Neb. 344 679
Ward v. Ely-Walker Dry Goods Building Co., 248 Mo. 348 426
Warm Springs Irrigation District v. Pacific Live Stock Co., 89 Or. 19 408
Warner's Estate, 207 Pa. St. 580 357

Warnick v. Warnick, 107 Neb. 747 795
Weaverling v. McLennan, 116 Neb. 466 706
Weber v. Kirkendall, 44 Neb. 766 637
Weeks v. United States, 232 U. S. 383, 392 580
Welker v. Anheuser-Busch Brewing Ass'n, 103 Minn. 189 425
Wells v. Cochran, 84 Neb. 278 551
Welter v. State, 112 Neb. 22 55
Wenzlaff v. Tripp State Bank, 50 S. Dak. 6 474
West v. West, 84 Neb. 169 344
Western Travelers Accident Ass'n v. Munson, 73 Neb. 858 675
‡Western Wheeled Scraper Co. v. Sadilek, 50 Neb. 105 331
Westover v. Aetna Life Ins. Co., 99 N. Y. 56 680
Wharton v. Jackson, 107 Neb. 288 821
Whedon v. Wells, 95 Neb. 517 378
Whetstone v. State, 99 Neb. 469 ..... 189, 576
Whitcomb v. Hooper, 81 Fed. 946 405
White & Sons v. Woodruff, 25 Neb. 797 40
Whitehead v. State, 115 Neb. 143 ..... 13, 191
Whitney v. State, 53 Neb. 287 590
Willard v. Key, 83 Neb. 850 352
Williams v. State, 103 Neb. 710 195
Wilson v. Thayer County Agricultural Society, 115 Neb. 579 427
Wilson v. Wilson, 89 Neb. 749 674
Winters v. Winters, 102 Ia. 53 676
Wolford v. City of Grinnell, 179 Ia. 689 561
Wolstenholme v. Smith, 34 Utah 300 387
Woltman v. Woltman, 153 Minn. 217 183
Woodruff v. State, 72 Neb. 815 576
Worthington v. Jones, 23 Vt. 546 327
Wyatt-Bullard Lumber Co. v. Bourke, 55 Neb. 9 ..... 242, 716

Yates v. Jones Nat. Bank, 74 Neb. 734 233
Yates v. Yates, 104 Neb. 678 ..... 431, 788
Young v. Georgia Home Ins. Co., 131 Ga. 54 412
Young v. Kinney, 79 Neb. 421 22
Young Men's Christian Association v. Rawlings, 60 Neb. 377 315

Zimmerman v. Carr, 59 Ind. App. 245 514
Zimmerman v. Kearney County Bank, 59 Neb. 23 782
Zinns Mfg. Co. v. Mendelson, 89 Wis. 133 528

STATUTES AND CONSTITUTIONAL PROVISIONS CITED AND CONSTRUED

NEBRASKA

CONSTITUTION

Art. I, sec. 3 376
Art. I, sec. 11 ..... 579, 703
Art. I, sec. 12 496
Art II, sec. 1 360
Art. III, sec. 7 748
Art. III, secs. 7, 9, 16 750
Art. III, sec. 14 ..... 251, 373, 628
Art. III, sec. 19 751
Art. IV, sec. 20 634
Art. VIII, sec. 1 ..... 64, 285
Art. VIII, secs. 1, 2, 4 546
Art. XII, secs. 4, 7 610

SESSION LAWS

1883

Chs. 40, 41 823

1887

Ch. 73 737

1895

Ch. 70, sec. 29 373

1901

Ch. 64 251

1903

Ch. 23, secs. 344, 345 138
Ch. 73, sec. 12 252

1905

Ch. 62 138
Ch. 83, secs. 193, 198 387

1911

Ch. 162 373

1913

Chs. 89, 172 737

1915

Ch. 25 138
Ch. 108 799

Ch. 149 627
Ch. 243 813
Ch. 243, secs. 1, 2, 7, 8 757

1917

Ch. 155 813
Ch. 155, sec. 1 757

1921

Ch. 4, secs. 1, 2, 7-10 758
Ch. 116, art. III, sec. 57 864
Ch. 133 251
Ch. 133, art. II, sec. 1 252
Ch. 205 137

1923

Ch. 89 192
Ch. 94, sec. 1 647
Ch. 104 137
Ch. 112 258
Ch. 191, sec. 39 224

1925

Ch. 29 338
Ch. 30, sec. 12 543
Ch. 30, sec. 16 858
Ch. 30, sec. 18 225
Ch. 57 635
Ch. 80 758
Ch. 80, sec. 2 759
Ch. 80, sec. 5, subd. (10) 762
Ch. 80, secs. 5, 14 760
Ch. 91 359
Ch. 96 533
Ch. 105 73
Ch. 106 ..... 219, 287, 313
Ch. 165 543
Ch. 172 61
Ch. 172, sec. 1 63

1927

Ch. 169, sec. 1 798

ANNOTATED STATUTES

1909

Secs. 6775-6924 375
Sec. 6877 373

COMPILED STATUTES

1903

Secs. 3155, 3156 138

1911

Sec. 5363 737

1922

Sec. 58 651
Sec. 866 282
Secs. 1220-1488, 1258, 8533 672
Secs. 1241, 1509, 1510, 8529, 8530 181
Secs. 1329, 7881 34
Sec. 1336 258
Secs. 1338, 1339, 1340 259
Sec. 1340 255
Sec. 1436 139
Sec. 1471 873
Secs. 1471-1480 876
Sec. 1509 205
Secs. 1511, 1512, 8837 182
Secs. 1534, 1538 823
Sec. 1555 ..... 355, 356
Sec. 1572 450
Secs. 1588, 8531 673
Sec. 1741 304
Secs. 1744-1812 806
Sec. 1762 807
Sec. 2372 361
Sec. 2607 739
Secs. 2734, 8469 737
Secs. 2746, 8388 554
Secs. 2770, 2777, 8364-8405, 8391, 8392, 9546 129
Sec. 2778 562
Secs. 2857-2943 375
Sec. 2887 373
Sec. 3031 396
Secs. 3039, 3041 422
Sec. 3041 418
Secs. 3085, 9551 571
Sec. 3097 225
Secs. 3238, 3239 287
Secs. 3238, 3239, 3288 313
Secs. 3238, 3288, 9989, 10113 635
Sec. 3247 647
Sec. 3252 712
Sec. 3288 ..... 220, 291, 609
Sec. 3377 406
Secs. 3388, 3397, 3399 407
Sec. 3610 862
Secs. 4182, 4203, 4278, 4304, 4306 264

Secs. 4612-4809 380
Secs. 4729, 4730 385
Secs. 4761, 4801 384
Sec. 4799 462
Sec. 5197 262
Sec. 5198 263
Secs. 5466, 5483, 5487, 5498, 9795 634
Sec. 5524 516
Sec. 5591 ..... 432, 787
Sec. 5594 428
Sec. 5820 ..... 252, 801
Secs. 5884, 5896 284
Sec. 5887 542
Secs. 5910-5912 254
Sec. 5912 251
Sec. 5917 695
Sec. 5928 698
Secs. 5951, 5952 798
Sec. 6018 702
Sec. 6153 196
Secs. 6186-6205 533
Sec. 6300 204
Sec. 6383 250
Sec. 6877 375
Secs. 7224-7231 ..... 753, 764, 809
Sec. 7811 819
Sec. 8008 165
Secs. 8024-8035 173
Sec. 8033 ..... 524, 532
Sec. 8035 170
Sec. 8046 686
Secs. 8364-8405, 9546 274
Secs. 8523, 8567, 8570 740
Secs. 8562, 8583, 8676-8728, 8702 322
Sec. 8581 96
Sec. 8583 323
Sec. 8598 405
Sec. 8657 ..... 18, 219
Secs. 8810, 8811 883
Sec. 8835 671
Secs. 8840, 8841 676
Secs. 8848, 9923 314
Secs. 8901, 10075 46
Secs. 9138, 9140 804
Sec. 9160 119
Sec. 9209 307

Secs. 9210, 9212, 9213 88
Sec. 9211 30
Secs. 9264, 9265 105
Secs. 9522, 9523 258
Sec. 9541 192
Sec. 9544 96
Sec. 9545 191
Sec. 9549 586
Secs. 9552, 9554, 9556 602
Sec. 9553 600
Secs. 9563, 10153 97
Sec. 9576 93
Sec. 9584, 9931 308
Secs. 9598, 9602 2
Secs. 9611, 9616 3
Sec. 9612 1
Sec. 9760 364
Sec. 10087 363
Secs. 10087, 10088 45
Sec. 10117 73
Sec. 10155 162
Sec. 10159 127
Sec. 10186 ..... 131, 316, 575, 579, 648

REVISED STATUTES

1866

Ch. 16, sec. 26 823

1913

Sec. 1491 138
Sec. 3016 737
Secs. 4329, 4330 865
Secs. 6107, 6124, 6128, 6139 634
Sec. 6300 252
Secs. 7471-7513 758
Secs. 8068-8073 627
Secs. 8074, 8777 628
Sec. 8198 353

UNITED STATES

CONSTITUTION

Amendment XIV 376

REVISED STATUTES

Sec. 5219 549

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

SEPTEMBER TERM, 1927.

LOUIS E. LAFLIN, APPELLANT, V. JESSE G. COWEN, APPELLEE.

FILED OCTOBER 6, 1927. No. 25884.

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

Vasey & Mattoon, for appellant.

Jay C. Moore, contra.

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

PER CURIAM.

Reversed on the authority of *Andrews v. Hastings*, 85 Neb. 548, and *Carnahan v. Cummings*, 105 Neb. 337, with directions to the district court to enter judgment in accordance with the prayer of plaintiff's petition.

REVERSED.

CHAPMAN HALBERT ET AL. V. STATE OF NEBRASKA.

FILED OCTOBER 6, 1927. No. 25934.

1. **Receiving Stolen Goods: INFORMATION.** In a prosecution under section 9612, Comp. St. 1922, it is not necessary to allege in the information that stolen chickens received by the defendants had value.
2. ———. On examination of the record, the evidence is *held* insufficient to sustain the verdict.

ERROR to the district court for Richardson county: JOHN B. RAPER, JUDGE. *Affirmed in part, and reversed in part.*

John C. Mullen, for plaintiffs in error.

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

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

GOSS, C. J.

All three defendants were jointly charged and tried under section 9612, Comp. St. 1922. The first count charged them with stealing from George Parchen about 35 chickens of the value of $35, and the second count charged the defendants Louis Halbert and Mrs. Louis Halbert, father and mother of the other defendant, with receiving certain stolen chickens from the defendant Chapman Halbert and others unknown, knowing them to have been stolen from George Parchen. The jury found the defendant Chapman Halbert guilty and the other defendants not guilty on the first count and found the defendants Louis Halbert and Mrs. Louis Halbert guilty on the second count. The defendants were duly sentenced. The defendant Chapman Halbert accepted his sentence. The other defendants are here on proceedings in error. Unless otherwise described, they will be referred to as the defendants.

The chief complaint of the defendants is that the second count did not state that the stolen chickens alleged to have been received by the defendants had some value. Was this necessary?

Section 9612, provides: "Whoever steals any chickens * * * of any value or receives or buys any chickens * * * that shall have been stolen, knowing the same to have been stolen, with intent, by such receiving or buying, to defraud the owner * * * shall be imprisoned" as provided in the section.

This section makes it a substantive offense to steal or receive chickens of any value, as section 9598 makes stealing property of any value by taking from the person without putting in fear, as section 9602 makes stealing or receiving

any stolen horse or its kind, of any value, as section 9603 makes the stealing or receiving stolen cattle, of any value, as section 9611 makes the stealing or receiving stolen hogs, of any value, and as section 9616 makes the stealing or receiving or buying of a stolen automobile, of any value, a substantive offense. The subject is not new. In *Mares v. State,* 112 Neb. 619, the cases prior to *Griffith v. State,* 94 Neb. 55, are referred to by Chief Justice Morrissey and overruled in so far as they support the contention of the plaintiffs in error. In that case, the defendant was charged with buying and receiving a stolen automobile. It should be noted that section 9616 contains the phrase "of any value" both in the part making it an offense to steal an automobile and in that part making it an offense to buy or to receive a stolen automobile, while in the instant case that phrase is omitted in section 9612 in the part of the section denouncing the unlawful receiving of stolen chickens, of which offense the defendants at bar were convicted. This court, in the *Mares* case, expressed the rule in the text of the opinion and in the syllabus as follows:

"In a prosecution under section 9616, Comp. St. 1922, it is neither necessary to allege in the information nor to find in the verdict the value of the property described."

These words evidently do not fully express what the author of the opinion and the court had in mind, for the information, quoted in the opinion, shows that the prosecutor in drawing the charge did not even allege that the automobile was of value and made no reference to value whatever. The interpretation of the statute by the court was, therefore, this: That the legislature, by the words "of any value," meant that stealing an automobile or knowingly buying a stolen automobile was an offense irrespective of value or without regard to its value, and thus did away with the necessity, not only of charging value, but also of finding any specific value. The theory upon which this rests is that of judicial notice of value, on the principle that courts take judicial notice of whatever is generally known within the limits of their jurisdiction. With reference to the

value of money, the same question was raised in *Reed v. State,* 66 Neb. 184, where larceny from the person was the particular offense. The late Chief Justice Sullivan with his characteristic clarity, and with his saving touch of humor, said: "It is not necessary for a jury in any case to fix the value or worth of a dollar; judges, as well as other people, know what it is. *Bartley v. State,* 53 Neb. 310." Judges, as well as other people, in this jurisdiction, know that an automobile is of value. All know that chickens, alive and well enough to run around, are at least a basis upon which juries in this jurisdiction may ground a finding of some inferential value.

It should be noted, too, that the portion of section 9612 which denounces the receiving of stolen chickens, being the charge on which the defendants were convicted, omits any use of the word "value." Moreover, the general rule is: "Where by statute an aggravated form of larceny is punishable without reference to the value of the goods stolen, the value need not be stated." 36 C. J. 826, sec. 301. Generally, a careful drawer of indictments and informations puts into the charge all the calls indicated directly or even by implication in the statute under which he is prosecuting; and in the discussion in *Mares v. State, supra,* this court suggested that, for the purposes of imposition of sentence, it was well to show the value of the property involved. However, we do not think the assignment of error before us is well taken, and we hold that in a prosecution under section 9612, Comp. St. 1922, it is not necessary to allege in the information that stolen chickens received by the defendant had value.

Defendants argue that the court erred in refusing to grant their motion made at the close of the evidence to dismiss the first count as to the defendants. If this was erroneous it was cured by the verdict of the jury acquitting these defendants on the charge contained in that count. 17 C. J. 285, sec. 3621.

The defendants insist that the verdict is not sustained by sufficient evidence. There was ample testimony from

which it could be concluded that chickens stolen from Henry Parchen were found on their premises; that they were stolen by their son and co-defendant Chapman Halbert, and another, and taken home in the night-time while the defendants were at home; but there is no direct evidence that these defendants received or even knew that there were any other than their own chickens on the premises; in that respect the reliance of the state is on circumstantial evidence alone.

While not compelled to do so in a law case, yet in this instance we have read the entire testimony in order to discover what, if any, guilty knowledge the father and mother had of the presence on their place of the chickens brought there about 2 o'clock in the morning and found there about two hours later by the officers and neighbors. The testimony of the witnesses shows at its best for the state the following: A witness who lived about a mile and a half away from the Halbert home testified that about 1 o'clock on the night in question a car had stalled in front of his home; that he was awakened and heard chickens in the back of the car; that the car started and went down about 15 rods to a culvert; that he thought the parties in the car were carrying something to the culvert; that he took his boy with him to see what they did at the culvert, but found nothing there; that the car, a coupé, had gone on; that thereupon he notified the sheriff, who came out with a deputy, and that his son got in with the sheriff and the deputy and followed the coupé; one of the deputy sheriffs testified that he followed the coupé to the Halbert home, where it had been stopped and parked in the barnyard; that he raised the lid and found about 15 chickens in the back end of the coupé; that he called for Mr. Louis Halbert, and a voice unidentified by him ordered him off the place, following which a shot was fired, and he then went to town for a search warrant, leaving two companions to watch the place; that he returned about 2 o'clock with the search warrant and read it to Mr. Halbert, although Mr. Halbert told him he did not need any search warrant; that thereupon, in company with Mr.

and Mrs. Halbert, and others who had gathered, the various chicken houses were searched, with the result that some of the Parchen chickens involved in this case were discovered; that Mr. and Mrs. Halbert showed him all the chicken houses except one small house which he opened up himself. His testimony shows that he made no charges against these defendants and they made no admissions while he was there.

Another witness testified that he was left by the deputy sheriff with another to watch the house while the deputy went after the search warrant, that they did watch the place while the deputy was gone—an hour and a half or two hours—and were there when the search warrant was executed by a search of the chicken houses; that the Halberts were there and said that the house in which the chickens were found was their duck house and the witness testified that it was a duck house (and there was other testimony that this particular house had no roost in it); that when the chickens were taken out and claimed, Mrs. Halbert did not want to see them go off the place and wanted to mark them with a pair of scissors.

Another witness, who was likewise charged to watch the place and did so while the deputy was absent after the search warrant, was present during the later search of the chicken houses, and testified that the Halberts said one little shack was their duck house, and that when the deputy sheriff searched it he found chickens in it, which Mrs. Halbert wanted to mark with a pair of scissors when she found they were going to take them off the place and that Mr. Halbert thought they ought to give a bond before taking the chickens away. While none of the witnesses so testified, it may be inferred from the lack of evidence on the subject that the defendants never left the house after the deputy sheriff arrived shortly behind the coupé in which the stolen chickens were taken to the Halbert home.

It is interesting to note from Chapman Halbert's testimony that he was in the car stalled in front of the neighbor's house; that he and another went down to the culvert, took out some chickens they had previously left there, took

them to his home, put them in the chicken house or duck house, and that it was his companion who fired the shot, heard by the deputy sheriff, and then departed. All the defendants in their testimony denied that the father and mother received the stolen chickens, knew that they were stolen, or knew that they were on the premises; and, as the evidence heretofore abstracted shows, when the officer was about to remove the chickens, upon their discovery, the mother wanted to mark them, evidently to identify them later, and the father wanted a bond given before their removal.

The mere fact that the chickens were on the premises, for approximately only two hours, and that in the night-time, and during almost all of which time the place was being watched by officers, is not sufficient evidence from which a jury might draw the inference that the defendants had received the chickens and had guilty knowledge that the chickens had been stolen by their son.

The court aptly charged the jury, in relation to circumstantial evidence, that, to justify a conviction, such evidence must be inconsistent with any hypothesis of innocence that can reasonably be drawn from the evidence. It is evident that the hypothesis of innocence could readily be drawn from the evidence and that the jury ignored this instruction. It is apparent, also, that the evidence was insufficient as a basis of the hypothesis of guilt, and therefore the defendants should have been granted a new trial on the ground that the verdict was contrary to the evidence.

The defendant Chapman Halbert having accepted his sentence and waived error, for the reasons stated in the opinion the judgment of the district court is affirmed as to Chapman Halbert and is reversed and the cause remanded for further proceedings in the district court as to Louis Halbert and Mrs. Louis Halbert.

AFFIRMED IN PART, AND REVERSED IN PART.

FRANK STYSKAL V. STATE OF NEBRASKA.

FILED OCTOBER 6, 1927. No. 25288.

Homicide: INSTRUCTIONS. In a prosecution for shooting with intent to wound, it is error to instruct the jury that defendant is presumed to have intended the reasonable, probable and natural consequences of his voluntary act, where the theory of the defense, supported by evidence, is that defendant shot in defense of his wife and home, and witnesses who were present at the time testified fully to the shooting and to the attending circumstances.

ERROR to the district court for Seward county: LOVEL S. HASTINGS, JUDGE. *Reversed.*

Norval Brothers and *Thomas, Vail & Stoner,* for plaintiff in error.

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

Heard before ROSE, GOOD, THOMPSON and EBERLY, JJ., LESLIE and SHEPHERD, District Judges.

ROSE, J.

This is a prosecution by the state in the district court for Seward county. Frank Styskal, defendant, was accused of shooting Joseph Styskal July 14, 1925. The information contained two counts, the first charging an intent to kill and the second an intent to wound. Defendant pleaded not guilty. The jury acquitted him of shooting with intent to kill, but found him guilty of intent to wound. For that offense he was sentenced to serve a term of one year in the penitentiary. Defendant, as plaintiff in error, presents for review the record of his conviction.

There are 57 assignments of error. One of them challenges an instruction on the intent presumable from the shooting and requires an examination of more than 300 pages of the record. This instruction was manifestly erroneous, but, in determining the question of prejudice to defendant, brief references to some of the evidential facts are necessary.

Defendant admitted the shooting. He used a shotgun at a distance estimated at 90 feet or more. About 79 birdshot struck the complaining witness on his left side and he was thus wounded. He was called "Joseph" by some of the witnesses. He walked from the scene of the shooting to his home and was promptly taken to a hospital, where he remained under the care of a physician for ten days or two weeks. The theory of defendant under his plea of not guilty was that he shot in defense of his wife and home. Defendant and Joseph were cousins. Both were married. Defendant was childless. Joseph had a large family. The two cousins were near neighbors in the village of Bee, Seward county. Their gardens were separated by a line fence. In 1918 and for more than two years thereafter they were partners in a general store at Bee. In it the wife of defendant had been a clerk. The partners sold out at the same time. Defendant gave as a reason for selling his share that his wife had been annoyed by amorous attention of his partner. The latter said he sold his interest in the store because defendant was dishonest. After a time Joseph reengaged in the mercantile business at Bee. According to the story of defendant's wife, Joseph repeatedly, for a year or more, in absence of her husband, attempted to have improper relations with her in and about her home, using at different times threats, personal violence, and other means. She testified that she reported these attempts to her husband. Joseph was in the home of defendant in the evening early in May, 1924. Both defendant and his wife were there at the time. Defendant wrote a check for wallpaper previously purchased from Joseph. The wife questioned the price charged and later hastened Joseph's departure from her home by firing two wild shots at him with a revolver. While testifying to this incident, Joseph himself was asked, referring to defendant: "Did he say or do anything at that time?" This was the answer: "No; he didn't. She hit at me and I pushed her hands down and she shot at me twice, and he took the revolver away from her." Joseph gave the reason for her shooting at him in

this form: "She thought I charged her too much for the paper." He explained further that the bill was $18.35, while she thought it should be $12. Her version of the shooting was that it was prompted by a false accusation on his part that she had formerly sustained criminal relations with him. There is evidence tending to prove that Joseph, in the presence of defendant's wife, had applied vile epithets to her husband, and that she had not herself escaped ignominy of a similar nature from the same source. During the unhappy relations existing between the two families, Joseph Styskal, the complaining witness, and his wife, Frank Styskal, defendant, and his wife, with their respective counsel, met at the office of the county attorney and entered into the following agreement:

"It is mutually agreed by and between the parties, Joe A. Styskal and Marie Styskal, husband and wife, and Frank J. Styskal and Victoria Styskal, husband and wife, that each of the parties will leave the other alone, stay away from each other's houses and places of business; that each will not talk about each other, each will keep their mouths closed and not threaten each other, not try to do each other any harm physically, and each will try to be, in the community, peaceful and will have no more trouble with each other, and further agree not to make any threats or hostile actions of any kind against each other.

"It is specially agreed that the parties hereto will live in peace in the village of Bee, and not associate with each other, and severely leave each other alone.

"Dated this 9th day of May, 1924.

"Joe A. Styskal,
"Frank J. Styskal,
"Marie Styskal,
"Victoria Styskal."

Details of what is implied by this instrument appear in the testimony. Each of the principals confessed to having a pistol and consented to surrender it to his attorney. Defendant testified that he had complied with the agreement.

Joseph said he had kept the agreement on his part, but he was compelled to admit that, contrary to its terms, he was in defendant's back yard when shot. He explained his presence there by saying he had been signaled by defendant's wife to approach and invited there by her to hear something about his own wife. It appears from her testimony that Joseph signaled to her and called her; that she told him she wanted nothing to do with him; that Joseph's wife was not then at home; that she thought defendant was absent; that she feared Joseph and went into her house. There is testimony to the effect that defendant, at the time, under circumstances implying his absence from home, had hid among growing corn in his garden and there fired the shot which inflicted the wounds charged in the information. There was also evidence that on a former occasion, at night, in absence of defendant, when his wife was alone, his house was entered clandestinely by Joseph who attempted to ravish her; that knowledge of this occurrence was communicated by her to her husband who, at an earlier date, as already stated, had taken a revolver from her while shooting at Joseph; that defendant had appealed in vain to his tormentor and to the law itself. The evidence of misconduct on the part of Joseph was contradicted by him and others who imputed to defendant shortcomings of the latter. In the situation thus far outlined the trial court gave the following instruction:

"Upon the question of intent, you are instructed that the law presumes a sane man to intend the reasonable, probable and natural consequences of any act by him intentionally and voluntarily done, and this presumption will always prevail, unless, from a consideration of all the evidence bearing upon this point, you entertain a reasonable doubt whether such intention did exist."

Both defendant and his tormentor testified to circumstances attending the shooting. Thereafter the law did not presume a criminal intent to take the place of evidence on that subject. After those present testified to the shooting and to the attending circumstances, presumptions of law as

to criminal intent were at an end. Contrary to the instruction, presumptions of law did not prevail for any purpose. A malicious intent was the controverted question for the jury to determine. The shooting itself was admittedly intentional. Evidence of the wounding was not disputed. Did defendant intend to protect his wife and home from an intruding defiler after the violation of a solemn contract and a vain appeal to the law? Did he shoot with a malicious intent to wound? These were questions for the jury to determine from the evidence without the aid of any presumption of law that defendant's intent was felonious. It was not within the province of the court or the jury to presume as a matter of law from the admitted fact of intentional shooting that the intent was malicious or felonious. Malicious intent was an element of the offense charged. Without malicious intent there was no felony. The burden of proving a criminal intent beyond a reasonable doubt by competent evidence was on the state throughout the trial. Presumptions of law did not take the place of such evidence or lessen or shift the burden of proof.

Should the reviewing court affirm the sentence on the ground that the error was not prejudicial? Defendant testified in his own behalf that he saw Joseph signaling to the former's wife and approaching, heard his insults and threats and his wife's protest that she wanted nothing to do with him, and that defendant shot in defense of his wife and home. He did not seem to understand English clearly and as a witness he expressed himself imperfectly at times. By able counsel he was cross-examined into saying in effect that he could, when present, protect his wife, but could not do so when absent, asking in answer to a question on cross-examination: "What do I have to take from this mean devil?" If a malicious and felonious intent should be inferred from his own confusing or inconsistent testimony, the question for determination was nevertheless for the jury without any erroneous instruction permitting them to presume malice as a matter of law from the admitted shooting, contrary to law and to defendant's theory of the de-

fense. The instruction under consideration was given in *Whitehead v. State,* 115 Neb. 143, and upon review the court said:

"For such an erroneous charge alone, when the circumstances of the tragedy were detailed by eye-witnesses, convictions have been reversed time and again. *Vollmer v. State,* 24 Neb. 838; *Botsch v. State,* 43 Neb. 501; *Whitner v. State,* 46 Neb. 144; *Kennison v. State,* 80 Neb. 688; *Davis v. State,* 90 Neb. 361; *Flege v. State,* 90 Neb. 390; *Franco v. State,* 98 Neb. 746; *Egbert v. State,* 112 Neb. 129."

Following these precedents, the conclusion is that the erroneous instruction was prejudicial to defendant. Consequently, the judgment is reversed and the cause remanded for further proceedings.

REVERSED.

SHEPHERD, District Judge, dissenting.

It seems clear to me from the record that the accused was not afraid of his cousin and knew that all he had to do in order to cause the latter to desist from advances to his wife and to leave his premises was to make his presence known. This is his own statement. But he chose to shoot from ambush at a range of 90 feet and to inflict a bloody and dangerous wound. His purpose was deliberate and premeditated, not only to stop his cousin in the instant attempt in his presence, but to fix him so that he could not repeat the attempt in his absence. As he put it and repeated it in his own testimony, "I wanted to fix him so he couldn't do it again." This being the case, it is trifling with plain words and making nothing of necessary implications to say that the defendant could have been without intent to wound.

Conceding that the instruction of the trial court was erroneous, it was not prejudicially so in view of the defendant's own testimony, and in my opinion the judgment should be affirmed.

Good, J., dissents on the ground that the instruction criticised was not prejudicial.

MARY SCHUETH ET AL., APPELLEES, V. FARMERS UNION MILLING & GRAIN COMPANY, APPELLANT.

FILED OCTOBER 6, 1927. No. 25180.

1. **Corporations**: STOCK: ASSESSMENTS. "In the absence of statutory authority or power given by the articles of incorporation there can be no assessment against or on 'paid-up' stock of a corporation." *Enterprise Ditch Co. v. Moffitt*, 58 Neb. 642.
2. **Evidence** examined, and *held* to sustain the judgment of the district court.

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

Joseph E. Daly, for appellant.

J. C. Cook, contra.

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

DAY, J.

Mary Schueth and Charles M. Schueth brought this action against the Farmers Union Milling & Grain Company, a cooperative corporation, to recover a balance claimed to be due upon a promissory note for $10,000 executed by the defendant on February 15, 1922. The note was payable to Mary Schueth or Charles M. Schueth on demand and drew interest at 8 per cent. from date. It was alleged in the petition that on April 11, 1923, $800 was paid upon the note, paying the interest thereon up to February 15, 1923. It was further alleged that the plaintiffs were indebted to the defendant for merchandise purchased in the sum of $604.35, which was a proper sum to be credited upon the note. The answer of the defendant admitted the execution of the note, the payment of $800 interest thereon, and the indebtedness of the plaintiffs for merchandise purchased. The defendant also claimed a further indebtedness for merchandise, owing by plaintiffs, which was not sustained by defendant's evidence. The defendant, by way of set-off, pleaded that plaintiff Charles M. Schueth was the owner of 19 shares of stock in the defendant company; that an assess-

ment had been duly made in February, 1921, against the shares of stock, amounting to $12 a share; that a further assessment was duly made on January 29, 1923, of $97.93 a share; that the total amount of the assessments made against the shares of stock of plaintiff Charles M. Schueth, with interest, amounted to $3,177.59, leaving a balance due and owing by the defendant to the plaintiffs of $7,629.01, which defendant tendered to plaintiffs, and which they refused to accept in settlement of the amount due upon the note. While there was some controversy over a part of the items of account for merchandise between the plaintiffs and defendant, the real controversy presented by the pleadings arises upon the assessments made by the defendant upon the shares of stock owned by Charles M. Schueth. At the close of the testimony the trial court determined that the defendant had no lawful right to assess the stock held by Charles M. Schueth, and after deducting the amount of interest paid on the note by the defendant, and the amount of merchandise purchased by the plaintiffs as shown by defendant's testimony, directed a verdict for the plaintiffs in the sum of $11,545.92, upon which judgment was rendered. From this judgment defendant appeals.

The failure of the trial court to allow the defendant the amount of the assessments as a set-off against the note is the principal error complained of.

It appears that in 1914 the defendant was organized as a cooperative corporation under the laws of the state pertaining to corporations of that character. On March 16, 1914, Charles M. Schueth became the owner of ten shares of stock in the corporation, paying for the same $1,000, the full face value thereof, and certificate No. 48 was issued to him therefor. The certificate contained a recital as follows: "Nonassessable. Not transferrable while holder is indebted to above named company." On February 25, 1915, Schueth became the owner of seven shares of stock, paying full face value therefor, and certificate No. 108 was issued to him, containing the same nonassessable clause. On February 14, 1921, Schueth became the owner of two shares of stock,

paying therefor $200, and certificate No. 244 was issued to him. In this last certificate a red ink line was run through the nonassessable clause. Why this was done does not appear in the record.

It was the contention of plaintiffs that there was no authority in law, in the articles of incorporation, or in the by-laws, which authorized the directors, or a majority of the stockholders, to levy an assessment upon the shares of stock issued by the corporation.

While the record is not entirely clear as to the assessment of $12 a share made in February, 1921, we think it a fair inference that the board of directors made the assessment, which was ratified by the holders of a majority of the stock at a subsequent stockholders' meeting. The second assessment, made January 29, 1923, was first recommended by the board of directors, of which plaintiff Charles M. Schueth was a member. Later, at a stockholders' meeting this resolution was approved, the vote being 248 for and 54 against the assessment. The total number of outstanding shares of stock at the time was 433. The record fails to show how Schueth voted at the stockholders' meeting.

There is nothing in our statute relating to corporations of this character, or in the articles of incorporation or by-laws, which would authorize an assessment upon fully paid shares of stock. The general rule is that, unless the corporate charter or the statute provides otherwise, a stockholder, the full par value of whose stock has been paid in, is not liable and cannot be made to pay any sum in addition thereto, as an assessment against his stock. This general rule was recognized in *Enterprise Ditch Co. v. Moffitt*, 58 Neb. 642, wherein it is held: "In the absence of statutory authority or power given by the articles of incorporation there can be no assessment against or on 'paid-up' stock of a corporation." This rule has never been modified in this state.

The defendant cites, and relies on, *Mirage Irrigation Co. v. Sturgeon*, 77 Neb. 175. In that case, however, there was an indorsement upon the stock as follows: "This stock

is subject to assessment over and above its par value, for maintenance of the canal, and may be sold for all delinquent assessments so levied." This recital indorsed on the shares of stock clearly authorized the assessment in that case, and it was held to be valid. Thus, the *Enterprise Ditch Company* case and the *Mirage Irrigation* case are easily distinguishable. The mere fact that a red ink line is run through the clause "nonassessable," as affecting the two shares of stock, in and of itself will not authorize the levy of an assessment. The authority to make the assessment must appear either in the law, the charter, the by-laws, or by contract.

Defendant argues that it would be manifestly unfair for plaintiff Schueth to avail himself of the benefits of an assessment paid by other stockholders, and at the same time refuse to pay the assessment against his own stock. We fail to find anything in the record which sustains the contention that any stockholder paid any part of the second assessment. There is some proof from which an inference might be drawn that some payments were made on the first assessment.

As to the first assessment, Schueth claims the cause of action is barred by the statute of limitations. This seems to be borne out by the record.

Assuming, but not deciding, that the by-laws were sufficient to authorize penalties upon stockholders, and give the corporation liens upon the stock for amounts owing to the company by the stockholders, such fact would not create personal obligations against the stockholders. It would merely give a lien upon the stock in favor of the corporation which could be enforced only against the stock itself.

Upon a review of the entire record, we are of the view that the trial court was correct in denying the set-off claimed by the defendant for alleged assessments upon Schueth's shares of stock.

We have been unable to reconcile the amount of the judgment with our computations, but the amount is substantially correct and will not be disturbed. The facts in this case, we

think, bring it clearly within the principle announced in *Enterprise Ditch Co. v. Moffitt, supra.*

No error appearing in the record, the judgment of the trial court is

AFFIRMED.

AUGUST BERGGREN, APPELLEE, V. HANNAN, O'DELL & VAN BRUNT, APPELLANT.

FILED OCTOBER 6, 1927. No. 24426.

1. **Evidence:** DECLARATIONS. Where action is brought against both master and servant to recover damages for alleged negligent acts of the servant, claimed to have been committed as employee of the master while acting in the course of his employment and within the scope of his authority, declarations made by the employee in conversation after the accident, and not *res gestæ*, are admissible in evidence against such employee, though not binding upon the employer, and cannot properly be excluded, notwithstanding they may have some ulterior or collateral effect detrimental to the employer's interests.
2. **Trial:** REQUEST FOR INSTRUCTION. "If either party desires an instruction which would serve only to guide the jury in weighing certain features of the evidence in connection with the issues, he must request such specific instruction. The proper time to make the request is when the evidence is concluded, and the proper manner of making it is by submitting in writing the instruction desired." *Osborne v. State*, 115 Neb. 65.
3. **Witnesses:** IMPEACHMENT. When it is desired to impeach a witness who is a party to the action against whom a judgment is sought, by showing statements or declarations made by him contradictory to his evidence given upon the trial, evidence of such statements or declarations is admissible without any previous foundation being laid therefor by calling his attention to the time and place and the party to whom they were supposed to be made.
4. **Trial:** ORDER OF PROOF. Ordinarily the order of proof is a matter in the discretion of the trial court, and error cannot be successfully asserted on account of any irregularity therein; prejudice, in such case, should first appear. Comp. St. 1922, sec. 8657.
5. **Master and Servant:** QUESTION FOR JURY. Where the weight of evidence is sufficient to sustain a finding that the plaintiff was

injured by the identical car furnished by the master to his servant for use in the course of his employment; that the servant was in control of the car at the time of the accident; that the accident happened in a place or locality where the servant was authorized to use the car, and at a time of day when he did occasionally use the car in the course of his employment in the master's business and with his knowledge, *held* to create a presumption that the car was at the time of the accident being used by the employee in his employer's service, with his knowledge and direction; and when the evidence offered to refute such presumption is not conclusive, the issue is one for submission to the jury.

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

Kennedy, Holland, DeLacy & McLaughlin, for appellant.

Anson H. Bigelow and *Carl T. Self, contra.*

Heard before GOSS, C. J., GOOD, THOMPSON and EBERLY, JJ., ELDRED and L. S. HASTINGS, District Judges.

ELDRED, District Judge.

August Berggren brought suit against Hannan, O'Dell & Van Brunt, Incorporated, and George Baker to recover damages for an injury received December 2, 1922, at about 8:45 p. m. as a result of being struck by an automobile while walking on a sidewalk on the east side of Tenth street, north of Pierce street, in the city of Omaha. The car which struck plaintiff was owned by the defendant Hannan, O'Dell & Van Brunt, Incorporated. The defendant Baker was an employee of the defendant company, engaged in the business of selling automobiles for said company in the city of Omaha. The defendant Baker was permitted to drive an automobile of the company in connection with his work as salesman for said company; the car causing the plaintiff's injury being one furnished Baker by the company for that purpose; and the defendant Baker sometimes so used said automobile after the regular working hours.

The petition sets out certain alleged negligent acts claimed to have been the proximate cause of plaintiff's in-

jury; and further alleges that at the time of the accident the car was being used by the defendant Baker in the course of his employment, and within the scope of his authority. The answer is, in effect, a general denial. From an adverse verdict and judgment against both defendants, the defendant company has appealed.

Five errors are assigned in brief upon which the defendant relies for a reversal. The first two assignments of error raise the question of the sufficiency and competency of the evidence to sustain the verdict; that is, it is urged there was no competent evidence that the driver of the automobile at the time of the accident was a servant of the defendant company, engaged in driving the automobile of the company on the master's business or pleasure, or with the knowledge and consent of the master. By the three remaining assignments, error is charged in the admission in evidence of certain declarations of the defendant Baker made some time after the accident, and after his employment by the company had terminated.

On behalf of the plaintiff four witnesses identified the defendant Baker as the driver of the car at the time of the accident. Baker testified that he was not driving the car, and was not present, but claimed the car was stolen from in front of his boarding house; two other witnesses testified that Baker was at the boarding house at the time the accident occurred. Baker's testimony is contradicted, to some extent at least, by evidence of declarations made by him bearing upon the accident. The evidence conflicting, the issue as to the identity of the driver of the car was a question for the determination of the jury.

Witness Oathout was called by the plaintiff in making his case in chief, and testified, over objections of the company, to the following declarations by Baker, made some time after the accident, and at a time when he was no longer employed by the defendant company:

"Q. What was said at the interview at the 'Y' by you or by him? A. 'Why;' I says, 'Mr. Baker,' I says, 'how you come to be here?' 'Well,' he says, 'I came down here and I am go-

ing to school here.' 'Well,' I says, 'the last time I saw you you was in Omaha.' 'Yes,' he says 'I know I was in Omaha, but,' he says, 'I got into some trouble down there,' and he says, 'they just rode the devil out of me and I made up my mind I would leave.' I says, 'What trouble did you get into?' 'Well,' he says, 'I was working for the Van Brunt people driving the car and got into an accident down there on Tenth and Pierce,' and he says, 'they had me arrested and fined me,' and he says, 'I made up my mind I would leave.' And I asked him, I says, 'Don't you remember me?' And he says, 'No; I don't,' I says, 'I am the gentleman that you run into down on Tenth and Pierce.' 'Oh! yes.' But he says, 'I didn't drive that car.' Q. Didn't what? A. He says, 'I didn't drive that car.' He says, 'That car was stolen.' So he just talked along there about the conversation and that was about all there was to it. * * * Q. What, if anything, was said as to his using the car to visit prospects in the evening? A. He said he did. Q. What further did he say as to the use of the car in the evening to visit prospects, if you can recall, if anything? A. He said whenever he had the car out he was always on duty; that his sales came at any time; that whenever he saw prospects he was out to make a deal."

It is now strenuously urged by the company that the admission of these answers constituted prejudicial error. The plaintiff was seeking to recover judgment against the defendant Baker as well as against the defendant company. But the company urges that as to the defendant Baker the question for whom he may have been acting at the time was not an issue; that if Baker was driving the car his liability did not depend upon that question. The facts disclosed by the first answer were not only competent, but very material in making a case against the defendant Baker. The second answer quoted is more favorable to the defendant than the plaintiff. While the answers to the two remaining questions were not so material, they did disclose how Baker happened to be at the place in question, and his reasons for being there, and would have a tendency to throw some light

upon the probability of the evidence upon this disputed point. As against the defendant Baker this evidence was clearly admissible:

"The admissions and declarations of a party to an action against his own interest, upon a material matter, are admissible against him as original evidence, and, where he is examined as a witness in his own behalf, it is unnecessary to lay a foundation for the admission of such evidence by cross-examination." *Young v. Kinney,* 79 Neb. 421.

The evidence being admissible to make out plaintiff's case as against the defendant Baker, it was properly received, notwithstanding it may have had some ulterior or collateral effect detrimental to the other defendant. *Cleland v. Anderson,* 66 Neb. 252; *Gibbard v. Cursan,* 225 Mich. 311; *Lampton v. Davis Standard Bread Co.,* 48 Cal. App. 116.

Among other authorities cited by appellant in support of its contention that the declarations should not have been admitted are the following from this jurisdiction: *Clancy v. Barker,* 71 Neb. 83; *Shoemaker v. Commercial Union Assurance Co.,* 75 Neb. 587; *Gale Sulkey Harrow Co. v. Laughlin,* 31 Neb. 103. An examination of the authorities so cited convinces us they are not controlling in this case; each of those cases was based on a contractual right; and in none of them was the agent or servant, whose declaration was offered, a party to the suit.

The court could not properly have sustained the objections and kept the evidence complained of from the jury. The most the court could have done would have been to instruct the jury that such evidence could only be considered for the limited and specific purpose for which it was admitted. Such an instruction would have been proper, and doubtless would have been given, if tendered.

If the defendant company desired to limit the purpose and application of any evidence admitted, an instruction to that end should have been requested. But such request was not made.

"If either party desires an instruction which would serve only to guide the jury in weighing certain features of the

evidence in connection with the issues, he must request such specific instruction. The proper time to make the request is when the evidence is concluded, and the proper manner of making it is by submitting in writing the instruction desired." *Osborne v. State,* 115 Neb. 65.

There is another reason why the admission of the declarations of the defendant Baker should not be considered as prejudicial. Baker testified as a witness by deposition taken prior to the commencement of the trial. The company, in making its defense, offered this deposition of Baker in evidence, in which he denied the driving of the car at the time of the accident; that he was at the place of the accident, or that he transacted any business for the defendant company after leaving their establishment that day.

Had the declarations of Baker been offered by the plaintiff in rebuttal, for impeachment purposes, they should have been received. But it is urged that no foundation was laid for impeachment by proof of contradictory statements or declarations, by calling the attention of the witness to them on cross-examination. The witness Baker being a party to the suit, against whom judgment was sought, it was not necessary to lay such foundation. *Young v. Kinney, supra; Dunafon v. Barber,* 3 Neb. (Unof.) 613; Jones, Evidence (3d ed.) sec. 851.

If the evidence of contradictory statements or declarations was offered solely for impeachment purposes, it should not have been admitted, notwithstanding the deposition of Baker was on file, until after the deposition was read in evidence. Until the deposition was read in evidence, statements therein could not be properly impeached. However, while such impeaching testimony, if intended solely for that purpose, may not have been competent at the time it was offered, any error in so receiving it was cured by the defendant subsequently offering the deposition in evidence. Ordinarily the order of proof is a matter in the discretion of the trial court, and error cannot be successfully asserted on account of any irregularity therein; prejudice, in such case, should first appear.

"The court in every stage of an action must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect." Comp. St. 1922, sec. 8657.

It is urged by the company that there is no evidence, other than the declarations of the defendant Baker, from which it could be found that Baker was, at the time plaintiff was injured, driving the company's car, in the course of his employment, and with the knowledge and consent of the master. It appears from the evidence that the plaintiff was injured by a car owned by the defendant company; that Baker was employed by the defendant company as a salesman in the city of Omaha, and was furnished a car for use in his work, which he sometimes used in connection therewith at the time of day the accident occurred, and that the car in question was the one furnished Baker by the company for his use as salesman. There is also ample evidence, though conflicting, to support a finding that Baker was the driver of the car at the time in question. A presumption was thus created, in the absence of evidence to the contrary, that the defendant Baker was at the time using the car for the purpose for which it was furnished him by his employer. *Finegold v. Union Outfitting Co.*, 110 Neb. 202; *Dirks v. Ensign Omnibus & Transfer Co.*, 107 Neb. 556. The only evidence offered to refute the presumption that the car was being used for the purpose for which it was furnished to the defendant Baker was Baker's testimony to the effect that he transacted no business for the company after leaving their establishment that day, and had none to transact for them at the place where the accident happened; but his declaration is also in evidence that whenever he had the car out he was always on duty; that his sales came at any time. This clearly created a condition as to which different minds might draw different conclusions. Under the evidence we conclude that the case was peculiarly one for submission to a jury.

No prejudicial error appearing in the record, the opinion

of the commission is withdrawn, and the judgment of the trial court is

AFFIRMED.

UNITED STATES TRUST COMPANY, APPELLEE, V. CLARA C. MILLER ET AL., APPELLANTS.

FILED OCTOBER 6, 1927. No. 25003.

1. **Mortgages:** SUBROGATION. While a subsequent mortgagee has an undoubted right to pay the interest accruing on a prior mortgage to protect his security, yet, in a case where the subsequent mortgage does not, by its terms or conditions, authorize the holder thereof to pay any prior lien or interest thereon, and add the amount paid to the debt secured by the subsequent mortgage, or contain any condition of like purport, the right to pay interest on a prior mortgage lien to protect the security of the junior lienholder, and recover therefor in foreclosure proceedings, depends upon the equitable doctrine of subrogation; and in such case, in order for a junior lienholder to recover, on foreclosure of his mortgage, the interest paid on a prior mortgage, he must plead the prior mortgage lien, and facts showing such a breach of conditions thereof as give a right to foreclose that mortgage.
2. ———: INSURANCE. In the absence of a condition in a mortgage requiring the mortgagor to keep buildings on mortgaged premises insured for the benefit of the mortgagee, as additional security for the loan, the mortgagee is not justified in having the buildings insured at the expense of the mortgagor, and adding the costs thereof to the indebtedness secured by the mortgage.
3. ———: BONUS. Where a loan company undertakes to pay off a prior lien out of the proceeds of the loan it is making for a landowner, it is not justified in paying a bonus to the holder of such prior lien, without express authority from the borrower.
4. **Evidence** examined, and *held* to support a decree in favor of the plaintiff for only the sum of $833.80, with interest at 10 per cent. from date decree entered in the district court.

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

Sullivan, Squires & Johnson, for appellants.

Morsman, Maxwell & Haggart and *H. L. Wilson, contra.*

Heard before GOSS, C. J., GOOD, THOMPSON and EBERLY, JJ., ELDRED and L. S. HASTINGS, District Judges.

ELDRED, District Judge.

Appellee, hereinafter called the plaintiff, filed its petition for the foreclosure of a real estate mortgage given plaintiff, on land owned by appellant Clara C. Miller; the other appellants being joined as parties defendant, because of the fact that they, with Clara C. Miller, were joint makers of the note secured by the mortgage. All appellants are hereinafter termed defendants.

It is alleged in the petition that the plaintiff, to protect its security on March 17, 1924, paid taxes on the mortgaged premises in the sum of $198.13. It is also alleged, in substance, that the mortgage sued upon was, by its terms and conditions, subject to a prior mortgage to secure $16,000; that the plaintiff, to protect its mortgage security and prevent foreclosure of the prior mortgage, paid three instalments of interest accruing on said mortgage aggregating $1,310, and alleges that said sum, with interest, should be added to the amount of the debt secured by the mortgage.

The answer of Clara C. Miller admits the execution of the note and mortgage; that said mortgage was subject to a $16,000 mortgage; that she made payments alleged, and that the other defendants have no interest in the real estate, and denied all the other allegations; alleges that at the time she signed the $16,000 mortgage plaintiff stated to her that it would bear interest at 6 per cent., and that the $480 note sued upon was given entirely without consideration; further answering, alleges that at the time she made said mortgage there existed upon said land a prior mortgage of $13,500; that plaintiff paid no money to the defendants in consideration of the execution of the mortgage sued upon, or the $16,000 mortgage; that defendant paid plaintiff $155 with which to pay taxes due on the land; that plaintiff undertook to pay from the proceeds of the loan the $13,500 mortgage, and promised that it would pay to her

the amount remaining after such payment; that it did pay off said prior mortgage, but refused to turn over or deliver to her the remaining sum in its hands as the proceeds of said $16,000 mortgage and the mortgage in suit; alleges plaintiff still has in its possession belonging to her $2,000, and prays for an accounting.

The defendants Orville W. Miller, Harland W. Miller, and Hugh A. Miller file answers alleging that they signed said note, as sureties only, for their mother, the defendant Clara C. Miller, and entirely without any consideration; that they claimed no title or interest in the land mortgaged; and for further answer allege the same facts, in substance, as are alleged by their codefendant, Clara C. Miller, and deny all other allegations of plaintiff's petition, and pray that the issues may be presented to a jury.

The reply is, in effect, a general denial.

On February 17, 1925, a supplemental petition was filed in which it is alleged, in substance, that since the commencement of the action the plaintiff has paid out, to protect its security, the following additional items: February 17, 1924, for insurance on buildings, $24.85; August 1, 1924, interest on $16,000 prior mortgage, $520; February 1, 1925, interest on said prior mortgage, $520; January 30, 1925, taxes on real estate covered by mortgage, $196.60, which items, with 10 per cent. interest from dates of payment, plaintiff asks to have added to the indebtedness secured by the mortgage in suit.

On May 7, 1925, the court found generally for the plaintiff on the petition and supplemental petition, and that there was due plaintiff from the makers of the note, for the items set forth in the petition, $2,337.95, with 10 per cent. interest from that date, and a decree of foreclosure was entered, from which the defendants have filed this appeal.

The supplemental petition appears to have been filed February 17, 1925, the date of the trial, without the consent of the defendants or permission of court, and of this the defendants complain; but it further appears that on February 10, 1925, notice of application to file supplemental petition

was served upon defendants' counsel, to whom a copy of the proposed supplemental petition was also furnished at that time. While no formal order appears to have been made with reference to the filing thereof, no objection is shown to have been made thereto by defendants nor motion to strike, nor application made for additional time to plead, nor for postponement of the time of trial by reason thereof. We conclude that there was no prejudicial error in considering the issues raised by the supplemental petition under the circumstances shown by the record. Counsel for plaintiff urges that no issue was joined on the supplemental petition, but defendants had all answered the original petition, and in the absence of an order of the court for the making of separate issues on the supplemental petition being filed, the answers of defendants already on file would stand as answers to both the original and supplemental petition. The trial court evidently treated the issues as joined thereto, and so do we.

While the sufficiency of the allegations of the petition, so far as it seeks to foreclose the $480 mortgage in suit, is not questioned, it is urged by the defendants that neither the allegations of the petition, the supplemental petition, nor the evidence is sufficient to sustain any recovery by the plaintiff on account of any sums alleged by plaintiff to have been paid to take up interest coupons, claimed to be secured by the $16,000 prior mortgage, to protect its security. It will be noted that neither the petition nor the supplemental petition set out the prior mortgage, nor any of its terms and conditions. The mortgage of $480 sued upon provides that it is subject to one certain mortgage for $16,000, in favor of the United States Trust Company, but makes no further reference thereto, nor does it authorize the holder to pay any prior lien other than taxes, which it does provide that the mortgagee may pay and add to the amount of the mortgage debt. Therefore, the plaintiff's right to pay such interest on a prior mortgage to protect its security depends upon the equitable principle that the holder of a second or inferior lien may protect his interest

in the security by paying off a prior incumbrance, and thereby become substituted to the rights of the holder of the lien so discharged under the doctrine of subrogation. In this case the plaintiff had the unquestionable right to pay the interest accruing on the prior mortgage, and, if it did so, it became subrogated to the rights of the holder of the first mortgage to the extent of the interest paid; but, there being no provision in the mortgage in suit for the payment of a prior lien by the mortgagee and adding it to the amount of the mortgage debt, or that the mortgage sued upon should stand as security therefor, as there is with reference to tax liens, any lien enforced by the plaintiff for the recovery of the interest so paid on the prior mortgage would be the lien created by the terms of such prior mortgage. No claim of subrogation is made, nor any right nor lien claimed under the prior mortgage, nor does it appear what the terms or conditions of the prior mortgage were, nor that it was in any manner trying to enforce a lien thereunder. We conclude that the allegations of the petition and supplemental petition in this case were not sufficient to sustain any recovery by the plaintiff for any sum claimed to have been paid to take up the interest accruing on a prior mortgage lien.

In the supplemental petition it is alleged that the defendant failed to keep buildings insured as required by the mortgage, and that plaintiff paid certain insurance on such buildings to protect its security, and seeks to recover the amount of the premium paid. The mortgage was offered in evidence, and appears in the record. While apparently it was a mortgage blank used in instances where insurance on improvements might be required as additional security, yet in this case the blank was not filled out so as to require insurance to be carried in any sum. In the absence of an agreement for insurance, there was no authority for the plaintiff procuring such insurance on the buildings on the mortgaged premises at the expense of the mortgagor, and claim therefor cannot be sustained.

It appears from the evidence that the plaintiff paid taxes

on the mortgaged security as follows: March 17, 1924, taxes for 1922, $198.13, and January 30, 1925, taxes for 1923, $196.60, which plaintiff is entitled to recover from the defendant Clara C. Miller, with interest at 10 per cent. from dates of payment, which computed to May 7, 1925, the date of the decree in the trial court, aggregate $422.56.

It is contended by the defendants Orville W. Miller, Harland W. Miller, and Hugh A. Miller that they were not properly joined as defendants in the foreclosure action; and further that, if properly joined, they were entitled to a trial of issues raised by their answers before a jury. The contention is answered by section 9211, Comp. St. 1922. Under the authority of that section they were properly joined as parties defendants. As to the contention that they were entitled to a trial by jury, this action is purely of an equitable nature to foreclose the mortgage, with incidentally a possible liability of such defendants for a deficiency judgment. Said defendants knew at the time they signed the note in suit as surety for their mother that it was to be secured by a real estate mortgage. Under the circumstances there was no error in failing to submit the issues joined by the defendants' answer to a jury.

By the terms of the note sued upon there was due plaintiff thereon, including interest to the date decree was rendered in the district court, May 7, 1925, from the defendant Clara C. Miller as principal, and the other defendants as sureties, the sum of $541.78. In arriving at this amount we have computed interest on the three instalments past due at the time the action commenced from the dates they matured, respectively, and on the balance have computed interest from the date default was declared by commencing suit thereon.

It is contended by the appellants that by the agreement for the loan the rate of interest was to have been 6 per cent. While the original application for a loan, offered in evidence, would indicate that the interest was to be 6 per cent., a new application was made and executed which indicates the rate of interest as 6½ per cent., with a commission

of $800; and the papers executed all call for 6½ per cent. While there is some conflict in the oral testimony, we conclude that there was no mistake as to this rate of interest.

Likewise, it is contended in the briefs of appellants that there was fraud and misrepresentation, with reference to the necessity of securing life insurance policies by the three sons, and assigning them as additional security for the loan. There is no issue of this kind raised by the pleadings in the case, nor do we find such contention sustained by the evidence.

At the time the $16,000 loan was secured from the plaintiff there was a prior mortgage upon the real estate involved of $13,500, with some accrued interest. Plaintiff, out of the proceeds of the loan, undertook to pay off this prior mortgage. Shortly before the application was made the holder of the prior mortgage had been asking full payment of the loan it held, as shown by the letter from the holder of such loan appearing in the record; but, when the plaintiff arranged for settlement, a commission was asked, first of $216, which was reduced to $108, and this was paid by the plaintiff and charged to the defendant. Under the circumstances, after having requested payment of the entire indebtedness, the charging of a bonus was hardly justified, and the plaintiff in this case ought not to have paid the bonus to the holder of such prior mortgage without having special authority from the defendants so to do; and we conclude that the defendants are entitled to a credit for the amount of the bonus so paid, with interest at the same rate they agreed to pay upon the money borrowed, which, including the $800 commission, would figure 7½ per cent.; such bonus and interest aggregating at the date of the decree $130.54.

After the settlement of the prior mortgage by the plaintiff, and on July 25, 1922, plaintiff had the defendant Clara C. Miller sign a letter directed to plaintiff, stating: "This will be instructions to pay Nate J. House of Broken Bow, Nebraska, or as he may direct, the proceeds of my loan of $16,000," etc.—and thereafter, on or about September 8,

1922, the company remitted to Nate J. House the balance due borrower on said loan, also $320, which would be the balance of the $800 commission agreed on in the application, after deducting the amount of the commission mortgage, $480. House made a statement to Clara C. Miller showing the manner of disbursing the proceeds of the loan, and included therein an additional sum for commission of $160; premium on life insurance policies taken out by the three sons, $386.80, and claim of Columbia Fire Insurance Company for $242.91. It is contended by the defendants that these items should not have been charged to Clara C. Miller nor deducted from the proceeds of the loan. However, the plaintiff had nothing to do with making these charges. While House had throughout the transaction been the agent of the plaintiff, and was paid a commission by plaintiff, those charges were made and received by House individually after the defendant Clara C. Miller had instructed plaintiff to pay House the proceeds of the loan, and the statement made by House to her shows such items charged against her (and others about which there is no contention). and that there was still due him on account of the items submitted a balance of $155.41, which balance the defendant paid; fairly indicating a consent on her part to the payment of such items. Whatever may be the rights of the parties as between House and the defendants, the plaintiff is not responsible for those three items.

There was due the plaintiff, on May 7, 1925, the date of the decree from which appeal was taken, upon the commission mortgage sued upon in this action, $541.78, and for taxes paid by plaintiff on the mortgaged premises, including interest to that date, $422.56, or a total of $964.34, on which defendants are entitled to a credit of $130.54, for the bonus erroneously paid by the plaintiff on the settlement of the prior mortgage, leaving a balance due the plaintiff on the date of the decree of $833.80.

The decree of the district court is modified and reduced to $833.80, with interest from May 7, 1925, at 10 per cent.

per annum; costs of this appeal taxed to the appellee. As so modified, the decree of the district court is affirmed.

AFFIRMED AS MODIFIED.

E. J. LA BORDE, EXECUTOR, APPELLEE, V. FARMERS STATE BANK, APPELLEE: EMMA SUHL, APPELLANT.

FILED OCTOBER 6, 1927. No. 25100.

1. **Appeal.** Under the facts stated in the opinion, the payment of the money, the subject of litigation, into court by the codefendant of appellant did not thereby deprive the appellant, claiming such fund, of the right of appeal from the decree adverse to her claim thereto.

2. **Insurance: CHANGE OF BENEFICIARY.** Where a policy of life insurance provides the manner in which a change of beneficiary can be made and the insured has done all that is required of him thereunder to effect such change and dies before his written change thereof reaches the insurer, but before the policy became payable, the question whether such change is effective ordinarily depends upon the precise wording of the contract, whether the acts of the insurer required in relation thereto are essential parts of the contract or mere ministerial or formal details. *Held*, that under the provisions of the policies set out in the opinion the acts to be done on the part of the insurer in relation to changing the beneficiary were merely ministerial or formal details, and not essential parts of such contracts.

3. ———: ———: **BURDEN OF PROOF.** Where an insured, while insolvent and in contemplation of death, changes the beneficiaries named in certain policies of life insurance from his estate to his wife and dies two days after making such change, and the effect thereof was to hinder and delay his creditors in the collection of their debts, such transaction is presumptively fraudulent, and in a suit brought by the executor of the estate of the insured, on behalf of creditors thereof, to have such transaction declared fraudulent and to recover the proceeds thereof, the burden of proof is upon the wife to establish the *bona fides* of the transaction.

4. **Fraudulent Conveyances: INSURANCE: EXEMPTIONS.** Where a person obtains credit on the faith that he is carrying policies of life insurance on his life payable at his death to his estate, and two days before his death, and in contemplation thereof

and while insolvent, changes the beneficiary therein from his estate to his wife without any consideration therefor, the same will be held fraudulent as to his creditors, and his wife will not be permitted to claim any part of the proceeds as exempt to her from the claims of his creditors, under section 7881, Comp. St. 1922.

5. **Executors and Administrators:** FRAUDULENT CONVEYANCES. Under section 1329, Comp. St. 1922, an executor is given the authority to commence and maintain an action in equity on behalf of the creditors of his testate to recover the proceeds of insurance on the life of his testate, transferred in fraud of the creditors of such testate.
6. **Constitutional Law.** "A party invoking the provisions of a statute is not in a position to raise the question as to its constitutionality." *Ross v. Lipscomb*, 83 S. Car. 136.
7. **Evidence** examined, and *held* sufficient to support the findings and decree of the trial court.

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

Sears, Horan & Shaw, for appellant.

E. S. Nickerson and *William R. Patrick, contra.*

Heard before GOSS, C. J., DAY, GOOD, THOMPSON, and EBERLY, JJ., ELDRED and HASTINGS, District Judges.

L. S. HASTINGS, District Judge.

This action was brought by the executor of the last will and testament of Fred H. C. Suhl, in behalf of the creditors of his testate, against Emma Suhl, the Farmers State Bank of Millard, Nebraska, et al., to have the change in beneficiary in three certain life insurance policies for $10,000 each from his estate to the appellant, Emma Suhl, decreed fraudulent as to his creditors, and to have the same canceled and set aside and said defendants enjoined from transferring and disposing of the proceeds thereof and to impound and recover the part of said funds to which said estate was entitled. Plaintiff's cause of action is predicated upon the following undisputed facts:

On the 26th day of November, 1924, Fred H. C. Suhl was carrying life insurance on his own life in the North-

western Mutual Life Insurance Company in the amount of $50,000. One policy for $20,000 was made payable to Emma Suhl, his wife, and three policies, each in the sum of $10,000, were payable to his estate. On said date, in contemplation of death, the insured, in a writing signed by him, on a blank furnished by the insurance company, changed the beneficiary in the three $10,000 policies from his estate to his wife and delivered the same to an agent of the company to be transmitted by such agent to the home office of the insurance company in Milwaukee, Wisconsin. The policies were then in the possession of the insurance company at their home office. He died insolvent two days later and his written change of beneficiaries was not received by the company at their home office until a few hours after his death. The insurance company made an indorsement upon said policies in conformity with the change of beneficiary as made by him. The money due on the four policies, after deducting the loans thereon, amounting to $46,461.97, was paid to his wife on December 4, 1924, by the insurance company. Upon receipt of the insurance money, appellant deposited same in the defendant bank and said bank issued to her, against said deposit, its cashier's check for $20,000 and a draft for the sum of $10,000 drawn on the Merchant's National Bank of Omaha. The actual funds remained in the defendant bank and were there at the time of the commencement of this action and at the time the decree was entered. At the time the beneficiary was changed, the debts of the insured approximated $90,000, more than $50,000 of which were unsecured. At the time this action was commenced claims had been allowed against the estate for the amount of said indebtedness. The assets of the estate other than the proceeds of the insurance are sufficient only to pay a small part thereof. A part of the insured's indebtedness was incurred by the insured upon the representation that he carried the three policies of insurance payable to his estate.

The dates, amounts and annual premiums of said life

insurance policies carried by Fred H. C. Suhl at the time of his death are as follows:

One dated April 15, 1918, for $10,000 with an annual premium of $246.36.

One dated April 23, 1918, for $10,000 with an annual premium of $246.30.

One dated March 20, 1919, for $10,000 with an annual premium of $253.40.

One dated October 23, 1919, for $20,000 with an annual premium of $521.80.

The appellant in her answer alleged that she had a separate estate which she received by inheritance from her father, and that in good faith she loaned her husband money derived therefrom, and that shortly before his death, in payment of and to secure payment of said indebtedness, he duly assigned said policies of insurance to defendant, and that defendant accepted the same in good faith in payment of and as security for payment of said indebtedness. She further alleged that the amount of insurance she had received was less than the amount owing from said deceased and the amount exempt to her under and by virtue of section 7881, Comp. St. 1922. She prayed that the action of plaintiff be dismissed, that so much of said insurance as was purchasable by annual payments of $500 should be decreed to be held exempt from the claims of the creditors of insured, and that the policies be decreed to have been received in satisfaction of and as security of the indebtedness of the deceased to the defendant.

The reply was a general denial.

The trial court found that the change in beneficiaries in the three $10,000 policies was fraudulent as to the creditors of the insured, and that the transfer of such insurance should be canceled and set aside. The court further found that there was exempt to the defendant, Emma Suhl, as the beneficiary named in the $20,000 policy, a sum equal to a policy on which the annual premium did not exceed $500, and that the proceeds of all insurance over and above that amount inured to the creditors of Fred H. C. Suhl. The court

ordered that the defendant Emma Suhl and the Farmers State Bank, out of the funds held by them, forthwith pay to the clerk of the court the sum of $27,803.53 to the account of plaintiff for the benefit of the estate of Fred H. C. Suhl for use in payment of claims and debts against said estate and the administration expenses thereof, with 7 per cent. interest from the date of said decree, and enjoined said defendants from transferring or in any manner disposing of said amount except as ordered.

The defendant, Emma Suhl, prosecutes appeal from said decree.

Prior to the submission of this case appellee filed a motion to dismiss the appeal of the appellant, Emma Suhl. The motion was submitted with the case. The record shows that, after the rendition of the judgment and before an appeal was taken, the defendant bank paid into the district court the sum of $28,029.58 in accordance with the decree, and at that time the defendant, Emma Suhl, appeared and objected and reserved an exception to said payment by her codefendant. The principal ground of the motion and the only one that merits consideration is that, by the payment of the sum of $28,029.58 into the district court in compliance with said decree, no real issue is presented here for determination. Counsel for appellee filed their affidavit in support of the motion. It appears from the affidavit that the appellant indorsed a cashier's check issued to her on the defendant bank in the sum of $20,000 and a draft on the Merchants National Bank of Omaha issued by the defendant bank to her for the sum of $10,000, same being part of the proceeds derived from the insurance, and delivered same to the defendant bank, and that the cashier of defendant bank thereupon placed said money in a special fund in said bank and drew a check on said fund payable to the clerk of the court and delivered the same to him pursuant to the decree of the court. It is contended, under the facts stated, that payment by the bank amounted to a confession or recognition of the correctness or validity of the judgment by appellant, and that her objection to the

payment of the money into court by her codefendant was only a pretext on which to base her appeal to this court, and that by such compliance with the decree there is nothing left upon which a judgment of reversal can operate. The defendant bank at no time claimed any interest in the money, the subject of litigation; it was simply the custodian of the fund and only a nominal defendant. The bank might well desire to pay the money into court and thus be relieved of any further liability. The appellant has shown no intention of abandoning her appeal, and we are satisfied that she did not intend that the payment of the money by the defendant bank into court should be regarded as a compliance on her part with the judgment of the court so as to deprive her of the right of appeal. So far as the record shows, the money has never been disbursed and is still in the district court subject to any disposition that this court may order made thereof. The only parties who have any interest in the money in question who can be affected by this appeal are the appellee and the appellant and their rights thereto can as well be determined with the money in court as it could be if the defendant bank was still the custodian thereof. We conclude that the payment of the money, the subject of litigation, into court by the defendant bank under the facts stated did not thereby deprive the appellant claiming such fund of the right of appeal from the decree adverse to her claim thereto. *Sanford v. First Nat. Bank*, 94 Ia. 680. The cases cited by appellee are not applicable to the facts herein. The motion is overruled.

The appellant assigns as error the finding of the trial court "that the change in beneficiaries in said three policies from the estate to the appellant is fraudulent as to creditors and should be set aside." It is the contention of counsel for appellant that the evidence establishes that the insured was indebted to appellant at the time of the transfer of said policies in about the sum of $20,800 for money loaned to him by her from her separate estate, and that she was entitled to have set off to her so much of the

proceeds of said insurance as would pay the indebtedness due her and as would be exempt to her under section 7881, Comp. St. 1922.

In this connection it is claimed by counsel for appellee that there was no actual change in beneficiaries in the three policies prior to the death of the insured, in that the indorsement of such change was not made by the insurance company thereon until after the death of the insured and that therefore the estate was entitled to the proceeds of said insurance. Whether such change was made depends upon the precise wording of the policies in question. The policies all contain this provision:

"The insured may change any beneficiary not irrevocably designated, but that no such change shall be effective unless made in writing and filed in the home office of the company (accompanied by this policy for suitable indorsement) prior to or at the time this policy became payable."

The policies also provide that the insurance should become payable upon proof of the death of the insured. In considering a similar question in the case of *Goodrich v. Equitable Life Assurance Society,* 111 Neb. 616, it is said in the opinion by Judge Day:

"In some of these cases where the insured has not an unconditional right to change the beneficiary, and the language used seems to require that some exercise of judgment on the part of the company is essential to the change of beneficiary, it is held that, notwithstanding the insured may have done all that is required of him, but dies before the insurer's consent is given, the change of beneficiary is not effected. The question in each particular case, therefore, is ordinarily whether the acts required on the part of the company are essential parts of the contract or mere ministerial and former details."

Applying the foregoing as the correct rule in construing the provisions in the policies in question, the question arises: Were the acts required by the company essential parts of the contract of insurance or merely ministerial

tion required that the change of beneficiary be made in writing by the insured. This was done upon a blank furnished by the company and transmitted by its agent to the home office of the insurance company. Under such provisions it was required that such written change of beneficiary be filed in the home office of the company before the policy became payable. This was done, although not received by the company until after the death of the insured. The indorsement of the change of beneficiary thereon by the company was, under said provisions of the policies, purely a ministerial act. It required no exercise of judgment on the part of the company in relation thereto. The company recognized the change and paid the proceeds of the insurance accordingly. The change made in the beneficiary was effective under the terms of the policies so as to entitle appellant to the proceeds thereof if such change was not fraudulent as to the creditors of the insured. The principal question involved herein is: Was the change in beneficiary valid as against her husband's creditors on account of money loaned to him from her separate estate? The effect of the transfer of the insurance from her husband's estate to her while he was insolvent was to put the proceeds of such insurance beyond the reach of his creditors and the transaction is presumptively fraudulent, and the burden of proof was upon the appellant to establish the *bona fides* of such transaction. *Carson v. Stevens*, 40 Neb. 112; *Kirchman v. Kratky*, 51 Neb. 191; *Glass v. Zutavern*, 43 Neb. 334; *Jansen v. Lewis*, 52 Neb. 556; *Fisher v. Herron*, 22 Neb. 183; *Bartlett v. Cheesbrough*, 23 Neb. 767; *Plummer v. Rummell*, 26 Neb. 142; *White & Sons v. Woodruff*, 25 Neb. 797.

Briefly summarized, the evidence upon the question involved shows that appellant owned eighty acres of land when she was married to Fred H. C. Suhl, which she had inherited from her father. This eighty was sold in the fall of 1919 for $20,800. Eighteen-hundred dollars was paid at the time the contract of sale was made and the balance on March 1, 1920. The evidence does not show what be-

came of the $1,800. Nineteen-thousand dollars was deposited in the Farmers State Bank of Millard, in a joint account of herself and husband, about March 1, 1920. The evidence does not show how much money the husband had on deposit in the bank at the time the $19,000 was deposited. It appears that the husband, soon after the deposit of said money in the bank, drew checks on said account as follows: $8,000 to his father; $9,000 in payment of an indebtedness that he owed to the bank, $5,000 of which had been borrowed from the bank to make the initial payment on 480 acres of land in Keith county, Nebraska, which he had purchased on contract in the fall of 1919; and $1,288 to Payne Brothers. The evidence shows that the purchase price of the Keith county land was $50,000. Five-thousand dollars was paid, as stated, at the time of the making of the contract; $23,000 was to be paid on March 1, 1920; for the balance of the purchase price, mortgages then on the land were to be assumed. The evidence further shows that on the 4th day of March, 1920, the husband deposited between $12,000 and $13,000 in the joint account of himself and wife in said bank, and no further deposits are shown to have been made in that account up to the time the Keith county land was settled for on March 23, 1920. Neither does it appear from the evidence that from the time that his wife deposited the $19,000 in the bank on March 1, 1920, up to March 23, 1920, any part on deposit therein was withdrawn from said account except as hereinbefore stated. On March 23, 1920, the bank paid a check drawn thereon by the husband for $22,918 in payment for the Keith county land. It would appear from this that the husband must have had about $10,000 of his own money in said bank at the time appellant's $19,000 was deposited. On the payment of the purchase price over and above the incumbrances on the land, the same was deeded jointly to appellant and her husband, Fred H. C. Suhl. The evidence further shows that before the Keith county land was purchased appellant and her husband looked over the land together, and she stated that

she was going to have the 160 acres of the land that had the improvements on. After the contract for the purchase of the land had been entered into by her husband and $5,000 paid down thereon, she had a conversation with her father-in-law, in which he told her that "it didn't look so well; that he thought they had better let the $5,000 go and stay where they were," and that she said "that it was all right the way it was; that she was getting more out of it that way, out there." After the death of her husband and while his estate was in the progress of settlement, she made a statement in the presence of the county judge and others "that she was the owner of 80 acres of land in Sarpy county which she had sold and put the proceeds into Keith county land." She denied making these statements or that she knew very much about the purchase of the Keith county land and claimed that she loaned the money to her husband.

It is claimed that certain statements made by her husband to the insurance agent who made the transfers of the insurance policies tend to support her claim that he was indebted to her. The statements in substance were that he wanted to transfer the policies to her because he had "went through with about all of her property." These statements made by the husband have little probative force upon the question involved. The Keith county land had been purchased when, as a matter of common knowledge, land values were at about their highest point, and the land had decreased in value from that time until at the time of his death it was worth but little more than the incumbrance against it, and his statements probably refer to the fact that he had lost her money by making their joint investment. We have nothing but her bare statement that she loaned the money to her husband. On the other hand, the facts and circumstances disclosed by the evidence seem quite convincing that she invested her money in the Keith county land. We are convinced from a careful examination of the evidence that appellant has not established that her husband was indebted to her at the time of the transfer of the insurance policies, therefore she does not have any

claim as against his creditors to any part of the proceeds of such insurance on account thereof. We conclude that under the evidence the change in beneficiary from the estate of the husband to his wife either as security for an alleged indebtedness or as payment thereof was fraudulent as to his creditors.

Counsel for appellant further contends that, should it be found from a consideration of the evidence that the insured was not indebted to appellant at the time of the change in beneficiaries on the three policies in question, such change would be valid under section 7881, Comp. St. 1922, and taking into consideration the $20,000 policy in which she was named as beneficiary, that she would be entitled to so much of the proceeds of such insurance on all of said policies as a $500 annual premium would purchase, and that the remainder of said funds would inure to the benefit of the creditors. That statute provides:

"All moneys and all and every benefit accruing under any policy or certificate payable at the death of the insured where the annual premium thereon, including all others on like policies, does not exceed five hundred dollars, shall be exempt from the claims of creditors when the person entitled thereto is not the executor or administrator of the insured or of the beneficiary. And when the annual premium thereon shall exceed five hundred dollars, such exemption shall not apply to such excess, but all money accruing thereunder, or under like policies, by virtue of such excess, shall inure to the benefit of the creditors of the person paying the same, whether such person is the insured or a beneficiary."

Under the statute all moneys and benefits accruing under any policy or certificate payable at death of the insured, where the insured pays the premium thereon, are not exempt from the claims of creditors of the insured when the person entitled thereto is the executor or administrator of the insured. The effect of the change in beneficiary from his estate to his wife was to make a part of the proceeds

thereof exempt from the claims of his creditors when, otherwise, this would not have been the case. Credit was extended to him on account of having such insurance payable to him. When the insured made the change of beneficiaries in the policies, he made the same in contemplation of impending death. He died two days after making the change. The fact that the insured was about to die at the time the change was made gave to the policies a pecuniary value nearly equal to the amount which the insurance company on his death would be required to pay under the terms of the policies. The estate of the insured, but for the change in beneficiary, would have been entitled to have received the full amount payable thereon at his death. If the change in beneficiary had been made at a time when the insured had a normal expectancy of life, even though he was insolvent, the change might have been valid as against his creditors. But under the facts herein he could not, while insolvent, change his beneficiary and so divert from the claims of his creditors so much of the proceeds as would become exempt, under the statute, by reason of such change. The change in beneficiaries under such circumstances was fraudulent as to his creditors. The following cases support the conclusion reached: *Navassa Guano Co. v. Cockfield,* 165 C. C. A. 363, 6 A. L. R. 1168, and note; *Burton v. Farinholt,* 86 N. Car. 260; *Ionia County Savings Bank v. McLean,* 84 Mich. 625; *Friedman Bros. v. Fennell,* 94 Ala. 570; 12 R. C. L. 511, sec. 41. The trial court was right in finding that the appellant did not have any claim to any part of the proceeds derived from said three insurance policies, and in setting aside and canceling the transfer thereof.

The trial court found that under the statute the appellant was entitled to all the proceeds of the $20,000 policy in which she was named as beneficiary and on which there was a premium of $521.80 payable annually; the proceeds of which, after deducting the loans made thereon by insured, amounted to $18,658.44. This was all that she was entitled to.

Appellant further insists that the executor is not authorized by law to bring this action and that the same should be dismissed. This is without merit. Section 1329, Comp. St. 1922, expressly gives an executor or administrator authority to commence and maintain an action of this kind.

It is further urged by appellant that section 7881, Comp. St. 1922, is unconstitutional and void. The appellant is not in a position to raise this question. She invoked the protection of the statute and thereby treated the same as constitutional and valid. The rule is: "A party invoking the provisions of a statute is not in a position to raise the question as to its constitutionality." *Ross v. Lipscomb*, 83 S. Car. 136.

The decree is right, and is

AFFIRMED.

CHARLES EARL MARSHALL v. STATE OF NEBRASKA.

FILED OCTOBER 6, 1927. No. 25727.

1. **Information: VERIFICATION.** Under section 10088, Comp. St. 1922, requiring informations to be verified by the oath of the county attorney, it is sufficient to meet the requirements of the statute if it appears, no matter in what form, that the truth of the charge or charges contained in the information are confirmed and substantiated by the oath of the county attorney. *Held*, that the truth of the charges contained in the information herein was sufficiently verified by the oath of the county attorney to meet the requirements of the statute.
2. ———: **FILING.** Under section 10087, Comp. St. 1922, an information may be filed in vacation in the court having jurisdiction of the offense.
3. **Forgery.** "Where one affixes to a note a signature which he intends shall be regarded as that of another person, the act is not prevented from being forgery by the circumstance that the name is not correctly written." *State v. Chance*, 82 Kan. 388.
4. ———. Where the name "H. A. Timnernan" was signed to a variance is so slight that a person of ordinary prudence would note with the intention of the person signing the same that it should be taken for the signature of "H. A. Timmerman," the

be likely to be deceived thereby and to accept it for the genuine signature.

5. ———: INFORMATION: VARIANCE. Under section 10075, Comp. St. 1922, a variance in names in order to be fatal must be such as to be material to the merits of the case or such as may be prejudicial to the defendant. *Held*, that the variance between the name "H. A. Tinnerman" as signed to the copy of the forged note set out in counts three and four of the information and the name "H. A. Timnernan" signed to the forged note offered in evidence is not so great that it can be said, as a matter of law, to be material to the merits or likely to have misled the defendant to his prejudice in making his defense.

6. **Criminal Law**: INSTRUCTIONS. "Before error can be predicated upon the failure to charge the jury upon a given point, there must have been a request therefor, unless it is upon a question where a statute or positive rule of law requires the giving of such instruction." *Georgis v. State*, 110 Neb. 352.

7. ———: ———. In a prosecution for forgery and uttering and publishing a forged note, the failure of the trial court to instruct that variance between the name of the maker of the note, as alleged in the information charging such offense, and the one signed to the note is fatal, if not *idem sonans*, is not reversible error, where no request is made for such an instruction.

8. ———: INSPECTION OF BOOKS. Under section 8901, Comp. St. 1922, the granting of orders for the inspection of books and papers or the right to make copies thereof is left to the discretion of the trial court, and it is also left to the discretion of the trial court whether or not to exclude such books and papers at the trial if inspection is not permitted. *Held*, there was no abuse of discretion by the trial court in denying the application of defendant for an order for the inspection of books and papers and the right to make copies thereof or in permitting the introduction of such books and papers in evidence when offered.

9. ———: NEW TRIAL: MISCONDUCT OF PROSECUTOR. Where one of the grounds alleged in a motion for new trial is misconduct on the part of the county attorney, and the question is submitted upon conflicting affidavits and decided by the trial court, the ruling will not be set aside upon review, unless such ruling is clearly wrong.

10. **Forgery**: PENALTY. "An information which charges forgery of an instrument and the fraudulent uttering of the same instrument by the same person charges but one crime, and in case of conviction but one penalty can be inflicted." *In re Walsh*, 37 Neb. 454.

11. **Evidence** examined, and *held* sufficient to support the verdict of the jury.

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

Nickerson & Nickerson and *Pitzer & Tyler,* for plaintiff in error.

O. S. Spillman, Attorney General, and *T. J. McGuire, contra.*

Heard before GOSS, C. J., ROSE, GOOD, THOMPSON and EBERLY, JJ., ELDRED and HASTINGS, District Judges.

L. S. HASTINGS, District Judge.

The defendant was tried and convicted in the district court for Sarpy county, Nebraska, upon the charges of forgery and uttering forged notes. The information upon which he was convicted contained four counts. In the first count of the information defendant was charged with having forged the signature of Mike Klien to a note in the amount of $1,500, the second count charged the defendant with uttering and publishing said note, and the third count charged the defendant with having forged the signature of H. A. Timmerman to a note in the amount of $2,500, and the fourth count charged the defendant with uttering and publishing the Timmerman note. By this proceeding the defendant seeks a reversal of the judgment of conviction.

Before the arraignment the defendant moved to quash the information, one of the grounds being that same was not verified as required by law. The motion was overruled and the ruling thereon is assigned as error. An examination of the information discloses that it has no formal verification attached to it. The information is in the form of an affidavit. Immediately following the title of the case and preceding the information appears the following: "State of Nebraska, County of Sarpy, ss." In the body of the information the county attorney says he gives the

court to understand and be informed, then follows the first count, wherein forgery is charged in direct and positive terms, and in the beginning of the second, third and fourth counts the county attorney "being first duly sworn on his oath shows," then follow in direct and positive terms the charges of uttering and publishing, forgery, and uttering and publishing. At the end of the information appears the signature "H. A. Collins," the county attorney referred to in the information, and following his signature: "Subscribed and sworn to before me this 9th day of October, 1926, Eliza M. Wilson, Clerk of the District court, by C. S. Marth, Deputy." To this is attached the seal of the court.

Counsel for defendant contend that because no formal verification in the form of a statement or certificate is appended to the information stating that the facts therein contained are true, or true as the county attorney verily believes, the same is not verified by the oath of the county attorney, as required by section 10088, Comp. St. 1922. The statute requires that the information "shall be verified by the oath of the county attorney, complainant, or some other person." The statute is mandatory and has been so construed by this court. *Trimble v. State*, 61 Neb. 604. Verify means "The swearing to an affidavit. To confirm and substantiate by oath." 3 Bouvier, Law Dictionary (3d Rev.) 3394. To meet the requirements of the statute, it is sufficient if it appears, no matter in what form, that the truth of the charge or charges contained in the information are confirmed and substantiated by the oath of the county attorney. The county attorney subscribed to the information and was sworn thereto by an officer qualified to administer the oath. It appears in the information that he made the charges on his oath; the legal import of this is that the county attorney made oath that the charges therein were true. This is sufficient to meet the requirements of the statute, although no formal verification was appended thereto. However, the form used is not recommended as a model to be used in verifying informations. A form meeting all requirements of the statute

is set out in *Nichols v. State*, 109 Neb. 335, and should be used in verifying informations, although any form may be used that meets the requirements of the statute.

It is assigned as error that the information was not filed while the court was in session at a regular jury term, and that by reason thereof the court did not acquire jurisdiction to try the defendant.

It appears from the record that on preliminary examination the defendant was held to appear at the next jury term of the district court for Sarpy county, which commenced on October 11, 1926. A transcript of the preliminary examination was filed on August 2, 1926. The information on which defendant was tried was filed October 9, 1926.

It is stated by counsel, although such does not appear in the record, that the term during which the information was filed was an equity term, and that court was not in session at the time the information was filed. The question here presented was not brought to the attention of the trial court in any way, but is raised for the first time in this court. In support of their contention counsel cite *In re Vogland*, 48 Neb. 37, and *Cubbison v. Beemer*, 81 Neb. 824, wherein it is held:

"Under the provisions of chapter 108 of the Laws of Nebraska passed in 1885, the requirement that 'all informations shall be filed during term, in the court having jurisdiction of the offense specified therein,' is mandatory, and an information, upon which the accused is to be tried for felony, is void if filed in vacation."

If the statute on which those decisions were based was still in force the contention of counsel would be correct, but in 1915 the legislature amended the section by striking out "during the term," and the section now reads:

"All informations shall be filed in the court having jurisdiction of the offense specified therein, by the prosecuting attorney of the proper county as informant." Section 10087, Comp. St. 1922.

The plain intention and purpose of the legislature in

making that amendment was to do away with the construction placed thereon by this court in the cases cited. To give the statute the construction that counsel for the defendant now contends for would be to judicially legislate that back into the statute which the legislature deliberately took out by the amendment. This we are not inclined to do. The statute as amended does not require that an information must be filed "during the term," and no good reason exists for requiring it to be done. "In the absence of a statute to the contrary, informations may be properly filed with the clerk of court in vacation." 31 C. J. 637, sec. 151; *State v. Kyle*, 166 Mo. 287; *State v. Corbit*, 42 Tex. 88. An information may now be filed in vacation in the court having jurisdiction of the offense.

Counsel for defendant cite *Nichols v. State, supra,* as holding that an information must be filed when the court is in session at a jury term. This is not correct. In that case a brief form of an information charging murder in the first degree was approved as sufficient and as a proper standard to be followed, and the question now under consideration was not involved or decided. We conclude that the trial court was not without jurisdiction to try the defendant on account of the information having been filed while the court was not in session at a regular jury term.

It is urged that there is a material variance between the name "H. A. Timmerman," alleged to have been forged, and the name "H. A. Timnernan" appearing as maker on the forged note. The evidence shows beyond any doubt that it was the name "H. A. Timmerman" that was intended to be forged on the note, and that of no other person. The simulation of the signature of "H. A. Timmerman" on the forged note is so well executed that a person used to comparing signatures might be deceived thereby. In writing the signature of "Timmerman" the forger misspelled the name by substituting the letter "n" in two places in the name for the letter "m," but the signature is so cleverly simulated otherwise that it takes more than a casual inspection to determine that the name has been

misspelled and that it is not the genuine signature of H. A. Timmerman.

It is upon the misspelling of the name "Timmerman" and the spelling of it as "Timnernan" that the defendant predicates his contention of material variance. It is claimed that by reason of the misspelling of the name "Timmerman" the names "Timmerman" and "Timnernan" are not *idem sonans,* and that the trial court should have held as a matter of law that such variance was fatal. The names are practically *idem sonans,* and the person writing the name to the forged note intended that it should be taken for the name "Timmerman," and having written it with that intention in such a way as might deceive a person of ordinary prudence, his fraudulent purpose and felonious intent to commit a forgery are as clearly manifested as they would have been if the spelling had been entirely correct.

"The general rule is that it is sufficient if the resemblance between the counterfeit and the genuine instrument or signature is such as to deceive a person of ordinary observation, and thus to create the possibility of fraud. It is not necessary that the similarity should be such as to impose on an expert. So it is not necessary that there should be so perfect a resemblance to the genuine handwriting of the party whose name is forged as would impose on persons having particular knowledge of the handwriting of such party. And one who signs to an instrument a name which he intends to be that of another person may be guilty of forgery, though the name is misspelled or incorrectly written, as where the name 'Henry Heinis' was signed to a note with the intention that it should be supposed to be the signature of 'Henry Hein,' or where 'Hawood' was signed for 'Haywood'." 12 R. C. L. 143, sec. 6.

See, also, *State v. Chance,* 82 Kan. 388, 27 L. R. A. n. s. 1003, and note; *State v. Gryder,* 44 La. Ann. 962, 32 Am. St. Rep. 358; *People v. Alden,* 113 Cal. 264; *State v. Covington,* 94 N. Car. 913, 55 Am. Rep. 650; *Baysinger v. State,* 77 Ala. 63, 54 Am. Rep. 46; *Gooden v. State,* 55 Ala. 178; *Peete*

v. State, 2 Lea (Tenn.) 513; *Rollins v. State*, 22 Tex. App. 548, 58 Am. Rep. 659; *Hall v. State*, 55 Tex. Cr. Rep. 267; *Rubio v. State*, 50 Tex. Cr. Rep. 177.

When the author of the forgery affixed to the note the signature "H. A. Timnernan" and intended that it should be regarded as the signature of H. A. Timmerman, the act was not prevented from being a forgery by the circumstance that he misspelled the name. It cannot be said as a matter of law that the variance in such names is so great as to prevent the deception of any person of ordinary prudence. The misspelling of the name was an error on the part of the author of the forgery and the law does not permit him to use it as a shield to protect himself from the consequences of his criminal act.

It is next urged there is a fatal variance between the name "H. A. Timnernan," signed as maker to the forged note offered in evidence, and the name "H. A. Tinnerman," signed to the copy of the forged note set out in counts three and four of the information. The cases bearing upon this question are many, some sustaining the position of defendant that the variance in names here presented is fatal and others holding that even a greater variance is not fatal. We believe from examination of the cases that the cases holding that such variance is not fatal are more in accord with our Criminal Code.

"In adopting the Criminal Code the legislature intended to provide a rational system of procedure for the trial of persons accused of crime, and to abolish the hypertechnical rules of the common law." *Burlingim v. State*, 61 Neb. 276.

Under section 10075, Comp. St. 1922, the variance in names, in order to be material, must be such as to be material to the merits of the case or such as may be prejudicial to the defendant. In construing the statute in *Goldsberry v. State*, 66 Neb. 312, 332, it was said: "This section does away with all objections that are merely technical, and do not affect the substantial rights of the defendant. It requires that every objection grounded upon alleged difference between a descriptive averment and the evidence

given in support thereof shall be disregarded, unless the difference is so material as to mislead the defendant and prejudice him in making his defense."

In 31 C. J. 840, sec. 451, the rule is announced: "Under the modern practice, a variance is not material unless it misleads accused in making his defense or may expose him to the danger of being again put in jeopardy for the same offense."

In 14 R. C. L. 207, sec. 51, it is said: "Slight variations in orthography have sometimes been held fatal and sometimes not, but it may be stated as the general rule deducible from the modern decisions that where the name as written in the indictment may be pronounced in the same way as the name given in the evidence, although such may not be the strictly correct pronunciation, the variance will not be regarded as fatal, unless the variant orthography be such as would be likely to mislead the defendant in preparing his defense."

The following cases hold a variance in names as great or greater than the variance in the names here in question not to be fatal: *People v. Spoor*, 235 Ill. 230, 126 Am. St. Rep. 197; *Pitsnogle v. Commonwealth*, 91 Va. 808, 50 Am. St. Rep. 867; *State v. Patterson*, 24 N. Car. 346, 38 Am. Dec. 699; *State v. White*, 34 S. Car. 59, 27 Am. St. Rep. 783; *Rowan v. State*, 57 Tex. Cr. Rep. 344, 136 Am. St. Rep. 1005; *Santolini v. State*, 6 Wyo. 110; *Millett v. Blake*, 81 Me. 531; *Myer v. Fegaly*, 39 Pa. St. 429; *Elliott v. Knott*, 14 Md. 121; *Langdon v. People*, 133 Ill. 382.

We conclude that the names in question may be pronounced so nearly alike, although such may not be strictly the correct pronunciation, that we cannot say as a matter of law that the variant orthography was such as to mislead the defendant to his prejudice in making his defense. Furthermore, in this connection the record shows that, after defendant's motion to quash said counts on account of the variance in names and before the defendant was arraigned, counsel for the state made application to correct the variance in names by amendment to the information, and the

trial court granted the application. The defendant then renewed his motion to quash said counts of the information "as amended," and on the court overruling the motion the defendant moved the court to quash said counts of the information "as amended" for the reason there had been no preliminary examination on the offense charged in said counts "as amended," and this motion was overruled. When the forged note, exhibit 18, was offered in evidence, no objection was made by the defendant on account of any variance between said names. The copy of the information set out in the transcript does not show that such amendment was actually made, but the record does show that defendant treated the information as amended, and he is not now in a position to complain because the manual change might not have been made therein correcting the variance in names On the record as presented, we conclude the variance between such names could in no way be prejudicial to the defendant or in any way mislead him in making his defense.

It is further contended in this connection that the question as to whether there was a material variance in names should have been submitted to the jury for their determination, and that there was error in not doing so, also that the court erred in assuming in the instructions to the jury that "Timnernan" as signed to the forged note was the name "Timmerman." We are unable to find in any instruction given by the trial court where it was so assumed. The instructions left the question to the jury to determine whether the defendant had forged the signature of H. A. Timmerman. The trial court in the instructions did not, "either by omission or by expression, withdraw from the consideration of the jury an issue or essential element necessary for its determination." The above rule announced in the case of *Osborne v. State*, 115 Neb. 65, does not apply, as contended by counsel for defendant. It would have been proper for the court to have instructed the jury without any request therefor that if they found there was a material variance between such names to acquit the defendant. The

defendant did not request any instruction bearing upon this question and in the absence of such request the failure of the court to so instruct was not error. This court has held: "Before error can be predicated upon the failure to charge the jury upon a given point, there must have been a request therefor, unless it is upon a question where a statute or positive rule of law requires the giving of such instruction." *Georgis v. State,* 110 Neb. 352; *Welter v. State,* 112 Neb. 22.

The precise question here involved was decided in the case *of Santolini v. State, supra,* wherein it was held:

"Failure to instruct the jury that a variance between the name of the maker of a check as alleged in an indictment for forgery, and as signed to the check, is fatal if they are not *idem sonans,* is not reversible error when no request is made for such instruction." (71 Am. St. Rep. 906).

The defendant complains that the trial court erred in denying his application to permit him to inspect certain books and papers named therein and in permitting same to be introduced at the trial when inspection and copies were denied. Among the papers which defendant asked to inspect were the two forged notes. Under section 8901, Comp. St. 1922, it is left to the discretion of the trial court whether or not an order should be entered directing the adverse party to give the other, within a specified time, an inspection and copy or permission to take a copy of the books, and it is also within the discretion of the trial court whether or not to exclude such books and papers at the trial if inspection or copies is not permitted. The trial court in denying the application of defendant exercised his discretion and there was no abuse thereof. Furthermore, the record shows that the defendant was not prejudiced in any way by the denial of said application, as he was furnished photographic or photostatic copies of the forged notes, as well as practically all other exhibits offered in evidence by the state prior to the trial. Defendant seems to complain, not so much of the fact that he was denied an inspection

and copy of the instruments demanded, as his failure to have the originals in his possession so that he might make an ink test of the signatures on the two forged notes, also of the ink in the number and due date on the notes and of entries in the note register. If this was the main purpose for which he desired the instruments mentioned the trial court certainly did not abuse his discretion in denying the application. To have permitted such experiment with the ink used on such instruments would possibly mutilate them before they were introduced in evidence and destroy, to a great extent, their value as evidence.

The defendant assigns as error the alleged misconduct of the county attorney in causing the defendant's second arrest on another charge the evening before the trial and statements claimed to have been made by the county attorney in the presence of some members of the jury in regard thereto. The defendant supports his claim of the alleged misconduct of the county attorney with his own affidavit. The affidavit of the county attorney and the sheriff flatly contradict the affidavit of the defendant as to such alleged misconduct. Upon the showing thus made the trial court passed upon this question in overruling the motion for a new trial and after an examination of the affidavits we are not disposed to disturb the ruling of the trial court.

It is insisted that the evidence is not sufficient to sustain the verdict. We will not discuss the evidence in detail, to do so would unnecessarily extend the length of this opinion.

It is conceded by the defendant that the names to the notes in question are not the genuine signatures of the persons that they purport to be, also that the notes are in the handwriting of the defendant with the exception of the signature, number and due date in the lower left hand corner of each note. The number and due date of each of said notes is conceded to be in the handwriting of one E. C. Goerke. At the time the forgeries were committed on May 13, 1926, E. C. Goerke was president and the defendant cashier of the First State Bank of Papillion, Ne-

braska, formerly the Farmers State Bank at that place. The evidence shows that irregularities were discovered by the bank examiners in the bank about July 1, 1926, and that thereafter the president, E. C. Goerke, absconded and has not since been apprehended. The bank was taken over by the guaranty fund commission shortly thereafter. The two forged notes were found in the note case of the bank, and the purported makers, on being notified that the bank held their notes, declared their signatures to the notes to be forgeries. The purported makers of said notes, Mike Klien and H. A. Timmerman, were farmers living near Papillion, and who had resided in Sarpy county for many years. Klien had a small deposit account with the bank, Timmerman none. He had formerly done business with the Farmers State Bank before its name was changed to the First State Bank of Papillion. Both of their signature cards were in the bank at the time the forgeries were committed and the author of the forgery undoubtedly copied their names from such signature cards. On the same day that Mike Klien's name was forged to the $1,500 note he received credit on his account in said bank for that sum, it also appears that on the same day an account was opened in said bank with H. A. Tinnerman, Adm'r, and on the same day the ledger sheet of H. A. Tinnerman, Adm'r, shows a credit for the amount of the forged note. On the same day it appears that three checks were drawn against the account of Mike Klien for $500 each, and on the same day three checks appear to have been drawn against the account of H. A. Tinnerman, Adm'r, two for $833.33 and one for $833.34. The checks on such accounts were not drawn by either Klien or Timmerman and they knew nothing of the transactions. The checks drawn against said account as well as the deposit slips were not to be found among the papers of the bank and had apparently been abstracted from the bank by some persons interested in their concealment. The evidence further shows that the defendant wrote the name H. A. Tinnerman, Adm'r, on the ledger sheet containing such account. The defendant

also posted on the ledger sheet in the Tinnerman account the amount of the forged note, and he also posted in the Mike Klien account on the ledger sheet the amount of such forged note. The evidence, however, shows that the notes were entered upon the note register by Mr. Goerke. The defendant testifying in his own behalf admitted the notes, with the exceptions hereinbefore noted, were in his handwriting, but that he made out both notes at the request of E. C. Goerke and delivered them to him unsigned. He denies that he forged the signatures to the notes.

The theory of the defense is that the signatures were forged to the notes by E. C. Goerke and that he uttered the same. Instruments containing the genuine handwriting of the defendant and instruments containing the genuine handwriting of E. C. Goerke were admitted in evidence and were used in making comparisons with the forged signatures on the notes in question. Expert evidence was offered and comparisons made between the genuine handwriting of the defendant and of Goerke with the forged signatures. In behalf of the state expert testimony in regard to handwriting was given by J. Fordyce Wood of Chicago. Mr. Wood appears to have a national reputation as an expert on handwriting and he gave it as his opinion that the forged signatures to the notes were written thereon by the defendant. The reasons upon which he based his opinion are very convincing. Mr. Wallace O. Shane, a recognized expert on handwriting, also gave the same opinion and nearly the same reasons as given by Mr. Wood for believing that the defendant forged the two signatures. A comparison of the genuine writing of the defendant with that of the signatures on the forged notes strongly supports their conclusions.

The defense called two expert witnesses; one, Mr. J. C. Shearman, recognized as a leading handwriting expert, but without the varied and extensive experience of Mr. Wood; the other, Mr. William W. Marsh, whose experience as an expert on handwriting was not so extensive as that of either Mr. Wood or Mr. Shearman. Both of the experts for the

defense pointed out some of the characteristics of the handwriting of Mr. Goerke in the signatures of the forged notes. They also admitted on cross-examination that many of the characteristics of the defendant's handwriting appeared in the signatures on the forged notes. Neither of the experts called by the defense expressed an opinion as to the authorship of the signatures on the forged notes. Mr. Wood on his cross-examination frankly admitted that the forged signatures contained some of the characteristics of Mr. Goerke's handwriting. Counsel for the defendant insists that the forged signatures contain as many of the characteristics of the handwriting of Mr. Goerke as that of the defendant. We do not think the evidence sustains the contention. After a careful examination of the evidence and comparison of the forged signatures with the genuine handwriting of both the defendant and Mr. Goerke, we are satisfied that the verdict of the jury is right and is supported by sufficient evidence.

It is next urged that the separate sentences imposed on counts two and four are erroneous. The record shows that the trial court imposed separate sentences on each count of the information, the sentences being imprisonment for an indeterminate period of from three to twenty years and a fine of $100 on each count. Under the terms of the judgment, the term of imprisonment on count two was to run concurrently with the sentence imposed on count one, and the sentence imposed on count four was to run concurrently with the sentence imposed on count three, but the fines imposed upon counts two and four are additional. We have held: "An information which charges forgery of an instrument and the fraudulent uttering of the same instrument by the same person charges but one crime, and in case of conviction but one penalty can be inflicted." *In re Walsh*, 37 Neb. 454.

It therefore follows that counts one and two charge the same offense and call for a single penalty; the same is also true of counts three and four. With the exception only of the judgment pronounced, the record is found free from

prejudicial error. Under the rule announced in *Kaufmann v. State*, 112 Neb. 718, the judgment entered is modified as follows:

The penalty imposed under count one shall stand as the penalty imposed under both counts one and two and the penalty imposed under count three shall stand as the penalty imposed under both counts three and four; otherwise than as thus modified, the judgment of the district court is affirmed.

AFFIRMED AS MODIFIED.

JONATHAN E. FENTON, APPELLEE, V. E. L. C. GILMORE ET AL., APPELLANTS.

FILED OCTOBER 21, 1927. No. 24960.

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

Burkett, Wilson, Brown & Wilson and *M. O. Cunningham*, for appellants.

I. C. Buell, contra.

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

PER CURIAM.

It appearing from a reexamination of the evidence, upon consideration of the motion for rehearing in this case, that the action of the district court in confirming a sale of lands was in all respects regular and valid, the same is affirmed.

But it further appearing that the sheriff, in that portion of his return to the order of sale devoted to the disposition of the fund in his possession created by the sale, has inadvertently erred in his computation of interest, this case is affirmed, with directions to the trial court that the amount of interest upon the decree, at date of confirmation, be corrected to conform to the facts.

AFFIRMED.

P. F. PATTERSON, APPELLEE, V. NATIONAL CASUALTY COMPANY, APPELLANT.

FILED OCTOBER 21, 1927. No. 25018.

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

Jackson B. Chase, for appellant.

Anson H. Bigelow, contra.

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

PER CURIAM.

Under the wording of the policy in suit, the decision of this case is ruled by the principles announced by this court in *Beber v. Brotherhood of Railroad Trainmen,* 75 Neb. 183.

Therefore, the opinion of the commission to the contrary is withdrawn, the former judgment of the court is vacated and set aside, and the judgment of the district court

AFFIRMED.

PANTORIUM, APPELLANT, V. HARRY J. MCLAUGHLIN ET AL., APPELLEES: NICHOLAS OIL CORPORATION, APPELLANT.

FILED OCTOBER 21, 1927. No. 25860.

Taxation: GASOLINE TAX: INJUNCTION. In a suit to enjoin the collection of the tax of two cents a gallon upon dry cleaner's solvents as motor vehicle fuels under the act of March 31, 1925 (Laws 1925, ch. 172), defining motor vehicle fuels to include such fuels known as gasoline, naptha, benzine, benzol and such other volatile and inflammable liquid as may be produced or compounded for the purpose of, or as may be used for, operating or propelling motor vehicles, except the product commonly known as kerosene oil, kerosene distillate, crude petroleum, residuum, gas oil or smudge oil, the record showing that such solvents are capable of and can be used for operating or propelling motor vehicles, *held,* that such solvents are subject to

the tax complained of, and that in such circumstances the word "may" should be and is interpreted as the equivalent of "can."

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

Crossman, Munger & Barton, for appellants.

O. S. Spillman, Attorney General, T. J. McGuire, John P. Breen, Henry J. Beal, Monsky, Katleman & Grodinsky and *W. H. Herdman, contra.*

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

GOSS, C. J.

The final order here appealed from denied a permanent injunction to prevent the further imposition and collection of the tax of two cents a gallon provided by law upon motor vehicle fuels and imposed and collected upon a certain product known as a dry cleaner's solvent and used for cleaning clothing and other fabrics.

The suit was brought by plaintiff, for itself and for all others similarly situated, against executive officers charged with the collection and enforcement of the tax and against three typical oil companies as dealers within the law and engaged in distributing and selling petroleum products including dry cleaner's solvent, sometimes termed "standard dry cleaner's naptha" or "Stoddard solvent." Nicholas Oil Corporation, one of the defendants, filed a separate answer and cross-petition, taking substantially the same position as a dealer that plaintiff did as a large user of the product. These two parties are appellants. The others are appellees. The appellants, by appropriate allegations, challenged the tax on the ground that the solvents so taxed are not produced, distributed, sold or used for the purpose of operating motor vehicles as contemplated by the law, nor adaptable thereto.

Upon a full hearing, the trial court in a decree found "that the cleaner's naptha and cleaner's solvent is a volatile oil which 'may be used for operating or propelling mo-

tor vehicles,' and is not among the enumerated ones exempted from the tax, and that the statute fairly means and applies to all such oils not exempted as possibly can and might be used for the purpose named," and the court dismissed with prejudice the petitions of the appellants. This particular finding (defining the meaning of "may be used") and order constitute the sole error relied upon by the appellants.

In 1925 the legislature passed, and there was duly approved, the act, a part of which is now before us for interpretation. Laws 1925, ch. 172. The act defined dealers as those who import into the state, or who produce, refine, manufacture or compound motor vehicle fuel, any part of which is for use, distribution, sale or delivery in the state. It required appropriate accounting, inspection and monthly reports and required monthly payments by the dealer at the rate of two cents a gallon to the secretary of the department of agriculture, to be paid over by him to the state treasurer and placed by that officer in a fund to be known as the gasoline highway fund. After paying administrative sums appropriated, the balance is each month transferred to the department of public works, for the improvement, including construction and maintenance, of the state and federal highway system under the provisions of certain laws previously passed and approved. Section 1 of the act contained the following definitions:

" 'Motor vehicles' are hereby defined and include all automotive or self-propelled vehicles, engines or machines, movable or immovable, which are operated or propelled in whole or in part by internal combustion of one or more of the 'motor vehicle fuels' defined herein.

" 'Motor vehicle fuels' are hereby defined and shall include such fuels known as gasoline, naptha, benzine, benzol and such other volatile and inflammable liquid as may be produced or compounded for the purpose of, or as may be used for, operating or propelling motor vehicles except the product commonly known as kerosene oil, kerosene distillate, crude petroleum, residuum, gas oil or smudge oil."

The purpose of the act is to raise money to construct and maintain highways. Direct taxation upon the lands affected being undesirable as a means of raising the necessary revenue, the method of charging a tax upon personal property that might be used in the enjoyment of the highway, so constructed and maintained, was resorted to. This power was delegated by the people to the legislature by section 1, art. VIII of the 1920 Constitution of Nebraska. The tax is an excise tax. 2 Cooley, Constitutional Limitations (8th ed.) p. 988; *Flint v. Stone Tracy Co.*, 220 U. S. 108.

The sole question to be decided is the meaning of the word "may" in the act, as used in its setting in the definition of motor vehicle fuel, and as applied to the solvents used in their art by cleaners. Shortly stated, the appellants contend that the phrase "as may be used for" was intended by the legislature, and should be understood and interpreted, to mean the same as the phrase "is used for;" while appellees insist, and the trial court in substance found, that "may" there means "can" or "might." The dictionaries give the following definitions of "may:" Funk & Wagnalls New Standard Dictionary: "4. To have power or ability; be competent: used in this sense with the meaning *can*, a word frequently substituted." Webster's New International Dictionary: "As auxiliary followed by the infinitive without *to*, qualifying the sense of another verb by adding that of: Ability; competency; now oftener expressed by *can*."

It is a general rule that the intention of the legislature to tax a particular item of personal property must be carried forward into language which can be reasonably construed to effect that purpose. Otherwise the intention cannot be enforced by the courts. The provisions of such acts will not be extended by implication so as to include such property in an excise law. *Smietanka v. First Trust & Savings Bank*, 257 U. S. 602. Another general rule that must also be considered is that the courts should take words in their ordinary grammatical sense unless such a construc-

tion would obviously be repugnant to the intention of the legislature or would lead to some other inconvenience or absurdity. Sedgwick, Construction of Statutory and Constitutional Law (2d ed.) 220. Mr. Justice Brewer, writing the opinion for the court in *Treat v. White*, 181 U. S. 264, quoted that rule with approval, held that the language of the statute was clear, and applied the tax to an item found by the court to come within the definition of the terms of the statute because not exempted by the letter or spirit of the statute and because commonly and legally within the meaning of the statute.

The evidence shows that the solvents used by cleaners are not used generally, if at all, in motor vehicles; their cost is somewhat greater than that of gasoline; the advantage of their use is found in the greater safety to those using them, and in the lessened property hazard from explosions and from fire.

It is not necessary nor desirable to recite with extended detail the interesting testimony of the chemists showing the qualities of the various liquids involved in the evidence. It is sufficient to record that these solvents can be used as motor vehicle fuels just as kerosene can be so used, by employing gasoline as a starter of the motor and then by switching to the other fuel. In the present state of the art of their production, the objections to the use of these solvents as a fuel are the cost, the inconvenience of combining the use with that of gasoline, the resulting carbon deposit, and perhaps also the lesser power produced.

In the statute, gasoline, naptha, benzine and benzol were definitely classified as motor vehicle fuels; kerosene oil, kerosene distillate, crude petroleum, residuum, gas oil or smudge oil were referred to as fuels and were expressly excepted from the list of fuels to be included as motor fuels; and any other fuel, if a volatile and inflammable liquid, and if produced or compounded for the purpose of, or if it may be used for, operating or propelling motor vehicles, was classified as a motor vehicle fuel. If all the liquids excepted in the definition could, like kerosene, be used in en-

gines, then the definition might furnish some special and internal aid to determine the meaning of the legislature in the matter under consideration. But while kerosene has been used and can be used as a motor vehicle fuel, crude petroleum, residuum, gas oil and smudge oil cannot be so used. The testimony shows that these cleaner's solvents were not produced and put on the market until January, 1925. The act of the legislature taxing motor vehicle fuels was approved March 31, 1925. There is nothing to show whether they were on the market here at that time. Even if the legislature knew of these solvents and of their usable qualities as motor vehicle fuels and could have exempted them from the tax as they exempted kerosene oil, it is sufficient to say that they did not list them among the exceptions. "It is well settled that an exception in a statute amounts to an affirmation of the application of its provisions to all other cases not excepted and excludes all other exceptions." 25 R. C. L. 983, sec. 230. The cleaner's solvents are inflammable liquids and under the facts are capable, under conditions heretofore named, of being used for the purpose of operating or propelling motor vehicles.

In passing, it may be of value to call attention to certain questions submitted by the house of representatives to the supreme judicial court of Maine, and to the opinion of the justices in answer thereto, relating to a tax on all gasoline and other internal combustion fuel, except kerosene, sold within the state. The answer stated comprehensively that such an excise tax was legal; and in answer as to a certain inquiry respecting exemptions, the opinion says:

"But in our view of the nature of the tax, the use to which the gasoline or other fuel may be put by the purchaser is not a factor in the problem; whether upon land or water, the highway or the farm is entirely beside the question." *In re Opinion of the Justices*, 123 Me. 573, 581.

So, we are thrown back upon the natural meaning of the words used by the legislature in our search for the proper interpretation of the words "as may be used." To find this authoritative meaning, we rely on the current dictionaries.

The natural meaning of the word "may" as used in the act under consideration is that of power, of ability, of competency. It is used in this sense with the meaning of "can" and the latter word is frequently substituted for it. And so, when the legislature passed the act listing as taxable "such other volatile and inflammable liquids * * * as may be used for operating or propelling motor vehicles," and did not include cleaner's solvents among the exceptions, we are of the opinion that these solvents should be classified among the taxable fuels for the reason that they are capable of use or can be used in operating such vehicles. If the legislature had intended to exempt these products, theoretically and legally at least it would have done so. This seems plain to us, and as a coordinate branch of the state government we cannot, under the guise of statutory interpretation, legislate for it. If this interpretation work a hardship or be considered erroneous, the next or any succeeding legislature will have the power to amend the statute.

For the reasons set forth, the judgment of the district court is

AFFIRMED.

FLORA BULLOCK ET AL., APPELLEES, V. CITY OF LINCOLN ET AL., APPELLANTS.

FILED OCTOBER 21, 1927. No. 25590.

Railroads: VIADUCTS: ASSESSMENTS. The city of Lincoln by means of special benefit assessments on lots in an improvement district cannot shift from a railroad company to the lot owners any part of the cost of a viaduct over a street, where the city charter requires the railroad company, if directed by a valid order, to construct the viaduct at its own expense, though it had the senior way.

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

C. Petrus Peterson, Charles R. Wilke and *R. A. Boehmer,* for appellants.

Mann & Whitten, contra.

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

ROSE, J.

This is a suit in equity for an injunction preventing the city of Lincoln from collecting special assessments to pay a portion of the cost of opening Thirty-fifth street northward 200 feet through the right of way of the Missouri Pacific railroad to the south end of Idylwild drive, where the railroad track ran east and west on an embankment 17 feet higher than the surface of those streets. The improvements consisted of an opening north and south through the railroad embankment, an abutment at each side of the opening, a railroad bridge or viaduct over the extension of Thirty-fifth street and the paving thereof and the laying of sidewalks through the railroad right of way. Flora Bullock and Edna D. Bullock, plaintiffs, own lots in Meadow Lark addition within the improvement district and these were assessed for special benefits. Plaintiffs seek relief also for other lot owners similarly situated.

The petition in equity contains pleas to the effect that real estate of plaintiffs was illegally assessed for a railroad viaduct which the railroad company should have been required to construct at its own expense and that the city was without power to impose any part of that burden on plaintiffs by means of assessments for special benefits. An injunction was sought on the ground that the assessments were void.

The suit was defended on the theory that the city proceeded regularly under its charter, which contains provisions for the creation of improvement districts, for the opening of streets and for the assessment of lots especially benefited. The facts necessary to a determination of the controversy were well pleaded on both sides.

Upon a trial of the issues the district court made findings in favor of plaintiffs and granted the prayer of their petition. The city appealed.

The power of the city to assess the property of plaintiffs for special benefits arising from the improvements is the question presented. The solution depends on the proceedings of the city and the provisions of the city charter. Conditions calling for the improvements were as follows: Thirty-fifth street, running north, terminated at right angles with the railroad right of way in Peck's Grove, a residential district. Idylwild drive, running south, terminated at the north side of the railroad right of way, opposite the north end of Thirty-fifth street, in Woods Brothers addition, also a residential district. Between the north end of Thirty-fifth street and the south end of Idylwild drive, a distance of 200 feet, were the railroad right of way, the railroad embankment 17 feet high, and the railroad track. A better and safer way to and from different parts of the city was obvious. The extension of Thirty-fifth street to Idylwild drive required a viaduct.

The power of the city to condemn or purchase the necessary land and to open the street through the railroad right of way and to require the construction of a bridge or viaduct for an overhead railroad track is not open to serious controversy, but authority to assess the lots of plaintiffs for special benefits is a different question. The railroad company owned the fee to the strip of land 200 feet wide between Thirty-fifth street and Idylwild drive.

In outline the city proceeded as follows: August 16, 1920, creation of improvement district, the cost of the improvements to be assessed against benefited realty therein; January 31, 1921, improvements ordered; June 23, 1922, agreement by the city to purchase and by the railroad company to sell the fee to a strip of railroad land 66 feet wide and 200 feet long between Peck's Grove and Woods Brothers addition, including the land for the extension of Thirty-fifth street, subject to an easement for railroad purposes, the city to pay in part consideration $10,000 to the railroad company and the latter to make at its own expense the contemplated improvements without liability for assessments for special benefits; August 28, 1922, delivery and accept-

ance of deed containing the terms of purchase and sale; September 29, 1924, improvements costing the railroad company over $23,000 accepted by the city; January 19, 1925, real estate in the improvement district assessed for special benefits to the extent of $5,000.

Were the assessments for special benefits valid? The city charter provides:

"The city council shall have power, by ordinance, to create public improvement districts for the opening, widening, or enlarging of any street, alley, boulevard, or public way or for the establishing or enlarging of any park or parkway within the city. Such special improvement district having been created, the city council may acquire, by purchase or by condemnation proceedings, the necessary lands, lots or grounds to carry out the purposes of the district. The cost thereof may be, in whole or in part, assessed proportionate to benefits, on the property specially benefited." City Charter, art. VIII, sec. 4½.

Another section of the charter relating to public improvements and applicable to viaducts contains, among other provisions, the following:

"The city council shall have power, by ordinance, to require any company owning or operating any railroad track on or across any public way to erect, construct, reconstruct, complete, and keep in repair any viaduct on or along such public way, under or over such track including viaduct approaches, as may be declared necessary for public safety. * * * Whenever the construction of any viaduct, including its approaches, over any street or under any track, or the elevation of any railroad track within the city limits, be by ordinance declared necessary for public safety and protection, the city council shall provide for appraising, assessing and determining the damages that may be caused to any property by the construction thereof. * * * It shall be the duty of any railroad company or companies on being required as herein provided to construct, reconstruct, erect or repair any viaduct or to elevate any railroad track, to proceed with the work within the time and in the manner

required by the city council, and it shall be a misdemeanor for any railroad company to fail, neglect, or refuse to perform such duty. * * * The city council shall have power whenever any railroad company shall fail, neglect, or refuse to erect, construct, reconstruct, or repair any viaduct or viaducts, or to elevate any railroad track, after being required so to do as herein provided, to proceed with such work by contract or in such manner as may be provided by ordinance and assess the cost thereof against the property of the railroad company or companies required to do the same." City Charter, art. VIII, sec. 2.

The city relies on provisions relating to the opening of streets to justify the municipal proceedings and the assessments, while plaintiffs, to sustain the injunction, invoke that part of the charter authorizing the city to impose on railroad companies the burden of constructing at their own expense viaducts at street crossings.

The provisions relating to viaducts are special in character and are not controlled by the section authorizing the opening of streets. A general plan to unite in a single scheme the opening of a street and the constructing of a viaduct above it does not relieve the railroad company from liability for expenses of the latter, if imposed by a proper exercise of police power, nor transfer that burden to property owners in the improvement district. The overhead structure, 17 feet high, resting on abutments 66 feet apart is a viaduct within the meaning of the city charter. It answers every purpose of the municipal law relating to the construction and the maintenance of viaducts. The evidence will admit of no other conclusion. At the intersection a better and safer way to and from different parts of the city was necessary. Public safety required the viaduct. It is argued, nevertheless, that the railroad company had the senior way over the land needed for the street and that it could not be compelled to construct the viaduct at its own expense because Thirty-fifth street had not been opened through its right of way, citing *State v. Chicago, R. I. & P. R. Co.*, 93 Neb. 263, wherein it was held:

"The city of Lincoln cannot compel a railroad company to construct a viaduct over its property occupied by its station and switching tracks where there is no public way or street."

The decision in the case cited was qualified as follows:

"We do not at this time determine the right and power of the city to now open the street over these station grounds by condemnation proceedings, as that question is not presented by the record." *State v. Chicago, R. I. & P. R. Co.*, 93 Neb. 263.

That decision, therefore, left open the question now under consideration.

The city of Lincoln by means of special benefit assessments on lots in the improvement district could not shift from the railroad company to the lot owners any part of the cost of the viaduct, since the city charter required the railroad company, if the city proceeded lawfully and regularly, to construct the viaduct at its own expense. If the scheme of, and the course pursued by, the city were illegal, authority to make the assessments did not exist. In the present instance the city, before the viaduct was constructed, created the improvement district, purchased land for the purpose of extending Thirty-fifth street and ordered the opening thereof through the railroad right of way. The nature of the overhead structure as a viaduct was not changed by proceedings and contracts calling it a "bridge" or "a part of an improvement for the opening of a street." The deed from the railroad company to the city contained a stipulation that part of the consideration for the payment of $10,000 was the construction of abutments and a bridge for the railroad track over the extension of Thirty-fifth street. The evidence shows that the property of plaintiffs was assessed to pay a portion of the cost of the viaduct, a burden not within the power of the city to impose. The injunction, therefore, was properly allowed.

AFFIRMED.

ALBERT W. HILL v. STATE OF NEBRASKA.

FILED OCTOBER 21, 1927. No. 25810.

1. **Homicide:** AFFIRMANCE. A defendant was charged with murder in the first degree. He admitted that he shot the decedent three times with a shotgun. The record shows that from the effects of the shooting the defendant's victim instantly died. The jury imposed a sentence of life imprisonment. The record presents neither mitigating circumstances nor reversible error. The judgment is affirmed.
2. **Witnesses.** Where a legal foundation is not laid for the introduction of character witnesses in a criminal case, it is not error for the court to deny the offer of such testimony.
3. **Criminal Law:** ARRAIGNMENT: WAIVER. In a criminal case, where a jury was regularly impaneled and sworn and the defendant failed to plead to the information, and where the court did not enter a plea of "not guilty" in his behalf and the defendant went to trial without being arraigned, and failed to demand a formal arraignment, *held*, that such defendant waived such right under section 10117, Comp. St. 1922, as amended by chapter 105, Laws 1925.
4. ———: QUESTIONS FOR JURY. It is elementary that disputed questions of fact, and of the credibility of witnesses as well, are for the jury. *Mathews v. State*, 111 Neb. 593.
5. **Evidence** examined, discussed in the opinion, and *held* that the jury's verdict of murder in the first degree is amply supported by the evidence.

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

Allen G. Fisher and *Samuel L. O'Brien*, for plaintiff in error.

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

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

DEAN, J.

August 30, 1926, Albert W. Hill, defendant, was informed against by the county attorney in and for Sheridan county and there charged with having unlawfully and maliciously shot Neil O'Blenness with a shotgun, on July 20, 1926, and

that, from the wounds so inflicted, Neil O'Blenness instantly died. The jury found the defendant guilty of murder in the first degree and fixed the penalty at imprisonment for life. Defendant prosecutes error.

The defendant is 41 and his wife is 34 years of age. Their home has been in Sheridan county about 8 miles south of Gordon since 1915, and elsewhere in the same county ever since 1909, when defendant there homesteaded a tract of land. O'Blenness was a young unmarried man, athletic, congenial and of fine appearance. At his death he was 21 or 22 years of age and for about a year before the defendant's encounter with him he worked as a hired man on defendant's ranch. The record discloses that the defendant suspected O'Blenness of having disturbed his marital relations. It was solely out of this suspicion that the trouble arose, out of which O'Blenness lost his life.

In defendant's brief it is argued that he "was not jealous in the least." But the argument does not appeal to us. It does not appear to fit the fact. One of the witnesses testified that, when he asked the defendant if he had ever found his wife and Neil in a compromising position, he replied: "No; that is the hell of it; they were too slick for me." To another witness the defendant said he "had never seen or caught them in any compromising position, and didn't that evening."

The record throughout goes to show that jealousy was the motive that actuated the defendant in his murderous assault upon O'Blenness. And it is explicitly disclosed that this was the only trouble they ever had. Whether O'Blenness was guilty of improper conduct with the defendant's wife is not, of course, the question that is before us, other than as it serves, if it may, to point out the motive for the commission of the murder with which the defendant is charged. The vitally important point in this suit for the jury to determine from the evidence was whether O'Blenness was armed at the time of the shooting or whether the defendant had reasonable grounds to believe that he was armed.

The substance of the defendant's material evidence, in respect of the efforts he made to detect the supposed infidelity of his wife, so as to verify his suspicions, is outlined in the discussion of the evidence which follows:

It appears from the defendant's evidence that, in the afternoon of July 20, 1926, he left the ranch house in his car and drove a mile or two away into a pasture field, and there he left his car in a secluded spot where it could not be seen from any highway. But before he left the ranch house he deceptively told his folks that he would not return until late at night or perhaps in the early morning. He testified:

"I swung over in that pasture and left my car and come back to the house and got in the granary. I wanted to see what I could see. And about 5 o'clock my little nephew had been sledding corn, and he came to the house with his team, and drove up to the north window and says to somebody in the house, he says, 'Is Uncle Albert (defendant) gone?' "

After putting his team away this young nephew went to the house and got some smoking tobacco from Mrs. Hill, as requested by O'Blenness, and took it to him in the field, and soon afterward the nephew and O'Blenness returned to the farm yard together, and O'Blenness, after putting his team in the stable, went into the house. At this time the defendant's wife and her mother were both in the yard, but shortly afterward his wife also went into the house. The defendant testified that, as his wife approached the house, O'Blenness opened the door for her and closed it when she entered. Soon afterward defendant saw a red dress that his wife had been wearing "flash through the window," and this appeared to him to be a circumstance so suspicious that he left his hiding place in the granary, and, going up to the house, he discovered that his wife "was practically standing in the bedroom door; she was just coming out," and O'Blenness came out right behind her. The defendant then promptly struck his wife in the face with his clenched fist and he said the blow gave her a black

eye. A fist fight then began between O'Blenness and the defendant, in which the defendant said he did not know which of the belligerents got the worst of it, but his wife testified that her husband got the worst of it. After the fight was over the defendant told O'Blenness "to get off the place and stay off;" to which O'Blenness rudely replied that "he would go when he got d——n good and ready;" and then, according to the defendant's evidence, he said, "I'll get you," and started toward the pantry. The defendant testified that he knew O'Blenness had a gun in the pantry, and he then went to the garage and got his shotgun and returned toward the ranch house; that O'Blenness came around the house with a gun in his hand, and that he, the defendant, "pulled up like this and shot." The defendant further testified:

"He run when I shot him, and I didn't know, when I shot him I couldn't tell where I hit him or not, he didn't stumble or flinch or anything, and I couldn't tell whether any shot actually hit him, and I stood there for a second, and then walked around the south side of the house to see where he was, and he was out here towards this corncrib, before he crawled over the fence, and he pointed the gun again at me, like that (indicating), and when I pulled up he kind of turned sideways to me, and I shot again at him then; and he jumped over the fence, and I thought he was going, but he turned round again and acted like he was going to shoot, so I up and shot him again. When he seen I was going to shoot again, he turned and acted like he was going to run, and I shot him the third time and he throwed up his hands and hollered, 'Oh!' And I turned and walked back out towards the hen-house where my wife and her mother was, to explain it to her, to try to pacify her. I never saw O'Blenness fall."

The defendant testified in respect of the manner in which he disposed of the body of O'Blenness. It appears that he waited until far into the nighttime and that he then drove to the place where the slain man lay and alone he loaded the body into his car and, at the hour of midnight,

he drove to an isolated spot in a pasture field about six miles from the place where O'Blenness fell and there he dug a shallow trench in the sand and into this opening he threw the body of the dead man and covered it over with sand. Several days afterward, upon the request of some of his neighbors, to whom he had related the facts, and of certain of the county officers, he voluntarily went with them to the place of O'Blenness' burial and the body was exhumed.

Defendant's wife testified that when her husband came from the granary to the house, as he testified, she was coming out of the door, and that defendant immediately said: "What are you doing?" And that he then struck and pushed her about, and when the men began the fight, above referred to, she ran away and saw no more of it. When her husband found that Neil was dead, according to her evidence, he brought his hat and his revolver into the house, but whether it was the revolver in evidence she did not know, but testified that it looked like it. Nor did she know what her husband did with it. On the cross-examination by the state, she testified that, on the evening of the tragedy, O'Blenness embraced her. And the state inquired: "Q. And what were you doing? Were you consenting to it? A. No. Q. Well, what were you doing, then? A. I was pushing him away; and I got out of the bedroom." On the recross-examination she testified: "Q. Now, had O'Blenness ever tried to embrace you before? A. Yes. Q. You were on friendly terms with him, weren't you? A. Yes." She further testified that O'Blenness was kind-hearted and never came into the house without talking awhile with her or her mother, but that they were nothing more than friends. This was the sum of her evidence in respect of O'Blenness' conduct toward her.

Did Neil O'Blenness have a gun in his hand at the time of the tragedy, as the defendant testified? Or did the defendant have reasonable grounds to believe that O'Blenness then had a gun in his hand? This vitally important inquiry was fairly put up to the jury for its determination

under the court's instructions which correctly stated the law applicable to the fact. After O'Blenness received the first shot just as he turned and fled, would the jury have been justified in the belief that O'Blenness, had he been armed, would have taken at least one shot or perhaps more than one at his assailant? In view of the verdict this, under the evidence and the court's instructions, must have been the jury's view of this important feature. The defendant himself testified that he fired his shotgun three times at O'Blenness. And it plainly appears from his evidence that he fell, mortally wounded, when he was struck by the third shot. He further testified that, as soon as he fired the first shot, O'Blenness turned and ran away from him, and that he continued to run until the last shot was fired. In fact, O'Blenness ran so fast from his assailant that he was not sure for some time whether the last shot had killed him. And, incidentally, it may be observed that neither the defendant nor any other witness testified that O'Blenness fired a single shot at the defendant. But, on the contrary, there is the evidence of three disinterested witnesses, and this is presently discussed somewhat in detail, who testified that the defendant talked severally to them within a day or two after the shooting, and informed them that O'Blenness was not armed and that he began to run away as soon as he fired the first shot, and that he continued to run until the last shot was fired, when he fell.

One of the three witnesses to whom the defendant freely talked the second day after the tragedy was called as a witness by the state, and he testified on the direct examination that the defendant told him that, just before he fired the first shot, "Neil came out of the house and started towards the barn, and just as Neil turned his head to look at him, he shot. Q. Now, just a minute: Did he (defendant) say anything about Neil having anything in his hands? A. I asked him if Neil had anything in his hands, and he said, 'No; he didn't have anything in his hands; he (O'Blenness) didn't think he needed it; he thought he had me

bluffed.'" This witness, having joined in a search of defendant's premises, a day or two after the shooting, further testified:

"Q. Did you make any search there for any other weapons that night? A. No; I didn't make any search at all; but Mr. Hill voluntarily handed me a gun that he got up on a shelf in the pantry, a small revolver, that he said belonged to Neil O'Blenness. Q. And what did he say about the gun? A. I asked him if there was any shells for it, and he said, 'No; there wasn't any shells; hadn't been any shells.' Q. Have you that gun in your possession yet? A. I turned the gun over to the sheriff." The shotgun and revolver are with the record.

Another state witness testified on the direct examination that he talked with the defendant a few days after the tragedy, and that he said to him: "Well, Neil was a small man, couldn't you handle him? And he said, 'No; I could in my younger days;' he said, 'We had a pretty hard fight and I ordered him off the place.'" This witness testified that defendant told him that after O'Blenness fell he "'turned round and went back where my wife and mother-in-law was,' and his mother-in-law said something about not shooting, there was to be no shooting around there, and he said, 'I wanted to explain everything to her mother, and my wife got up and denied everything that I said, and her mother, at first, wouldn't believe me, but I finally convinced her mother that Neil was crooked and hardboiled.' And he said, 'I wanted to show Neil that I was just as hardboiled as he was.'"

In respect of the comparative prowess of the defendant and O'Blenness as fighting men, the defendant elsewhere in the record testified that he weighed about 145 pounds, and that O'Blenness weighed 165 or 170 pounds, and that "he was the best guy on his feet I have ever seen."

A witness for the state testified on the direct examination that the defendant told him that, when he picked up his shotgun, Neil's hands were empty, and that "he didn't have anything in his hands, and just before he shot he said Neil

O'Blenness was heading around when he shot him," and that he, the defendant, "wanted to show Neil that there was guys just as tough in this world as he was; that if there was anything wrong his wife was to blame, and if there wasn't he (defendant) ought to be in prison for shooting him." This witness saw O'Blenness' body at the undertaker's, about a week after he was killed, and he testified that "he was pretty well plastered with shot. The main charge looked like it took him right around the heart," and there were a good many shots in his back. And another witness testified:

"Q. In your conversation with Mr. Hill at his home the evening you were down there, did he say anything about whether or not O'Blenness had anything in his hands when he shot him with the shotgun? A. He said he was headed for the barn, apparently to take care of his team, and he apparently had nothing with him."

The witnesses, in respect of the defendant's statements which were made to them, severally testified that they were voluntarily made by defendant, and that they were not induced by threats nor by promises of leniency in respect of lawful punishment.

The defendant contends that he was not arraigned nor did he plead, and that error was thereby committed. In view of chapter 105, Laws 1925, reversible error cannot be predicated on this assignment. Chapter 105 follows:

"The accused shall be arraigned by reading to him the indictment, unless, the reading shall be waived by the accused, by the nature of the charge being made known to him, and he shall then be asked whether he is guilty or not guilty of the offense charged. If the accused appear in person and by counsel and goes to trial before a jury regularly impaneled and sworn he shall be deemed to have waived arraignment, and plea of not guilty deemed to have been pleaded." Section 10117, Comp. St. 1922, as amended by chapter 105, Laws 1925.

Defendant requested the court to give the following instruction:

"You are instructed that in weighing the testimony greater care should be used in relation to the testimony of persons who are interested in, or employed to find, evidence against the accused than in other cases, because of the natural and unavoidable tendency and bias of mind of such persons to construe as evidence against the accused, and disregard everything which does not tend to support their preconceived opinions of the matter in which they are engaged."

We do not think the requested instruction is applicable to the facts. And it is well settled that the caution that is to be observed in weighing the testimony of persons "who are interested in, or employed to find, evidence against the accused," depends largely on the facts and circumstances of the individual case, and rests largely in the discretion of the trial court. The presumption will not, of course, be indulged that the evidence of the county judge and of the sheriff was biased until the contrary is shown. 16 C. J. 1014. And, besides, there is nothing in the record going to show that any of the witnesses were "employed to find evidence against the accused."

The court, of its own motion, very properly gave this instruction:

"Although you may believe from the evidence that at the time of the homicide in this case the defendant, on account of the friendship existing between his wife and the deceased, was jealous of the deceased, yet such jealousy, or friendship between his wife and the deceased, would constitute no defense and would be no justification for taking the life of the deceased."

The defendant offered and the court refused to give the following instruction:

"You are instructed that deliberation means the act of deliberating or weighing or considering the reasons for or against a choice or measure. In the sense which the word is here used, an act is done deliberately, or with deliberation when it is done in cool blood and not under the influence of violent passion, suddenly aroused by some real or supposed

grievance. A person who does an act, not in the heat of sudden passion, but after having coolly weighed or considered the mode and means of accomplishment, does it deliberately."

In view of the instruction given by the court of its own motion on the subject of deliberation and premeditation, we do not think the defendant can properly take exception to the refusal to give the offered instruction. In the court's instruction, last above referred to, the jury were instructed, *inter alia*, that: "It is sufficient if there was such design and determination to kill distinctly formed in the mind before or at the time the blow is struck or the fatal shot is fired; and in this case, if the jury believe from the evidence, beyond a reasonable doubt, that the defendant feloniously, purposely, and of his deliberate and premeditated malice, shot and killed the deceased in manner and form as charged in the information, and that before or at the time the shots were fired, the defendant had formed in his mind a wilful, malicious, deliberate and premeditated design or purpose to take the life of the deceased, and that the shots were fired in furtherance of that design or purpose, and without any justifiable cause or legal excuse therefor, then the jury should find the defendant guilty of murder in the first degree." We do not think argument is necessary to show the sufficiency of the instruction. The argument for the defense that premeditation and deliberation on the part of the defendant were not shown is not supported by the evidence, and this question, with others pertaining to the facts involved in this case, was properly submitted to the jury for their determination. *Bartlett v. State*, 115 Neb. 148, and cases there cited.

Counsel informed the court that he had three character witnesses, but the court denied the offer of each witness on the ground that it was not shown that they were qualified. Upon examination of the record, we conclude that, in excluding the evidence so tendered, the court did not err, from the fact that it was not shown that the witnesses were qualified to testify in respect of general reputation.

It appears that the defendant signed a written statement wherein some of the facts were connected with the circumstances which attended the killing of O'Blenness were related. The statement was handed to the witness while he was on the witness-stand and he was interrogated in respect of certain material matter contained therein. But in respect of the matter on which he was so interrogated no new material evidence appears to have been developed. Practically all of the material evidence so elicited was a repetition of the evidence of all the persons with whom the defendant had talked within a day or two after the killing and which is hereinbefore set forth. In this view of the fact, reversible error cannot be predicated upon the defendant's examination in respect of matter contained in the written statement.

In a criminal case, where a jury were regularly impaneled and sworn and the defendant failed to plead to the information, and where the court did not enter a plea of "not guilty" in his behalf and the defendant went to trial without being arraigned, and failed to demand a formal arraignment, held, that such defendant waived such right under section 10117, Comp. St. 1922, as amended by chapter 105, Laws 1925.

On the merits, as noted in the opinion, the defendant's argument now contradicts the statement of not less than three disinterested witnesses who testified in respect of statements voluntarily and severally made by him to them shortly after the death of O'Blenness, as to whether O'Blenness was or was not armed when he was killed. But this question, as of all others involved here, was submitted to the jury, under proper instructions, and the jury as triers of fact found against the defendant and for the state. It is elementary that disputed questions of fact, and of the credibility of witnesses as well, are for the jury. *Mathews v. State,* 111 Neb. 593. The record shows that the verdict is amply supported throughout by the evidence submitted on the part of the state, hence it will not be here disturbed by this court.

Defendant complained that the regular panel of the jury was irregularly selected, but he made no motion that the panel be quashed, and he waived his fifth, sixth, and eighth peremptory challenges. It follows that he thereby accepted the jury as being satisfactory to him. Reversible error cannot be predicated on this assignment. "If a party expressly accepts as satisfactory the jury as finally impaneled, he waives any prior objection to the action of the court in overruling a challenge for cause, * * * or irregularity in the selection or impaneling of the jury." 35 C. J. 371, sec. 410.

Other assignments of alleged error are pointed out which we do not find it necessary to consider. The defendant was given a fair and impartial trial. The facts were all fairly presented to the jury and the verdict is amply supported thereby. The judgment is therefore in all things

AFFIRMED.

ERNEST QUESNER, APPELLANT, V. ROSIE NOVOTNY, APPELLEE.

FILED OCTOBER 21, 1927. No. 25649.

1. **Mortgages**: ACKNOWLEDGMENT. A notary public who is likewise an officer and stockholder of a corporation is not disqualified from taking an acknowledgment to a mortgage in which the president of the corporation, in his individual capacity, is mortgagee, if the corporation as such is not interested in the mortgage.
2. ———: FILING CLAIM AGAINST ESTATE. Where a mortgagee commences an action to foreclose his mortgage after the death of the mortgagor, and thereafter files a claim for the mortgage debt against the estate of the mortgagor and the same is conditionally allowed with leave to take further proof after the mortgage security is exhausted, for the purpose of determining the amount due, such action does not preclude the mortgagee from prosecuting his action of foreclosure.
3. **Usury**: MORTGAGES. "A mortgage which, by its express terms, requires the mortgagor to pay the maximum legal rate of in-

terest on the debt which it secures, and, in addition, to pay the taxes upon the mortgagee's interest in the mortgaged premises is 'usurious.'" *Stuart v. Durland*, 115 Neb. 211.

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

George W. Wertz, W. M. Cain and *Frank Dolezal*, for appellant.

A. R. Oleson, contra.

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

DAY, J.

Ernest Quesner brought this action against Rosie Novotny and certain minor heirs of Emil and Rosie Novotny, and Rosie Novotny as executrix, to foreclose a real estate mortgage upon 160 acres of land in Cuming county. The petition was in the usual form. The answer interposed three defenses: First, that the mortgage was void because given upon a homestead and the acknowledgment taken before an officer and stockholder of the Howells State Bank, which, it is charged in the answer, was the real party in interest; second, that an action at law had been commenced to collect the debt secured by the mortgage; and, third, that usury had been exacted.

This case was before us on a former occasion, being reported in 113 Neb. 827, in which the judgment of the district court, denying a foreclosure of the mortgage, was presented. At the outset, it was discovered the plaintiff had failed to introduce any evidence, in the trial court, sustaining the allegations that no proceedings at law had been commenced for the recovery of the debt. This was a necessary part of his proof under the statute and repeated decisions of this court. In the interest of justice, we remanded the cause to the district court to permit the plaintiff, if he chose, to adduce proof in support of his allegation that no proceedings at law had been

commenced to collect the debt. This additional proof has been taken and we have the case now before us for consideration, *de novo*, upon all of the issues.

The record shows that on January 22, 1921, Emil Novotny, his wife, Rosie Novotny, and Thomas Novotny executed a note to the plaintiff for $10,000 payable one year after date with interest at the rate of 10 per cent. per annum from date until paid. On the same day Emil Novotny and his wife, Rosie, executed a mortgage in favor of plaintiff upon a quarter section of land in Cuming county to secure this note. The mortgage also covered another note for $2,200, but the latter note was paid and is not in controversy here. The mortgage was given upon the homestead of Emil Novotny and his wife. On March 10, 1921, Emil Novotny died leaving surviving him his widow, Rosie, and six minor children, named as defendants.

The mortgage was acknowledged before L. R. Coufal, a notary public who at the time was an officer and stockholder of the Howells State Bank. It is the contention of the defendant that, while the note and mortgage ran in favor of the plaintiff, the bank was the real party in interest and therefore Coufal was disqualified from taking the acknowledgement and the mortgage was void. We have frequently held that—"A mortgage upon a homestead, acknowledged by a notary who was likewise an officer and stockholder of the corporation, mortgagee, is invalid." *Chadron Loan & Building Ass'n v. O'Linn*, 1 Neb. (Unof.) 1; *Horbach v. Tyrrell*, 48 Neb. 514; *Trevett, Mattis & Baker Co. v. Reagor*, 112 Neb. 470; *Anderson v. Cusack*, 115 Neb. 643. We think, however, the proofs in the present case failed to show that the bank was the real party in interest in the note and mortgage. It is true that Novotny was owing the bank, but the testimony shows the mortgage was given to borrow money from Quesner to pay off his debts to the bank. The defendants, in an argument, cast aspersion upon the *bona fides* of the transaction as being a personal loan made by plaintiff, but we think the evidence fully sustains plaintiff's theory that it was a personal loan made

by him to Novotny, in which the bank had no interest. Under the facts disclosed by the record, Coufal was a qualified officer to take the acknowledgment to the mortgage.

It is next urged by defendants that plaintiff cannot prosecute proceedings to foreclose the mortgage because he has pending, in the county court, a claim involving the same debt, for allowance against the estate of Emil Novotny. The argument is made that, having elected to proceed against the estate, plaintiff thereby waived his mortgage security. The question presented involves an examination of the facts on this phase of the case.

As before stated, the mortgage was executed to plaintiff January 22, 1921. Novotny died March 10, 1921. On March 18, 1921, Quesner sold the note and mortgage to the Howells State Bank, which on June 22, 1921, filed a claim against the Novotny estate based on this note. This claim was withdrawn by the bank. Quesner repurchased the note and mortgage from the bank on March 27, 1922, and a few days later commenced a foreclosure proceeding. The record fails to show the date of the filing of the original petition, but an amended petition was filed May 6, 1922. On December 18, 1922, Quesner filed a claim against the Novotny estate, based on the $10,000 note, in which he stated, in substance, he had instituted proceedings to foreclose the mortgage, and that the district court had held the mortgage was void and of no effect, but he intended to appeal.

Objections were filed to the allowance of the claim by Rosie Novotny, executrix, upon the grounds that it was filed too late; and by commencing an action to foreclose the mortgage, he had elected to proceed against the security and is now estopped from making any claim against the estate. The county court overruled the objections and allowed the claim as a contingent claim for future determination as to the amount due thereon, after the claimant shall have exhausted his mortgage security upon the real estate belonging to Emil Novotny. Do these facts preclude the plaintiff from proceeding to foreclose his mortgage? Under the

general title, "Foreclosure of Mortgages," section 9210, Comp. St. 1922, it is said:

"After such petition shall be filed, while the same is pending, and after a decree rendered thereon, no proceedings whatever shall be had at law for the recovery of the debt secured by the mortgage, or any part thereof, unless authorized by the court."

Section 9212 reads as follows: "Upon filing a petition for the foreclosure or satisfaction of a mortgage, the complainant shall state therein whether any proceedings have been had at law for the recovery of the debt secured thereby, or any part thereof, and whether such debt, or any part thereof, has been collected and paid."

Section 9213 provides: "If it appear that any judgment has been obtained in a suit at law for the money demanded by such petition, or any part thereof, no proceedings shall be had in such case, unless, to an execution against the property of the defendant in such judgment, the sheriff or other proper officer shall have returned that the execution is unsatisfied in whole or in part, and that the defendant has no property whereof to satisfy such execution except the mortgaged premises."

It will be observed that these several provisions of the statute are for the protection of the debtor and to prevent the probability of two judgments being rendered against him for the same debt. In none of these provisions, however, is the mortgage security released. In one of them, where a judgment has been obtained, it is necessary that the judgment creditor exhaust his legal remedy by execution before proceeding to foreclose the mortgage.

Under the facts in this case, plaintiff commenced his action of foreclosure before filing his claim in the county court, and in so doing disclosed the full facts. The county court has not allowed the claim as a direct claim against the estate, but has left it for determination after the mortgage security has been exhausted. In no proper sense has the claim been allowed. We see no objections to this procedure, as the rights of defendants are fully protected.

The filing of the claim was a precautionary measure to prevent the limitation fixed by the court from expiring and also to guard against the possibility that the mortgage would ultimately be declared void.

In *National Life Ins. Co. v. Fitzgerald,* 61 Neb. 692, the court had before it a situation somewhat analogous to this case and it was held: "A mortgagee may, after the death of the mortgagor, institute a suit to foreclose his mortgage, and the mere filing in the county court of the mortgage debt as a claim against the decedent's estate while the foreclosure suit is pending will not operate as a release or discharge of the mortgage." The facts in the present case bring it within the reasoning of the above quoted rule. Under the facts of this record and the law, as we understand it, the plaintiff is not precluded from prosecuting his action to foreclose the mortgage.

It is also urged by defendants that the contract was usurious, and if foreclosure is allowed the amount should be for the face of the loan only. The note called for the payment of 10 per cent. from date until paid. The mortgage contained a clause as follows:

"It is expressly provided and agreed that the mortgagor herein shall and will pay all taxes levied upon this mortgage, or the debt secured thereby, together with any other taxes or assessments which may be levied under the laws of Nebraska against the said mortgagee or the legal holder of the said principal note * * * on account of this indebtedness."

The precise question here presented has been recently determined in *Stuart v. Durland,* 115 Neb. 211. In that case it was held: "A mortgage which, by its express terms, requires the mortgagor to pay the maximum legal rate of interest on the debt which it secures, and, in addition, to pay the taxes upon the mortgagee's interest in the mortgaged premises is 'usurious.'" The contract being usurious, the plaintiff is not entitled to collect any interest upon the note and mortgage.

From what has been said, it follows that plaintiff is en-

titled to a judgment foreclosing his mortgage for the amount of the face of the loan. The judgment of the district court is reversed and the cause remanded with directions to enter a judgment of foreclosure in accordance with this opinion.

REVERSED.

BERT M. DAVIS V. STATE OF NEBRASKA.

FILED OCTOBER 21, 1927. No. 25700.

1. **Homicide**: INDICTMENT. An information for murder by administering poison which charges that defendant "did then and there unlawfully, feloniously, wilfully and purposely, and of his deliberate and premeditated malice, make an assault in and upon one Blanche A. Davis, with the intent of him the said Bert M. Davis unlawfully, feloniously, purposely and of his deliberate and premeditated malice to poison, kill and murder the said Blanche A. Davis," followed by appropriate allegations of the administration of poison and her death as a result thereof, is sufficient to charge that the poison was administered with intent to take the life of Blanche A. Davis.
2. ———: PROOF. On the trial of one charged with murder by administering strychnine poison, where, after the body of the victim has been embalmed, competent physicians and chemists perform an autopsy and make a chemical analysis of the organs of the body of the deceased, and where the statutes of the state make it unlawful to embalm a dead body with embalming fluid containing strychnine or any of its compounds. and where it is shown that strychnine would serve no useful purpose in an embalming fluid, it is proper to permit such physicians and chemists to testify to the result of their examination: that they found strychnine in the body in sufficient quantities to produce death; that they found no indication that the victim died of any disease; and that in their opinion she died as a result of strychnine poisoning, without proving that the fluid used in embalming the body did not contain strychnine.
3. ———: SUFFICIENCY OF EVIDENCE. Evidence examined and discussed in the opinion *held* sufficient to support a verdict of guilty of murder in the first degree.
4. ———: 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 man-

slaughter or murder in the second degree, where the evidence clearly establishes that the defendant is either guilty of the crime charged or entirely innocent.

5. **Invited Errors.** A litigant will not be permitted to take advantage of an error which he has invited the court to commit.

6. **Homicide:** INSTRUCTIONS. On the trial of one charged with murder in the first degree by administering poison, it is not the duty of the court to instruct the jury as to the law with reference to the lesser and included offense of attempting to take life by the administering of poison, where there is no evidence in the record which would justify the rendering of a verdict of guilty of the lesser offense.

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

Bernard McNeny, Frank M. Colfer, John F. Fults and *Edward J. Lambe,* for plaintiff in error.

O. S. Spillman, Attorney General, and *George W. Ayres, contra.*

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

GOOD, J.

Bert M. Davis (hereinafter called defendant) was charged with administering to his wife, Blanche A. Davis, with felonious intent, strychnine poison and thereby causing her death, for which he was put on trial, convicted of murder in the first degree, and sentenced to imprisonment in the penitentiary for the term of his natural life. To review the record of his conviction, he prosecutes error to this court.

The principal errors relied upon for a reversal are: That the information is insufficient to charge defendant with murder in the first degree; error in the admission of evidence; error in the failure of the court to instruct on all the issues; errors in giving instructions to the jury; and that the evidence is insufficient to sustain the verdict.

Counsel for defendant contend that the information is insufficient to charge murder in the first degree, because,

as contended, it fails to directly charge that poison was administered with the intent to take the life of Blanche A. Davis.

It will be conceded that there may be instances where one may administer poison to another which causes the death of such person, where the crime of murder in the first degree would not be committed. For instance, if a physician should prescribe and administer a poisonous medicine, with proper motives, but, through mistake, should give an over- or fatal dose, which would cause the death of his patient, he would not be thereby guilty of first-degree murder. Whether an information for murder in the first degree by the administration of poison is rendered fatally defective by the omission to charge therein that the defendant administered the poison with intent to take the life of the person to whom it was administered, we find it unnecessary to determine. Conceding, for the sake of argument only, that such an allegation is necessary, we think the information in the instant case is not vulnerable to the objection urged.

The information in the instant case charges that "Bert M. Davis, then and there being, did then and there unlawfully, feloniously, wilfully and purposely, and of his deliberate and premeditated malice, make an assault in and upon one Blanche A. Davis, with the intent of him the said Bert M. Davis unlawfully, feloniously, purposely and of his deliberate and premeditated malice to poison, kill and murder the said Blanche A. Davis." Then follows the allegation of administering the poison and her death.

The case of *Schaffer v. State*, 22 Neb. 557, cited and relied on by defendant, is not in point. The information which was condemned in that case did not contain an allegation with reference to intent, similar to the one herein set out. We think the information fairly charges that the poison was administered with the intent to take the life of Blanche A. Davis.

It may be observed in this case that the information is needlessly involved and teems wtih unnecessary verbiage

and repetition. As heretofore pointed out by this court, an information should charge the offense in simple, concise, direct language. A suitable form is prepared and set out in *Nichols v. State,* 109 Neb. 335. Of course, the form there given would not be entirely suitable for charging murder by the administration of poison. In lieu of the second paragraph of the form there outlined, the following would be all that is necessary to charge murder in the first degree by poisoning: "In ——— county, Nebraska, on August 30, 1925, John Doe, defendant, with intent to take the life of and kill Mary Roe, did feloniously and purposely administer to her (or cause to be administered to her) strychnine poison, and as a result thereof she died on August 30, 1925. Defendant thus committed murder in the first degree." Attention is called specifically to the form of information contained in the opinion in *Nichols v. State, supra,* in the hope that those charged with the prosecution of criminal offenses will hereafter draw indictments and informations conformable to the suggestions therein contained.

Complaint is made because the trial court permitted Doctors Myers and Eggers to testify to an examination of the body and organs of Blanche A. Davis, and that in their opinion she died of strychnine poisoning. It appears that, before they made their examination and chemical analysis of parts of the body of Blanche Davis, it had been embalmed and that there was no proof in the record of the ingredients of the embalming fluid used. It is argued that before the evidence of the doctors was competent it was the duty of the state to first prove that the embalming fluid used did not contain strychnine.

We do not think the point is well taken. By the provisions of section 9576, Comp. St. 1922, it is unlawful for an undertaker to embalm a dead body with any fluid or preparation which contains strychnine or preparations, compounds or salts thereof. Moreover, it is further disclosed by the evidence that strychnine would serve no useful purpose in an embalming fluid. It is not a preservative, and the presumption would obtain that the undertaker had not

violated the law; nor will it be presumed that the manufacturers of embalming fluid would use strychnine as an ingredient when it possesses no useful properties for the purpose for which embalming fluid is designed. The record also discloses that the state offered to prove the chemical composition of embalming fluid taken from a bottle which came out of the same carton as did the bottle containing the fluid used to embalm Mrs. Davis's body. This evidence was excluded on defendant's objection. It was not incumbent upon the state to prove that an embalmer or undertaker had not violated the law of the state, or to prove that the embalming fluid used did not contain strychnine. There is nothing in the record to create even a suspicion that the fluid used would account for the strychnine found in the body of Mrs. Davis after her death. The court did not err in overruling defendant's motion to strike from the record the evidence of the doctors.

Defendant contends that the evidence is insufficient to support the verdict; that it does not conclusively establish that Blanche Davis died as the result of strychnine poisoning, or that defendant administered strychnine to her.

The evidence is very voluminous. It would serve no useful purpose to outline it in detail, and we shall not attempt to do so. We think it is sufficient to say that there is evidence tending to prove, and from which the jury might properly find, the following facts to be true: That on the morning of August 30, 1925, Blanche A. Davis was taken violently ill and died in convulsions shortly thereafter; that her last illness was attended by all the symptoms of strychnine poisoning; that the next day after her death there was an autopsy held, and it was ascertained therefrom that all of her internal organs were in a normal condition and such as to exclude the hypothesis that she had died of any disease; that after the body was interred it was exhumed, and the liver, kidneys, spleen and other organs and parts of the body were removed, and a chemical analysis made by competent chemists; that a considerable quantity of strychnine, more than sufficient to produce death, was found

in the body; that competent physicians gave as their opinion that Mrs. Davis had died of strychnine poisoning.

Taking the evidence as a whole, it is sufficient to warrant a finding by the jury that Mrs. Davis died as a result of strychnine poisoning. From the evidence it clearly appears that the poison must have been either taken by Mrs. Davis, or that it was administered by defendant. The evidence tends to show that no strychnine was kept in any place where it was even remotely likely that it could have been taken by Mrs. Davis by mistake. There is nothing in the evidence that would remotely suggest that Mrs. Davis desired to quit this earthly existence, or that she had any motive for committing suicide. The evidence tends to negative the suggestion that she might have intentionally taken strychnine. On the other hand, the evidence tends to show that defendant had ceased to care for or have any affection for his wife; that he had become deeply enamored of and infatuated with one Mrs. Ressler, a widow, living in the immediate vicinity of the Davis home; that he very much desired to take her to his bosom as his wife, and that his then wife was an obstacle to the accomplishment of his desires. Thus, a strong motive is disclosed for defendant to commit the offense charged. If Mrs. Davis did not take the poison accidentally or intentionally, the defendant was the only other person who could have administered it. The evidence tends to disclose that defendant made false and conflicting statements concerning the cause of Mrs. Davis's death. There is some evidence tending to show that he had administered to her a dose of salts immediately before she became violently ill; that after administering the salts he had prepared and given her an orange, and that he stated to one of his acquaintances that he knew that she died of strychnine poisoning. The evidence further discloses that he had procured strychnine poison a long time before, that it had been used for exterminating gophers, and that it was upon his premises. It is further shown that, a few days before her fatal illness, Mrs. Davis had suffered an attack which indicated that she was suffering from fluoride of

sodium poisoning; that a receptacle containing this kind of poison was found in defendant's garage. It is shown beyond doubt that within four months of his wife's death defendant married Mrs. Ressler.

These and other facts disclosed by the record we think are sufficient to justify the jury in reaching the conclusion that defendant administered the strychnine which caused the death of his wife. The evidence seems to be sufficient to support the verdict.

Counsel for defendant contend that it was the duty of the trial court, by proper instructions, to submit to the jury the question of defendant's guilt of the several degrees of homicide, to wit, murder in the second degree and manslaughter, as well as murder in the first degree, and that it was the province of the jury to determine the degree of defendant's guilt.

So far as we are aware, this court has not heretofore determined the precise question as applied to a charge of homicide by the administration of poison. Section 9544, Comp. St. 1922, is as follows: "Whoever shall purposely and of deliberate and premeditated malice or in the perpetration of or attempt to perpetrate any rape, arson, robbery or burglary, or by administering poison, or causing the same to be done, kill another * * * shall be deemed guilty of murder in the first degree." This court has hitherto held that, where the offense was committed in an attempt to perpetrate a rape or robbery, it was not proper to submit to the jury the question of lesser degrees of homicide than murder in the first degree.

In *Thompson v. State*, 106 Neb. 395, it was held: "An information charging defendant with a homicide committed in the perpetration of or attempt to perpetrate a robbery, under section 8581, Rev. St. 1913 (now known as section 9544, Comp. St. 1922), charges only murder in the first degree, and it is error for the trial court to instruct the jury that they may find defendant guilty of murder in the first degree, guilty of murder in the second degree, or guilty of manslaughter." In *Morgan v. State*, 51 Neb. 672, it

was held proper to instruct that murder in the second degree and manslaughter were not included in the count of an information charging murder while attempting to commit rape, and a like holding was made in *Rhea v. State*, 63 Neb. 461, where the information charged murder committed in the perpetration or attempted perpetration of a robbery. We adhere to the rule there announced, and hold that the same rule applies where the charge is homicide committed by the administration of poison.

It was not error for the court to fail to instruct upon the lesser degree of homicide in this case for another reason: There was no evidence in the record which would justify a verdict of a lesser degree than murder in the first degree. We held in *Simmons v. State*, 111 Neb. 644: "In a prosecution for murder in the first degree, it is not error to refuse to instruct the jury as to the law applicable to manslaughter, when the evidence conclusively establishes that the defendant is either guilty of the crime charged or entirely innocent."

Counsel for defendant point out section 9563, Comp. St. 1922, which makes it a felony for any person to administer poison with intent to destroy or take the life of the person or persons to whom the same should be administered, or to do him, her or them an injury, and that this offense provides a less penalty than that provided for murder in the first degree. It is argued that the lesser offense is necessarily included in the charge made in the instant case, and attention is called to section 10153, Comp. St. 1922, which, *inter alia*, provides that "upon an indictment for an offense * * * the jury may find the defendant not guilty of the offense but guilty of an attempt to commit the same, where such an attempt is an offense."

Counsel argue that it was the duty of the trial court, by proper instruction, to submit to the jury for their consideration the question of defendant's guilt of the lesser and included offense of an attempt to take life by administration of poison, and that it was the province of the jury, in their discretion, to find the defendant guilty of the lesser

offense. The general rule applicable to the question may be stated as follows: Such an instruction is proper only when applicable to the evidence and where the evidence would justify a verdict of guilty of the lesser offense. If the evidence is such as to warrant only a verdict of the greater offense, or one of not guilty, then it is not proper to give such an instruction.

The case appears to have been tried by both plaintiff and defendant upon the theory that defendant was guilty of murder in the first degree or not guilty of any offense. A number of instructions requested by defendant proceeded upon this theory, and by his own act defendant practically requested the court to eliminate from the jury's consideration the defendant's possible guilt of the lesser and included offense. If it was error for the court to fail to submit to the jury the question of defendant's guilt of the lesser offense, such error was invited and requested by defendant. A litigant will not be permitted to take advantage of an error which he has invited. *Schrandt v. Young*, 62 Neb. 254; *Robinson v. City of Omaha*, 84 Neb. 642; *Edbrooke v. First Nat. Bank*, 110 Neb. 134; *Longman v. Pope*, 111 Neb. 838; *Day v. Metropolitan Utilities District*, 115 Neb. 711.

The court did not commit error in failing to submit to the jury the included and lesser offense for a better reason: The evidence is sufficient to conclusively establish that Mrs. Davis died of strychnine poisoning and sufficient to justify the jury in finding that the poison was administered by defendant. There was no evidence that would justify the theory that the poison was administered by him with any other purpose than to take her life. There was, therefore, no logical theory upon which a verdict of guilty of the lesser offense could possibly have been rendered, and where the evidence is not such as to warrant such a verdict, it is not error for the court to fail or refuse to submit to the jury the question of defendant's guilt of the lesser offense.

Defendant has not shown that prejudicial error was committed. The judgment of the district court is

AFFIRMED.

FEDERAL LAND BANK OF OMAHA, APPELLEE, V. AGNES TUMA ET AL., APPELLEES; JOHN M. FOLDA, APPELLANT; STEPHEN TUMA ET AL., INTERVENERS, APPELLEES.

FILED NOVEMBER 10, 1927. No. 24997.

1 Partition: DECREE: CONCLUSIVENESS. When all the parties interested in a tract of land are before the district court in a partition suit, its judgment in fixing the shares, directing partition and later confirming a sale of the real estate is final, and the parties thereto, in the absence of fraud upon the face of the proceedings, cannot question the title acquired by a later *bona fide* purchaser who relied on the proceedings and decree and who was innocent of any fraud or of knowledge of any fraud in the partition proceedings.

2. Guardian and Ward: PURCHASER OF ESTATE OF WARD: PRESUMPTION. A purchaser who deals fairly with a guardian has a right to presume that the guardian acts for the benefit of his ward, and such purchaser is neither bound to inquire into the state of the trust nor to be responsible for the guardian's faithful application of the trust money, unless the purchaser knew, or had sufficient information to put him on inquiry, that the guardian was practicing or contemplated a breach of his trust.

3. ———: MORTGAGE: VALIDITY. The actual knowledge of one who is a guardian and is at the same time an officer of a bank will be imputed to the bank so that the bank cannot in equity, as an innocent purchaser, enforce a mortgage held by it against the estate of the guardian's wards, where the circumstances are such that no one save an innocent purchaser or owner of a lien can enforce it.

4. ———: MISCONDUCT OF GUARDIAN: RESTORATION. Where the interests of wards in an estate have not been properly protected by their guardians and rights of innocent purchasers have intervened so as to cut off some of the rights and interests of such wards, equity will, while preserving the rights of innocent purchasers, restore the wards as nearly as possible to

the position they would have occupied had their guardians done their duty in preserving their interests.

APPEAL from the district court for Colfax county: LOUIS LIGHTNER, JUDGE. *Reversed, with directions.*

W. B. Sadilek and *Dolezal, Spear, Mapes & Stevens*, for appellant.

George W. Wertz, E. F. Dougherty, Byron B. Oberst and *John C. Sprecher, contra.*

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

GOSS, C. J.

This is an appeal by John M. Folda, one of the defendants, from the judgment and decree of the district court, finding his mortgage to be null and void and dismissing his cross-petition.

There is not so much dispute as to the facts as to the conclusions to be drawn therefrom. This situation calls for a rather complete and definite statement of the evidence.

Frank Tuma, a resident of Colfax county, died testate on or about October 21, 1917. He left surviving him his widow, Agnes Tuma, and the following children: Stephen Tuma, age 17, Emil Tuma, age 14, Emilie Tuma, age 11, Lumir Tuma, age 10, Lambert Tuma, age 6, and Paulina Tuma, age 4. The widow duly and formally elected under the statute not to take under the will. She administered the estate, and on November 11, 1918, a decree on her final account was entered, assigning to her a homestead interest in the premises, as well as a one-third interest, and assigning to each of the children a one-ninth interest in the land, described as the south half of the northwest quarter and the northeast quarter of the northwest quarter of section 29, township 20, in Colfax county, Nebraska. The decree further found that the widow had personally advanced $4,716.42 besides $24 additional court costs for the benefit of the estate and gave her a charge and lien upon said real

estate on account thereof. The homestead was free from incumbrance at the time of Frank Tuma's death.

On September 9, 1918, Agnes Tuma executed a mortgage for $5,000 to Frank C. Hrabak, who was a cashier of the Colfax County Bank, located at Howells, Nebraska, on her undivided one-third interest in the 120 acres. There is testimony to the effect that this mortgage was transferred by Hrabak to the bank before the transactions which gave rise to this case; at any rate, the bank became the owner of it. November 30, 1917, Hrabak was appointed guardian of the six minor children and was such guardian until his resignation, tendered on July 16, 1920, was accepted on September 18, 1920, on which day Agnes Tuma was appointed as their guardian. On August 25, 1924, Agnes Tuma was discharged as guardian for the minors, and on the following day Stephen Tuma, who had then become of age, was appointed guardian of his five brothers and sisters. On March 2, 1920, Agnes Tuma gave a mortgage, recorded March 29, 1920, to E. Quesner, for $11,000, on her interest in the 120 acres described and covering also an adjoining 40 acres which she purchased on speculation. This mortgage was released September 25, 1920, the release being recorded October 4, 1920.

On September 13, 1920, by a mortgage recorded September 28, 1920, Agnes Tuma mortgaged for $19,000 to herself as guardian of the minors the 120 acres and the adjoining 40 acres; the records show a release of this mortgage March 1, 1923, the release being recorded five days later. On November 21, 1923, Agnes Tuma gave a mortgage for $1,161.65, which was recorded the next day, in favor of Joseph K. Suchan and Rudolph L. Suchan, covering the 120 acres.

The defendant, H. D. Myers, had a judgment lien against Mrs. Tuma in a justice court for $199.99, and the transcript was filed in the district court May 10, 1923.

In February, 1920, Agnes Tuma, with her son Stephen, went to John H. Roper, at Dodge, and employed him to procure a loan from the Federal Land Bank of Omaha, agree-

ing to pay him a commission of one per cent. of the amount of the loan secured. Roper was secretary and treasurer of the Surety National Farm Loan Association at Dodge, a corporation chartered by the Federal Farm Loan Board under the act of congress known as the Federal Farm Loan Act, passed July 17, 1917. An application was made by her for a loan. Shortly thereafter Mrs. Tuma was notified by Roper that a loan could not be made unless she acquired the entire fee title to the land. On consultation with her attorney, she brought an action for partition in the district court for Colfax county, on March 5, 1920. Frank C. Hrabak was appointed referee on April 26, 1920, and on April 30, 1920, filed his report showing that partition in kind among the widow and heirs could not be made. May 24, 1920, the court confirmed the report and directed a sale of the land. The referee sold the land to Agnes Tuma, on her bid of $250 an acre, for $30,000, which was the fair value of the land. Frank C. Hrabak, referee, filed his report of sale July 16, 1920, and his supplemental report on September 18, 1920, on which day the court confirmed the sale and directed the referee to execute a deed to the purchaser. The referee's supplemental report showed that the expenses of making the sale totaled $870.80; that he paid the equitable lien of Agnes Tuma, with interest from November 11, 1918, totaling $5,130.27; and that, after the payment of these items, there was left $23,998.93, to be divided as provided in the order determining shares, one-third, or $7,999.64, to the widow, and $2,666.55 to each of the children. The report stated that the referee filed receipts from the parties entitled thereto or from their guardian, and among the attached receipts were those from Agnes Tuma, receipting for her equitable lien and for her one-third interest, in the sums above named, and Frank C. Hrabak, guardian of the minors named, acknowledged that he had received from Frank C. Hrabak, referee, the sum of $15,999.30, in full of the minors' shares in the proceeds of the referee's sale. The referee conveyed the land sold to Agnes Tuma by deed dated September 13, 1920, and recorded September 16,

1920. On September 18, 1920, there was filed in the guardianship matter, in the county court, the receipt of Agnes Tuma, in favor of Frank C. Hrabak, retiring guardian, for the sum of $15,999.30, and acknowledging receipt from Hrabak, retiring guardian, of $1,891.21, "cash money and interest accumulated thereon which the minors received from the insurance of their father." The receipt also acknowledges "receipt of one note of Agnes Tuma for $2,091, made to Frank C. Hrabak, as guardian, on September 14, 1918, and bearing interest at 5 per cent. from date, being their money in the share of the personalty of the estate of Frank Tuma, deceased. In fact, the referee never received the purchase price in money or its statutory equivalent. On September 16, 1920, there was recorded the mortgage for $10,000 given by Agnes Tuma to the Federal Land Bank of Omaha on the 120 acres of land, to secure a note for $10,000, with interest at 5½ per cent. per annum, payable semi-annually at the rate of $325 each January 1 and July 1 until July 1, 1954. On September 13, 1920, Agnes Tuma executed and delivered to John M. Folda a mortgage for $10,000, covering the home place and the additional 40 acres. This was recorded September 28, 1920. Also, on September 13, 1920, Frank C. Hrabak released his $5,000 mortgage, heretofore described, on the 120 acres, which release was recorded October 23, 1920.

The inception of the trouble reflected in this action was the purchase by Mrs. Tuma late in 1919 or early in 1920 of the 40 acres adjoining the Tuma farm. She contracted to pay $12,000 for it, paid $1,000 down and was to make settlement by March 1, 1920. To finance this she borrowed $11,000 temporarily from E. Quesner, on the mortgage heretofore referred to, and then, to help discharge the Quesner loan, she sought and secured the loan from the plaintiff. Out of this loan she did not receive the full $10,000 in money. She had to take $500 in shares of the Surety National Farm Loan Association and to pay the commission of $100, as well as other items of expense, so that she received less than $9,500 as the net proceeds of the mortgage.

Ultimately she disposed of the 40 acres on a falling market at a considerable loss. Her troubles were further increased by the failure of the Lion Bonding Company, which was the surety on her guardian's bond. Her inability to give another bond led to her discharge as guardian as well as prevented any chance for the minors to recover any loss occasioned by her failure to handle their estate as her duty as guardian required.

The district court found and decreed as follows: That the Federal Land Bank of Omaha, plaintiff, by virtue of its mortgage, has a first lien for $10,508.28, which should be reduced by the cancelation of the par value of 100 shares of Mrs. Tuma of the par value of $5,000 in the Surety National Farm Loan Association and by the retirement of the equivalent number of shares at par by the plaintiff, so that the net amount of plaintiff's first lien is $10,008.28, to bear interest at 8 per cent. per annum from the date of the decree; that the defendants Joseph K. Suchan and Rudolph L. Suchan have a second mortgage lien on the premises, amounting to $1,299.10, with interest at 10 per cent. per annum; that H. D. Myers has a judgment lien which is a third lien on the premises, but that Agnes Tuma is the head of a family and as such has a homestead interest in said premises, and that the judgment lien of said defendant Myers, amounting to $228, to bear 7 per cent. interest, is subject to the homestead right of Agnes Tuma; that the mortgage of $10,000, set up by John M. Folda, is null and void and should be canceled, and that the said John M. Folda is not entitled to have the release of his prior mortgage of $5,000 set aside and said prior mortgage reinstated; and that the mortgage given by the defendant Agnes Tuma to the defendant Agnes Tuma, as guardian of the interveners, for $19,000, is a subsisting mortgage and lien upon the real estate, subject only to the liens hereinbefore found, and that the interveners are the owners of said mortgage lien; that there is now due and payable thereon the sum of $23,433.33, to bear interest at 7 per cent. from the date of the decree.

The process of reasoning by which the trial court reached these conclusions is shown by his opinion reduced to writing and filed in the record of the case. We acknowledge the valuable aid thereby given us in our review of the case.

The first thing to determine is whether the referee's deed to Mrs. Tuma is void because of failure to collect the purchase price of the partition sale of the land. If it is void or is voidable as against innocent purchasers, then the interveners whose interests in the estate were sold at the partition sale would be entitled to relief from the mortgages and liens asserted by the plaintiff and other parties to the suit, whether these lienors are innocent purchasers or not.

Section 9264, Comp. St. 1922, relating to partition sales, provides that no conveyance can be made until all the money is paid, or without receiving from the purchaser a mortgage upon the land so sold or other equivalent security. It provides that, if the sale be confirmed, an order shall be entered directing the referee to convey. Section 9265 provides that such a conveyance, when recorded, shall be valid against all subsequent purchasers and against all interested persons who were parties to the partition proceedings. In this matter, the referee reported to the court that he had received the money and thereupon the court confirmed the sale. There appears nothing, therefore, in the statute cited that would prevent a later purchaser, who was innocent in fact, from acquiring good title. This view is supported by *Kazebeer v. Nunemaker*, 82 Neb. 732, holding that, in a partition suit regular on its face and with fraud absent from the face of the proceedings, the parties thereto are estopped thereby, although the judgment is erroneous and would have been reversed on appeal; and by *Manfull v. Graham*, 55 Neb. 645.

In a discussion of the Federal Land Bank mortgage, it should be noted that it was stipulated on the trial that this mortgage is a first lien, "at least to the extent of the equitable lien which the court granted Agnes Tuma in the sum of $4,716.42, plus her one-third interest." The court, however, gave the plaintiff an unconditional first lien on the

land, on the theory that the record in the partition suit was conclusive, unless some actual notice was brought home to the plaintiff which would destroy the legal effect of that record. It is claimed that Roper had knowledge that the amount was not paid in cash by the purchaser at the partition sale, and that this would be notice to the Federal Land Bank. The evidence shows that Mrs. Tuma paid him for securing the loan. His duty was to make out the application as secretary of the local Farm Loan Association, and as such to transmit it to the plaintiff bank. He knew that the plaintiff would not make to Mrs. Tuma, the applicant, a loan until she had a perfect record title, and the most he could know would be that she could not get such a title except through partition proceedings. Assuming that he told the loan association and the plaintiff all that he had learned, yet there was nothing at that time to indicate that any fraud would be perpetrated on the minors. It would be presumed that the guardian of the minors was under bond and acting under the direction of the county court. There is nothing we can find in the evidence to indicate that Mr. Roper advised, participated in, or knew of any fraud, actual or constructive, and that his only knowledge that he could have communicated to the Federal Land Bank was that of a plan to get the title in the mother's name by legal methods. One of the earliest cases in this country, where the principle involved here was decided, was by Chancellor Kent, in *Field v. Schieffelin*, 7 Johns. Ch. (N. Y.) *150, the syllabus of which is as follows:

"A guardian having the legal power to sell or dispose of the personal estate of his ward, in any manner he may think most conducive to the purposes of his trust, a purchaser, who deals fairly, has a right to presume that he acts for the benefit of his ward, and is not bound to inquire into the state of the trust; nor is he responsible for the faithful application of the money, unless he knew, or had sufficient information at the time, that the guardian contemplated a breach of the trust, and intended to misapply the money;

or was, in fact, by the very transaction, applying it to his own private purpose."

Moreover, we are impelled to support that policy of the law which seeks the stability of titles. If sales, which are perfectly fair on their face, which appear to have been conducted according to law, and have been approved by the court, as was this partition sale, are to be held invalid by reason of secret agreements between a referee and the guardian, not ascertainable by such investigations as would ordinarily be made by a reasonably prudent person, then all titles thereby acquired would be rendered practically unmarketable and estates could not realize at a referee's or guardian's or other judicial sale the fair value of the property sold. We therefore hold that the Federal Land Bank mortgage was valid and is a first lien on the premises described in it.

The John M. Folda mortgage for $10,000, and the Hrabak mortgage for $5,000, both represented investments of the money of the Colfax County Bank. The Hrabak mortgage for $5,000 was for money borrowed by Mrs. Tuma and used to pay debts and expenses of the Frank Tuma estate. No question as to its validity could have been raised. It was released for the purpose of allowing the plaintiff's mortgage to come first and then was merged in the larger mortgage for $10,000, taken in the name of John M. Folda, for the increased amount, to cover $5,000 additional money borrowed by Mrs. Tuma. The $5,000 mortgage covered Mrs. Tuma's undivided one-third interest in the land, which she had a perfect right to mortgage. The $10,000 mortgage originally covered the entire title of the home place and the additional 40 acres, which latter tract was released when it was sold. Hrabak, while guardian of the minors, was appointed and acted as referee. There was no inconsistency in these two offices. But he was also an officer in the Colfax County Bank and owed fealty to it as to the Folda mortgage owned in fact by that bank. When, as referee, he sold the land, he filed his receipt as guardian, indicating that, as such guardian, he had received $15,999.30 in money as pro-

ceeds belonging to his wards, and when, immediately thereafter, he resigned as guardian and took the receipt of Mrs. Tuma as his successor in the guardianship for a like sum, he participated with her in a deception of the court and in a legal fraud upon the minors and their estate. These receipts did not represent money. They had no money value. They were a part of the scheme to change the record title of the interest of the heirs in the real estate into a paper title in their mother. It was successful only as to innocent purchasers. If that transaction be allowed to stand as to the Folda mortgage owned by the bank of which Hrabak was an officer and to be governed by the rule announced by us as applicable to the first mortgage, then the Folda mortgage, which before the sale could not have been a lien upon the interests of the minors, would, by the proceedings and by the acts of Hrabak and of Mrs. Tuma, be so promoted as to become a lien on their interest in the land. We think it clear that Hrabak's knowledge bound the bank, and that it and Folda, as its mortgage trustee, are in no sense innocent purchasers. It was, as we have seen, the dereliction of duty of Hrabak as referee and as guardian that permitted the Federal Land Bank to become innocent purchasers and to obtain a valid record lien upon the estate of the minors; but, in contemplation of law, his bank knew what he, as an officer of the court, knew, and cannot claim or secure protection as an innocent purchaser. Equity requires that we restore the minors, as nearly as possible, to the position they would have occupied had their guardians done their duty in preserving their interest in the estate. A court of equity, having jurisdiction of the parties and the subject-matter of a mismanaged guardianship estate, will put the estate belonging to the wards as nearly as possible where it was or would have been had no mismanagement taken place. This demands that we affirm that part of the decree of the trial court which cancels the John M. Folda mortgage, but it does not require that we affirm that part of the decree which refuses to reinstate the Hrabak mortgage. The debt secured by the latter mort-

gage was merged in the increased debt secured by the Folda mortgage. The Hrabak mortgage was a valid lien on Mrs. Tuma's interest in the land and secured a valid debt owing by her to Hrabak, but really belonging to the bank of which he and Folda were both officers. The Folda mortgage likewise belonged to the bank. We think it accords with the principles of equity to allow the Hrabak mortgage to be reinstated as a lien effective only as against Mrs. Tuma's interest in the land, being careful, however, that such reinstatement shall not of itself lessen the interests of the Tuma children in the land nor in their shares of the proceeds. The chief difficulty in this connection, however, is that of determining the priority as between the Hrabak mortgage and the Suchan mortgage. There seems to be no particular controversy as to the Suchan mortgage. There is no evidence that the Suchan brothers are not, like the Federal Land Bank, in the situation of innocent purchasers. The trial court so treated them. In carrying out our expressed purpose of guarding the interests of the Tuma children, we intend to require the proceeds of the sale of their mother's interests in the land to be applied, so far as they will go, toward the payment of the mortgages of those herein found to be innocent purchasers. So, while the first mortgage and the Suchan mortgage are both liens on the entire estate in the land, yet the Hrabak mortgage is a lien only on the mother's interest; and to allow the Hrabak mortgage to be paid out of the proceeds of Mrs. Tuma's interest, prior to the payment of the Suchan mortgage out of those proceeds, might, and we think probably would, end in taking some or more of the proceeds equitably belonging to the children, as the result of the sale of their interests. We therefore place the reinstated Hrabak mortgage and its lien next after the Federal Land Bank and Suchan liens.

The Myers judgment became a general lien against the real estate of Agnes Tuma on May 10, 1923. It, unlike the other liens, was subject to her homestead rights.

We are not in accord with the decree of the trial court wherein the court reinstated the $19,000 mortgage of Agnes

Tuma to herself as guardian, allowed it as a lien for $23,433.33, and gave the Tuma children a right to a judgment against their mother for any deficiency there might remain after payment of other liens and of this. In their pleadings they had not specifically prayed for any deficiency judgment against their mother, but had asked for one against Hrabak. True, they asked for a lien upon the real estate for their respective shares, but they also asked "that the proceedings had at such referee's sale may be decreed null and void, and as conveying no title to the purchaser thereat." Their mother was the purchaser and the $19,000 mortgage was based on whatever title she obtained by that purchase. It was not a proper investment of their funds, was not authorized by any court, and probably would not have been authorized by any court. While we have held that the plaintiff and the Suchans are as mortgagees innocent purchasers under those proceedings, we do not believe that equity will best serve the interest of the Tuma children by holding that the sale was valid as to the children in all respects, although, as we have shown, the law would authorize us to hold it valid throughout. It was voidable and should be avoided for the best interests of the children save as the rights of innocent purchasers are involved. Futhermore, we do not wish to establish the precedent of recognizing such sales to any greater extent than we have so far done here. In the circumstances, we think it the better course to preserve, as far as possible, the interests of the children in the land, and, in case of a judicial sale hereunder, in the proceeds of such sale. This method will make effective the right of redemption of the parties if by chance their circumstances become such that they may redeem.

We are therefore of the opinion that the equities suggest a decree ordering a sale of the land, and that out of the proceeds there be paid as follows: First, the lien of the plaintiff; second, the lien of Suchan brothers; and, third, the lien of the Hrabak mortgage, but that these liens be discharged, so far as the lien and interest of Mrs. Tuma in the land be sufficient, out of her such interest and lien (with

the qualification inherent in that lien that one-third of it is against her share and two-thirds of it is against the shares of the children), otherwise, any balance of the plaintiff's lien and any balance of the Suchan lien is to be paid out of the proceeds derived from the sale of the interests of the children; if the proceeds of the sale of the interest of Mrs. Tuma be insufficient thus to pay the Hrabak lien, or any remaining part of it, then such part shall not be paid out of these proceedings; the decree should provide an ascertainment of the value of the homestead interest of Mrs. Tuma and allow it to be subjected to the payment only of the liens of plaintiff, of the Suchan and of the Hrabak mortgage; next, the judgment lien of Myers should be provided for in the decree, but to be paid only out of the proceeds of the sale of Mrs. Tuma's interest in the land, and subject to her homestead rights, as this is a general judgment against her only. The evidence seems to indicate that the $10,000 Folda mortgage had been paid down to $5,100; if so, the amount due on the Hrabak mortgage would be ascertained by taking fifty fifty-firsts of the amount due on the Folda mortgage. If the balance, and its date, are not definitely shown by the proofs already taken, further evidence will be needed to compute the correct amount of this lien. All of the liens, including that allowed Mrs. Tuma in the county court, are to have interest attributed to them until discharged. Such a decree will carry out our intent to preserve as far as possible the shares of the children in the estate, notwithstanding the mutations that have taken place.

For the reasons given, the judgment is reversed, with directions to enter a decree in accordance with the views herein expressed, and with authority, not only to consider the evidence already taken, but to take further evidence, if need be, to ascertain the value of the homestead interest of Agnes Tuma and, if necessary, to show the amount due on the reinstated Hrabak mortgage.

REVERSED.

GOOD, J., dissenting.

While I concur in the major part of the majority opinion, I am unable to concur in the views expressed, in so far as they relate to the $10,000 Folda mortgage.

It appears that Mrs. Tuma owed the $5,000 Hrabak mortgage to Folda, or the bank of which he was an officer; that this mortgage was released and she borrowed an additional $5,000 and executed to Folda the new mortgage of $10,000 for the amount she then owed. To secure this, she gave a mortgage upon the entire tract of land on the theory that she was the owner of all; but, as properly held by the majority opinion, the sale to her in the partition proceedings was voidable and she therefore possessed only the interest in the premises which she had before the sale. The mortgage which she executed was valid as between her and Folda to the extent of her interest in the mortgaged premises. In my view, it should be held that the mortgage of $10,000, or the unpaid portion thereof, is a valid lien upon all the interest she owned in the land at the time of the execution of the mortgage. It may be of small importance financially to Folda whether this is done or the Hrabak mortgage is reinstated; however, it is not the amount but the principle which is involved. Where one borrows money, and, to secure repayment, gives a mortgage upon land, where he owns only an interest therein, the mortgage should be held valid and a lien upon the interest of the mortgagor in the land.

I concur in the view that only the interest of Mrs. Tuma can be affected by the mortgages which she gave, except the mortgage of the plaintiff bank, which stands in the position of an innocent purchaser.

WILLIAM SPANGENBERG, APPELLANT, V. GEORGE W. LOSEY ET AL., APPELLEES.

FILED NOVEMBER 10, 1927. No. 25122.

Parol Evidence: NOTES: CONSIDERATION. "It is not error to submit oral testimony to the jury to show the purpose for which a

negotiable promissory note was executed, where such note is sued on by the payee named in the note." *Davis v. Sterns*, 85 Neb. 121.

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

Prince & Prince, for appellant.

Horth, Cleary & Suhr, contra.

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

GOSS, C. J.

Plaintiff appealed from an adverse verdict and judgment thereon dismissing his case against the defendants.

The action was based on a promissory note, executed by the defendants to the plaintiff as payee. The petition was in the usual form and declared on a note for $1,000, dated February 7, 1924, due six months after date, with interest at 8 per cent. per annum. The defendants admitted the signing of the note, denied each and every other allegation of the petition, and alleged that neither defendant received any consideration for signing the note. They further alleged that on June 29, 1923, plaintiff represented to each of them that he had issued a $2,000 check on his bank and had thereby overdrawn his account approximately $1,700, requested the defendants to accommodate him by executing a note under date of June 29, 1923, for $1,000, which he would use as collateral with his bank from which he expected to make a loan to cover said overdraft, stated that they would never be called upon to pay said note, and that he had sufficient other collateral in the form of a chattel mortgage upon which he would soon be able to realize sufficient to take care of the obligation; and defendants alleged that the note sued on is a renewal of the other note, and that the defendants signed the note without consideration, for the accommodation of the plaintiff, and for no other purpose. Plaintiff's reply admitted that the note

sued on was a renewal of the note made by defendants June 29, 1923, and denied all other allegations in the answer except such as are admissions of plaintiff's allegations.

When the defendants rested, and also at the close of the evidence, the plaintiff moved for a verdict in his favor on the ground that, under the pleadings and evidence, the law would not support any other verdict. The motion for new trial and the assignment of errors preserved the points claimed by plaintiff as grounds for reversal, condensed by us as follows: Failure to direct verdict for plaintiff; error in one instruction given and in refusal to give two instructions requested; errors in the introduction of evidence; and error in refusing a new trial on the ground of newly discovered evidence.

The parties to the action and others at Grand Island were interested in seeking oil in Oklahoma. They had an unincorporated association, known as the Grand Island Oil and Gas Association. Their quest for oil had not been successful and their treasury was not well supplied as the result of the sale of shares. They needed $3,000 to pay their drillers in order to proceed with the drilling. At a meeting, the plaintiff and three others advanced $500 each, and it was planned to try to get the defendants to furnish the remaining $1,000. The plaintiff was chairman of the board of directors, had quite a sum invested in the association, and was interested in the continuance of its operations. On June 29, 1923, he got from the defendants their joint note in his favor for $1,000, due in six months, with interest at 8 per cent., and he furnished and paid to the association the balance of the desired money. On February 7, 1924, the defendants executed and delivered to him their renewal note in his favor for a like sum. This is the note in suit. Both notes are in evidence. Neither showed any indorsement by the plaintiff. Plaintiff testified that it was agreed between him and the defendants that he was to advance them $1,000 to pay their shares of the money needed by the association, and that they would pay him their

note. He produced in evidence his check, canceled July 3, 1923, dated "7-12-1923," but intended for July 2, 1923, for $1,000, drawn on his bank, the Commercial State Bank, in favor of the defendants, and bearing on its back as indorsees their names and that of the association, as well as the stamp of the People's State Bank, showing that it was paid by that bank July 3, 1923. Whether of any significance or not, it appears from an inspection of the back of the check that the name "Geo. W. Carr" was written thereon (in pencil) before the paid indorsement was stamped on it by the People's State Bank, and the names "Geo. W. Losey" and "G. I. Gas & Oil Ass'n" were written there after the stamped indorsement was made. There is also in the record the individual ledger account of the oil company, showing a deposit of $1,000 on July 2, 1923. Both defendants testified in general, in support of the plea in their answer, to the effect that the original note was given to accommodate the plaintiff, and for no other consideration, and in denial that the money advanced to the oil company was advanced by plaintiff on their account. The defendant Losey testified that he never saw the $1,000 check until after the suit was begun; and the defendant Carr testified that he never indorsed the check and never saw it until September, 1924. The original note was put in the hands of attorneys for plaintiff for collection, but was renewed by the payment of $49.10 for interest on the old note and revenue stamps on the new and by the execution of the note sued on. The defendant Carr paid for the interest and stamps by his check when he signed the note. He took up the old note and wrote on the back of it in ink the words: "Interest at 8% from date it was drawn until redeemed by the Grand Island Oil and Gas Association, to be paid Carr and Losey." Also, the attorney who secured the renewal having written on the back of the original note the items of interest and stamps, totaling $49.10, the defendant Carr in writing, on the back of the note, divided that total by two and indicated the result as "$24.55 each." Witnesses, other than the parties in interest, did not aid

much, if any, in clearing up the confusion of fact shown in the evidence, which is fairly condensed in the above paragraph.

Seldom is a jury called upon to decide ultimate facts where the testimony of interested parties is so utterly at variance, and where the written evidence, taken with the oral testimony, renders it most difficult to decide where the truth is. Under our system, the jury is the sole judge of the facts, and we are not permitted to try a jury case *de novo* and reverse it merely because we would come to a different conclusion on the facts. We think there was sufficient evidence on behalf of defendants to warrant submitting the defense to the jury and to support the verdict and judgment.

But appellant's brief earnestly insists that it was error on the part of the trial court to allow the defendants to produce oral testimony as to the purpose for which the note was executed. It is the settled rule in this court that "It is not error to submit oral testimony to the jury to show the purpose for which a negotiable promissory note was executed, where such note is sued on by the payee named in the note." *Davis v. Sterns*, 85 Neb. 121, and cases cited; *First Nat. Bank v. Burney*, 91 Neb. 269; *Exchange Bank v. Clay Center State Bank*, 91 Neb. 835; *Musser v. Musser*, 92 Neb. 387; *Coffman v. Malone*, 98 Neb. 819; *Security Savings Bank v. Rhodes*, 107 Neb. 223.

The appellant charged error in the giving of the second instruction on the court's own motion. This instruction was merely a statement of the defense set up by defendants, and in the fourth instruction the court so informed the jury. Appellant also claims the court erred in refusing his first and third requested instructions to the jury. The first requested a directed verdict and was properly refused; the second was to the effect that, if they found plaintiff was the owner of the note and it was unpaid, then they should find for plaintiff, unless they found that the note was not given for a valuable consideration. The court's eighth instruction told the jury that the law presumed the note to

have been given for a valuable consideration, and that on this point they should find for the plaintiff unless the defendants proved by a preponderance of the evidence that the note was not given for a valuable consideration. He had previously instructed the jury that, if in return for the execution of the note the plaintiff paid the money either to the defendants or paid or loaned it to the oil company, it would be a valuable consideration and entitle the plaintiff to recover. The instructions as given were as favorable as the plaintiff could ask or did request and there was no error in them. From their verdict it would appear that the jury believed that the plaintiff procured the defendants to make the note to use to help his credit, as in effect they pleaded.

Error is claimed by appellant as to the cross-examination of the plaintiff (when he first testified in chief) on matters not referred to in direct examination of the witness. The reason for this assignment is not persuasive. Nothing of any value to defendants or of any harm to plaintiff was elicited by the cross-examination.

The appellant asserts the court erred in permitting the cashier of the bank on which the $1,000 check was drawn to be cross-examined as to the indorsements. This witness was on the stand for a second time at the instance of plaintiff, who was trying to get the check identified and put in evidence, and to prove that it was paid and charged to plaintiff's account. Without offering the check in evidence, plaintiff's counsel turned the witness over and he was questioned on cross-examination as to the relative time of the indorsements of the names and of the bank stamp. This was objected to by counsel for plaintiff, and there might be technical merit, at least, in his objection, were it not for what followed. When the witness was turned back to him for redirect examination, counsel for plaintiff went into the question of the proofs of the indorsed signatures at considerable length. This opened up the whole subject of proofs as to the indorsements and rendered it immaterial whether the cross-examination complained of, which would

have been entirely proper then, should precede or follow the redirect examination on the same subject. In the circumstances, no prejudice to appellant resulted.

One of the grounds for the motion for a new trial was that a witness, now absent from the state, would testify that, at the meeting of the parties interested in the association on June 29, 1923, Spangenberg and three others, including herself, each agreed to advance $500; that Losey stated that he and Carr would advance a like sum if they could borrow the money; that she knows that Spangenberg advanced them the money by check as he had agreed with Losey at the meeting; and that the check went to the credit of the association. But this cannot be said to be testimony the need for which should not have been anticipated from the moment the defendants filed their answer. This testimony, if offered on a retrial, would be corroborative of that of the plaintiff, but it is in no sense newly discovered.

Under the rule binding us to the finding of facts by the jury, and because we find no error in the application of the law by the court, we conclude that the judgment of the district court must be affirmed.

AFFIRMED.

NORFOLK PACKING COMPANY, APPELLEE, V. AMERICAN INSURANCE COMPANY, APPELLANT.

FILED NOVEMBER 10, 1927. NO. 26043.

1. **Appeal: BILL OF EXCEPTIONS: PROVINCE OF TRIAL COURT.** Where a bill of exceptions in the district court is allowed and destroyed before it reaches the supreme court, but after the docketing of an appeal, a motion by appellant to require appellee to reproduce destroyed exhibits essential to a new bill of exceptions should be directed to the district court.

2. ———: ———: ———. Where written instruments essential to a new bill of exceptions are, without fault of any litigant, destroyed with the original bill of exceptions, the true import of each, as understood by appellant, may be reduced to writing and tendered for the purposes of a new bill of exceptions instead of the one destroyed and in the event of corrections the

controversy may be submitted to the trial judge for determination.

3. New Trial: UNAVOIDABLE CASUALTY. An "unavoidable casualty" is not a statutory ground for the granting of a new trial at a subsequent term of court unless it prevents a litigant from "prosecuting or defending." Comp. St. 1922, sec. 9160.
4. ———: ———. The statute providing for a new trial at a subsequent term of court on account of an "unavoidable casualty" applies to trials in courts of original jurisdiction and not to the right of appeal to the supreme court.
5. ———. Statutory authority to grant a new trial at a subsequent term of court is concurrent with independent equity jurisdiction and the latter may be exercised without the aid of legislative enactments.
6. Appeal: NEW TRIAL. The right of appeal to the supreme court is a substantial one guaranteed by the Constitution, and equitable relief in the form of a new trial may be granted, where a suitor, without fault or laches on his part, is deprived of a bill of exceptions essential to a review.
7. New Trial. Though a suit for a new trial on the ground that a litigant, without fault or laches on his part, was deprived of a bill of exceptions is cognizable in equity, equitable relief of this kind is not available, where there was an adequate remedy at law.
8. ———: GROUNDS. "In an action in equity to obtain a new trial of an action at law on the ground that the party complaining has been deprived of the right to have his case reviewed in the supreme court, it must appear that there was a genuine controversy in the law action, and that in the trial thereof matters were determined adversely to the party complaining to the prejudice of his interests, and that he was by fraud or accident deprived of his constitutional right to be heard thereon in the court of last resort, and that he was himself without fault." *Zweibel v. Caldwell*, 72 Neb. 53.
9. ———. The granting of a new trial on equitable grounds at a subsequent term of court, because plaintiff lost the right of appeal from the dismissal of the original action at law, *held* not erroneous under the circumstances outlined in opinion.

APPEAL from the district court for Madison county: ANSON A. WELCH, JUDGE. *Affirmed.*

C. C. Flansburg, for appellant.

R. J. Shurtleff, contra.

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

ROSE, J.

This is an independent suit in equity for a new trial in a former action at law, after expiration of the term at which the judgment in the original case was entered. The Norfolk Packing Company, plaintiff in equity, was plaintiff in the original action. The American Insurance Company was sued as defendant in both cases. Data disclosed by the record may be summarized as follows:

September 11, 1920, defendant issued a policy for $3,000, insuring plaintiff against loss by windstorm, tornado or cyclone, the insured property being frame husking sheds in Madison county; September 23, 1920, sheds destroyed, the estimated loss being $3,750; October 1, 1921, plaintiff commenced an action on the insurance policy; December 28, 1921, defendant filed an answer denying liability for the loss and alleging among other defenses that there was no destructive windstorm or tornado or cyclone September 23, 1920, and that plaintiff's loss resulted from its own negligence in operating a crane; February 9, 1924, trial to the district court for Madison county and dismissal of the action on a finding that there was a failure to show any liability of defendant under its policy; December 12, 1924, bond for appeal to supreme court filed in district court; February 21, 1925, transcript of proceedings in district court filed in supreme court; January 24, 1925, bill of exceptions allowed by district judge and left in office of plaintiff's attorney; January 25, 1925, bill of exceptions consumed by a fire which destroyed the building in which plaintiff's attorney had his office; July 23, 1925, motion in supreme court by plaintiff to require defendant to furnish a number of exhibits which had been included in the original bill of exceptions, the testimony of witnesses having been again transcribed; October 5, 1925, motion overruled by supreme court; October 19, 1925, voluntary dismissal

of appeal by plaintiff; October 27, 1925, mandate of supreme court issued.

Plaintiff began the present suit in equity in the district court for Madison county February 8, 1926, to set aside the judgment dismissing the original action on the insurance policy and to procure a new trial thereof on the ground that the loss of the bill of exceptions was an "unavoidable casualty," within the terms of the statute empowering the district court, at a subsequent term, to set aside a judgment "for unavoidable casualty or misfortune, preventing the party from prosecuting or defending." Comp. St. 1922, sec. 9160. Defendant interposed the defense, among others, that the destruction of the bill of exceptions was not an "unavoidable casualty or misfortune" entitling defendant to a new trial. The district court found the issues in favor of plaintiff in the equity suit and granted a new trial in the former action at law. Defendant appealed.

In a court of equity was plaintiff entitled to a new trial under the circumstances disclosed by the record? The order of the supreme court overruling the motion by plaintiff to require defendant to produce exhibits destroyed by fire was not an adjudication that a copy of the original bill of exceptions could not be substituted or that a new one could not be prepared and allowed or that the dismissal of the action for insurance could not be reviewed on the appeal already taken. A bill of exceptions in the action at law had been allowed by the district judge, but it was never filed in the office of the clerk of the supreme court. Additional time to prepare a new one or to substitute a copy of the original was allowed by the court below. The motion to require defendant to produce exhibits, therefore, if grantable, should have been directed to the trial court and not to the supreme court. If neither party, however, could reproduce the original exhibits, it would not necessarily follow that the bill of exceptions as allowed could not have been restored in some form for all purposes of the appeal. The reporter's notes of the oral testimony were available. They were extended for the second time. The

pleadings in the original action contained what was admitted by both parties to be a copy of the insurance policy, one of the exhibits in controversy. Copies of other exhibits, if produced and inserted, would have made the record complete. In a situation like this, where written instruments essential to a bill of exceptions are destroyed without fault of any litigant, the true import of each, as understood by appellant, may be reduced to writing and tendered to appellee for the purposes of a new bill of exceptions in place of the one destroyed. In the event of objections or corrections by appellee, the controversy may be submitted to the trial judge who admitted the originals in evidence and considered them in making his findings. Copies, or the true import of the originals in writing, if accepted by the district judge as correct, may be inserted in the new bill of exceptions instead of the missing exhibits. Where the course indicated may be pursued successfully, a resort to equity for a new trial to protect the right of appeal is generally unavailing.

On the undisputed facts of this case, however, plaintiff takes the position that the loss of the original bill of exceptions was an "unavoidable casualty" entitling it to a new trial under the statute relating to that subject. Comp. St. 1922, sec. 9160. This position does not seem to be tenable. Plaintiff seeks equitable relief because, as it contends, it lost the right to have the supreme court review by appeal the proceedings and judgment dismissing the action for insurance, a bill of exceptions being necessary for that purpose. Under the statute an "unavoidable casualty" is not of itself ground for the granting of a new trial at a subsequent term of court. The "casualty," to be available for that purpose, must be one "preventing the party from prosecuting or defending." Comp. St. 1922, sec. 9160. In the present instance plaintiff was not prevented from prosecuting its action for insurance. There was a trial in that case on the issues raised by the pleadings. Plaintiff adduced evidence in its own behalf. The district court made findings of fact and dismissed the original action.

The statute providing for a new trial at a subsequent term of court on account of an unavoidable casualty applies to trials in courts of original jurisdiction and not to the right of appeal to the supreme court. *Ritchey v. Seeley*, 73 Neb. 164. It follows that plaintiff was not entitled to a new trial under the statute.

Was the new trial properly granted under the general equity power of the district court? It is now well settled law that statutory authority to grant a new trial at a subsequent term of court is concurrent with independent equity jurisdiction, and that the latter may be exercised without the aid of a legislative enactment, since it was conferred by a self-executing provision of the Constitution. *Abbott v. Johnston*, 93 Neb. 726; *Matteson v. Creighton University*, 105 Neb. 219; *Kulhanek v. Kulhanek*, 106 Neb. 595; *Krause v. Long*, 109 Neb. 846; *Gainsforth v. Peterson*, 114 Neb. 442.

The right of appeal is a substantial one guaranteed by the Constitution and equitable relief in the form of a new trial is sometimes granted, where a suitor, without fault or laches on his part, is deprived of a bill of exceptions essential to a review. *Curran v. Wilcox*, 10 Neb. 449; *State v. Gaslin*, 32 Neb. 291; *Holland v. Chicago, B. & Q. R. Co.*, 52 Neb. 100; *Mathews v. Mulford*, 53 Neb. 252; *Saxton v. Harrington*, 68 Neb. 446; *Ferber v. Leise*, 97 Neb. 795, 101 Neb. 374.

Though the precedents show that a suit for a new trial on the ground that a litigant, without fault or laches on his part, was deprived of a bill of exceptions is cognizable in equity, equitable relief of this kind is not available, where there was an adequate remedy at law. In *Zweibel v. Caldwell*, 72 Neb. 53, the following rule was announced:

"In an action in equity to obtain a new trial of an action at law on the ground that the party complaining has been deprived of the right to have his case reviewed in the supreme court, it must appear that there was a genuine controversy in the law action, and that in the trial thereof matters were determined adversely to the party complain-

ing to the prejudice of his interests, and that he was by fraud or accident deprived of his constitutional right to be heard thereon in the court of last resort, and that he was himself without fault."

Within the meaning of this rule plaintiff herein seems to have made a case. The pleadings and evidence show a genuine controversy as to the right of plaintiff to recover insurance under the policy issued by defendant. The finding of the district court that defendant is not liable under its policy depends on the evidence and presents a serious question. In the equity case the parties stipulated in open court that neither plaintiff nor its attorney was responsible for the fire which caused the loss of the original bill of exceptions, and that telegrams, letters and correspondence therein cannot be supplied. The following is also part of the stipulated facts:

"It is further stipulated and agreed that there were attached to said bill of exceptions certain photographic reproductions of the view of the machinery destroyed, the same having been offered and received in evidence on the trial, and that said photographic exhibits were destroyed in the fire which destroyed said original bill of exceptions and that the plates from which said photographs were printed were destroyed and that said photographs cannot be reproduced."

It may fairly be inferred from these and other evidential facts that a correct bill of exceptions could not have been reproduced or a new one prepared in the action at law on the policy of insurance and that plaintiff, without fault or laches on its part, lost a substantial right of appeal. The leaving of the bill of exceptions over night in the attorney's office, where it was destroyed by fire, was not of itself sufficient evidence of negligence to defeat equitable relief. The conclusion is that the record fails to show error or the abuse of equity in the granting of a new trial.

AFFIRMED.

FAUNE M. CRAWFORD V. STATE OF NEBRASKA.

FILED NOVEMBER 10, 1927. No. 25962.

1. **Homicide**: INFORMATION: UNLAWFUL OPERATION OF AUTOMOBILE. An information stating in detail facts showing that defendant, while intoxicated, drove his automobile in an unlawful, reckless, careless and negligent manner on a public highway, thereon collided with another automobile. being lawfully operated at the time, and fatally injured an occupant of defendant's car, charges manslaughter.
2. **Criminal Law**: CONTINUANCE. Denial of a continuance on the ground that defendant could not have a fair and impartial trial before the regular panel of jurors, because a jury selected therefrom had on a previous day found him guilty of another offense, *held* not prejudicially erroneous, where the record shows that each juror selected for the second trial was duly qualified to act as such.
3. **Jury**: FAILURE TO CHALLENGE. Where a party fails to object to a juror whose *voir dire* examination discloses facts for which challenge for cause would be sustained, and fails to exercise such challenge, he will not after verdict be heard to complain.
4. **Homicide**: SUFFICIENCY OF EVIDENCE. In a prosecution for manslaughter, evidence that defendant was intoxicated while driving an automobile on the wrong side of a public highway, thus colliding with another automobile lawfully driven and fatally injuring a passenger in defendant's car, may be sufficient to sustain a conviction.
5. **Witnesses**: PRIVILEGED COMMUNICATIONS. In a criminal prosecution, communications voluntarily made by defendant to a physician not then employed as such and not necessary to professional services are not privileged.
6. **Manslaughter**. Manslaughter is the unintentional killing of another while the slayer is engaged in some unlawful act, and the circumstances may be such that he may be tried and punished under the manslaughter act, though some of the homicidal acts committed by him may constitute a violation of the motor vehicle act.
7. **Criminal Law**: INSTRUCTIONS. A misdirection to the jury in general terms instead of an instruction specifically defining acts that would constitute an offense charged is not a ground for reversal, where the jury were not misled or the defendant prejudiced.

ERROR to the district court for Adams county: WILLIAM A. DILWORTH, JUDGE. *Affirmed.*

J. E. Willits, for plaintiff in error.

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

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

DAY, J.

Faune M. Crawford, hereinafter called defendant, was convicted of manslaughter in the district court for Adams county, for which he was adjudged to serve three years in the penitentiary and pay the costs of the prosecution. As plaintiff in error, defendant has brought the record of his conviction to this court for review.

It is undisputed that on the night of January 9, 1926, defendant, while driving a Ford automobile southward upon a public highway in Adams county, collided with another automobile being driven in the opposite direction by Lloyd Jackson, resulting in physical injuries to one Clarence Nelson, who was riding in defendant's car as an invited guest, from which injuries the said Clarence Nelson died. The information charged that the defendant, while driving an automobile upon a public highway in Adams county, in an unlawful, reckless, careless and negligent manner and being in a state of intoxication did cause the automobile which he was driving to collide with another automobile being lawfully driven on the highway by one Lloyd Jackson, thereby wounding and injuring one Clarence Nelson, from the effects of which the said Clarence Nelson died; that by reason of the facts aforesaid the said Faune M. Crawford unintentionally and while in the commission of said unlawful act did unlawfully and feloniously kill Clarence Nelson. To this information, defendant pleaded not guilty.

It is urged by the defendant that the court erred in overruling his motion in arrest of judgment. No attack was made by the defendant on the information by motion or otherwise until after the trial, when he filed a motion in

arrest of judgment. The motion, as applied to the situation then before the court, raised only the question as to whether the facts stated in the information constituted an offense. Section 10159, Comp. St. 1922, provides that a motion in arrest of judgment raises only the questions of the jurisdiction of the court and whether the facts stated in the information constitute an offense. As we view it, there can be no question of the court's jurisdiction or that the facts constitute an offense.

It is next urged by defendant that the court erred in overruling the motion for continuance. This motion was founded upon the theory that defendant could not obtain a fair and impartial trial before the regular panel of jurors because, the day previous, he had been convicted, before a jury drawn from the regular panel, of violating the liquor laws of the state. During the argument of the motion, the court announced that the grounds alleged were not sufficient to grant a continuance, but that in the impaneling of the jury the court would sustain an objection for cause to any juror who had served upon the former case or against whom there was other ground of challenge for cause.

In the impaneling of the jury, all of the jurors who had served on the former trial were excused for cause except juror Havens. After otherwise qualifying, it was developed that he had been a juror in the former trial, but both sides passed him for cause. Defendant having declined to excuse the juror for cause, especially in view of the statement made by the court, he is not in position to now claim that he did not have a fair and impartial jury. Especially is this true since all of the jurors qualified to hear and determine the case. Where a party fails to object to a juror whose *voir dire* examination discloses facts for which challenge for cause would be sustained, and fails to exercise such challenge, he will not after verdict be heard to complain. *Beckman v. Lincoln & N. W. R. Co.*, 85 Neb. 228; *Palmer v. People*, 4 Neb. 68; *Morgan v. State*, 51 Neb. 672.

It is also urged that the evidence was not sufficient to support a conviction. It appears that on January 9, 1926,

about 11 o'clock p. m., defendant was driving his car on the highway and collided with a car driven by Lloyd Jackson, injuring Nelson, from the effects of which he died. Several witnesses testify that as defendant was coming south his car zigzagged across the road and Jackson drove his car to the extreme right so that his right wheels were partially in the ditch, when, within 20 feet of Jackson's car, defendant drove his car directly against Jackson's car, the force of the impact turning defendant's car completely around and upside down, east of the center of the road. After the accident, defendant was seen to pour some liquid out of bottles and throw the bottles over a fence. Witnesses also testify that there was a strong odor of whiskey; that he was seen to stagger; and several testified that he was under the influence of liquor. One bottle was picked up about half filled with intoxicating liquor. In addition to this, defendant, while riding back to town with the doctor, who had been summoned, told the doctor that he had been drinking. The position of the cars, together with their tracks, as well as the testimony, seem to corroborate testimony that defendant was operating his car on the wrong side of the highway. The facts were sufficient for the jury to say that he was operating his car while in a state of intoxication or was driving it upon the wrong side of the highway, either of which would constitute an unlawful act and be the proximate cause of the injury and resultant death of Nelson.

Defendant complains that the court erred in permitting Dr. Calbreath to testify as to claimed admissions made by defendant on the way to town with respect to his having been drinking. The objection is made that the conversation was incompetent because given to the doctor while the relation of physician and patient existed. The testimony is clear, however, that defendant did not employ the doctor to look after his wounds until after they had arrived in town, so that at the time of the alleged conversation the relation of physician and patient did not exist. Besides, it is extremely doubtful whether the fact of his drinking would

aid the doctor in patching up a slight scratch on defendant's head. There is no merit in this contention.

It was insisted by defendant, upon oral argument, that the court erred in submitting the case under the provisions of section 9546, Comp. St. 1922, commonly known as the "Manslaughter Act." It is sufficient for the purpose of this case to state that manslaughter is the unintentional killing of another while the slayer is engaged in some unlawful act. It was the claim of the defendant that the offense, if any, arose out of and was governed by an act of the legislature known as the "Motor Vehicle Act," passed in 1919 and later amended. Comp. St. 1922, secs. 8364-8405. The violation of the manslaughter act is punishable by imprisonment from one to ten years. The punishment for the violation of the motor vehicle act, in case the accident results in seriously maiming or disfiguring a person or causing his death, is a fine of not less than $200 nor more than $500, or confinement in the penitentiary for not less than one nor more than ten years. Section 8391 of the motor vehicle act prohibits the driving of a car upon the highway while the driver is intoxicated, and section 8392 limits the speed not to exceed 35 miles an hour outside of a village, and not greater than is reasonable and proper, having regard for the traffic and use and condition of the road, and such as not to endanger the life or limb of any person, and contains other provisions not necessary to mention. The rule of the road, sections 2770 and 2777, Comp. St. 1922, requires persons to turn seasonably to the right of the center of the road. While the failure to observe the rule of the road is a misdemeanor and may be punishable as such, this provision is no part of the motor vehicle act. It was therefore proper for the county attorney to embody in the information any unlawful act on the part of the offender which was the proximate cause of death under the manslaughter act. In addition to charging the defendant with driving his automobile while intoxicated, he also charged that he was driving in an unlawful, careless and negligent manner. If the defendant was not sufficiently apprised as to

what was intended by the general term "unlawful, reckless, careless and negligent manner," he could have asked for more specific statement. With the information in this form, we think it was proper to show that defendant was driving upon the wrong side of the road, in addition to the evidence that he was intoxicated at the time.

Defendant further urges that the trial court in general terms gave erroneous and prejudicial instructions misdirecting the jury on the road law applicable to the use of automobiles, and failed to define in specific terms what evidential facts would constitute a criminal offense, if proved. There was convincing evidence that the law was violated by defendant in two respects and that the unlawful acts resulted in a fatal collision: One was driving an automobile while defendant was intoxicated, and the other was driving on the wrong side of the road where a driver going in the opposite direction could not avoid a collision. One of them, in effect, made it plain to the jury that the act of defendant in driving while intoxicated and, as a result, the killing of Nelson without fault or negligence on the part of others, if proved beyond doubt, would warrant a verdict of guilty. The other instruction, instead of containing in like form a charge in regard to the act of defendant in driving on the wrong side of the road, contained the expression, "driving an automobile on the public highway of Adams county, Nebraska, in an unlawful, reckless, careless and negligent manner, without due regard to the safety of others." Though these general terms should not have been used in the charge to the jury, they were broad enough to include the offense of driving on the wrong side of the road, to which evidence on this feature of the prosecution applied. The jury heard the evidence on this issue. Any person qualified to sit on a jury in this state knows by experience which is universal that the law requires the driver of a vehicle on a public highway to turn to the right when meeting another vehicle and that a failure to do so is unlawful. We do not think that an instruction in specific language instead of the language used would have resulted

in a different verdict or that defendant was prejudiced by the instruction given. The charge criticized by defendant seems to fall within the class of instructions covered by the statute condemning the reversal of a conviction on account of a nonprejudicial misdirection of the trial court to the jury. Comp. St. 1922, sec. 10186. Upon consideration of all the evidence and the instructions as a whole, reversible error has not been found.

AFFIRMED.

BLUE VALLEY STATE BANK, APPELLEE, V. A. W. MILBURN ET AL., DEFENDANTS: WILLIAM PRAHL, APPELLANT.

FILED NOVEMBER 10, 1927. No. 25016.

1. **Witnesses:** IMPEACHMENT. Where a witness admits making a written statement, which tends to contradict or impeach material testimony he has given on direct examination, such statement is receivable in evidence, notwithstanding that it was never delivered to the party to whom it was directed and for whom it was intended.
2. ———: CROSS-EXAMINATION. "When testimony is given by a witness on direct examination, from which an inference of fact arises favorable to the party producing him, anything within the knowledge of the witness tending to rebut that inference is admissible on cross-examination, and the opposing party is entitled to pursue that cross-examination as a matter of right." *Larson v. Hafer*, 105 Neb. 257.
3. **Evidence.** The rule applicable in certain classes of cases in equity, requiring that the evidence should be clear and convincing to sustain certain issues of fact, is inapplicable to an issue of fact in a law case triable to a jury.

APPEAL from the district court for Clay county: LEWIS H. BLACKLEDGE, JUDGE. *Reversed.*

Hainer, Flansburg & Lee, D. B. Massie, M. H. Leamy, and *A. C. Epperson,* for appellant.

C. M. Skiles, Stewart & Greer, I. D. Beynon, W. L. Minor and *M. L. Corey, contra.*

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

GOOD, J.

Plaintiff brought this action against A. W. Milburn, William Prahl, and Milburn & Prahl, an alleged copartnership, to recover for an indebtedness evidenced by a number of promissory notes, in which plaintiff was named as payee, and the name of A. W. Milburn appeared as maker. Plaintiff alleged that Milburn and Prahl were copartners; that the notes evidence money loaned to the copartners for the partnership business, and that, by an agreement with the copartners, plaintiff was to make loans for the benefit of the partnership business and take the notes of Milburn, but that such notes, by agreement, were to be the obligation of both Milburn and Prahl. Prahl answered, denying that there was any partnership, and also denying any agreement, on his part, to be liable for loans that were evidenced by the notes of Milburn, and also pleading the statute of frauds and the statute of limitations, as defenses, and other matters, not necessary to be here considered. Subsequent to the commencement of the action, Milburn was adjudged a bankrupt and later departed this life, and the action was dismissed as to him and proceeded as an action against Prahl alone. A trial of the issues resulted in a verdict and judgment thereon for plaintiff. Defendant Prahl appealed.

This cause was heretofore argued to division No. 1 of the supreme court commission and an opinion prepared and approved, affirming the judgment of the district court. The cause is now before the court upon a motion for rehearing, which will be treated as though a rehearing had been allowed.

Numerous errors have been assigned by defendant for a reversal of the judgment, but in the motion for rehearing he has apparently abandoned all except two: (1) That the court erred in excluding exhibit No. 30, offered by defendant as a part of the cross-examination of the witness Stew-

art; (2) that the court erred in limiting the cross-examination of the witness Stewart.

The following is a brief summary of the facts disclosed by the record: Defendant Prahl is a resident of Pierce county, Nebraska. In February, 1918, he purchased a farm in Clay county, Nebraska, and entered into an arrangement whereby his son-in-law, A. W. Milburn, would take charge of and operate the farm. By the arrangement between them, Prahl was to furnish the farm and furnish certain stock, feed, seed and other personal property, and Milburn was to take charge of, and put in his time in operating, the farm, taking care of the live stock and marketing the same, and agreed to pay Prahl one-half of the net profits for the use of the farm and personal property. The Blue Valley State Bank loaned money and took promissory notes from A. W. Milburn over a period of about three years. In all, there were more than 60 notes executed by Milburn. Some of them were renewals, and at the time this action was tried four of the notes, so signed by Milburn, were unpaid, the face value of which aggregated nearly $8,000, in addition to the interest accruing thereon. One Hall, cashier of the bank at the time Prahl purchased the farm, testified that immediately thereafter there was a conversation in the bank with Prahl and Milburn, in which Prahl stated that he and Milburn had formed a copartnership to operate the farm and were to be partners in the operation of the farm; that the partnership would from time to time need money and would be compelled to borrow money with which to carry on its operations; that Prahl would be in his home in Pierce county, a considerable distance away, and it would be inconvenient for him to sign the notes; that Milburn would be upon the farm, which was near to the bank; that Prahl requested the bank to loan money and take the notes of A. W. Milburn, and that he, Prahl, would be liable thereon. Later, Hall was succeeded as cashier by W. E. Stewart. Stewart testified to conversations with Prahl in which, he states, Prahl, in substance, reiterated the statements con-

cerning the partnership to which Hall had testified; that the bank relied upon his statements and loaned the money in good faith, upon the theory that Prahl would be liable therefor. On the cross-examination of Stewart, it was developed that plaintiff had discounted some of the notes signed by Milburn and that it had also taken property statements from Milburn. Some of the notes, apparently, were discounted to a bank in Hastings. On the cross-examination of Stewart, defendant produced and submitted to the witness exhibit No. 30, which the witness admitted was in his own handwriting, and which purported to be a property statement made by A. W. Milburn. This property statement contained recitals to the effect that Milburn was a tenant, operating a farm of 440 acres, and that he had no partner in the business. This written statement was offered in evidence by defendant, as part of the cross-examination of Stewart, for the purpose of contradicting and tending to impeach and discredit the testimony, given by him, to the effect that he believed there was a copartnership and relied upon the statements made by Prahl. On objection, the exhibit was excluded. This is assigned as error.

We think it is a rule of quite general application that, where a witness, especially one interested, as was Stewart in this case, testifies in his direct examination to facts, and upon cross-examination admits that he has made a written statement, which tends to contradict the testimony, given on his direct examination, such written statement is admissible in evidence, as tending to discredit or impeach the testimony of the witness. Plaintiff contends, however, that the statement in this case shows on its face that it was directed to a bank in Hastings, and, although written by the witness, was never delivered to the bank or person, to whom it was addressed and for whom it was intended, and therefore it was as though the statement had never been made, and is not admissible as evidence to contradict or impeach the direct testimony of the witness. Plaintiff relies upon 22 C. J. 308, sec. 346, to sustain its contention. The text cited seems to support its position, but no reason

is announced for the supposed rule. Four cases are cited as supporting the text. An examination of the cases, however, shows that none of them supports the proposition, and that at least a part of them hold directly contrary to the doctrine announced in the text.

We think the true rule, and the one supported by the great weight of authority, is that, where a witness has made a written statement, which tends to contradict or impeach the testimony he has given on direct examination, such written statement is receivable in evidence, even though never delivered to the person for whom it was intended. In the instant case, we think the court erred in not receiving the exhibit in evidence, and that the error was prejudicial to the defendant. Stewart, cashier of the bank, and Hall, the former cashier, had both testified to a very unusual state of affairs, in that they were making loans and taking the notes of one person and seeking to hold another liable thereon as a supposed copartner, without any written evidence of any copartnership; without having the notes signed in the firm name; and without even knowing what the firm name was; and the evidence further discloses that Prahl had been requested, both by letter and in person, to sign some of the notes, executed by Milburn, and had declined and refused so to do. It is peculiar also in this; that one of the cashiers testified that he knew that Milburn was worthless and had nothing "but good intentions," and knew that Prahl was well-fixed financially. Yet, in the face of this state of facts, as claimed by them, they were taking the notes signed by Milburn alone, on the theory that Prahl was to be jointly liable with Milburn thereon, without a scrap of paper of any kind showing a purpose, on the part of Prahl, to be bound, or a scrap of writing of any kind showing the existence of a copartnership.

In view of the testimony given by the officers of the bank on direct examination, the exhibit, which tended to show that the bank's officers knew there was no partnership and therefore they could not have relied upon the alleged statements made by Prahl, would have been very harmful to

the plaintiff's contention and very helpful to the defendant. Its exclusion is an error so palpable and prejudicial that it requires a reversal of the judgment.

Defendant urges that the trial court unreasonably restricted the cross-examination of the witness Stewart. We have examined the rulings complained of, and, while the examination was quite restricted, we are unable to say that prejudicial error was committed in that respect. However, since the cause must be remanded for another trial, we think it proper to observe that the rule which prevails in this jurisdiction is: "When testimony is given by a witness on direct examination, from which an inference of fact arises favorable to the party producing him, anything within the knowledge of the witness tending to rebut that inference is admissible on cross-examination, and the opposing party is entitled to pursue that cross-examination as a matter of right." *Larson v. Hafer*, 105 Neb. 257. In that case it was further held that a denial of that right on cross-examination, when the ruling is prejudicial, is sufficient ground for reversal.

Defendant urges that this court should apply to the situation existing in this case the rule that the evidence must be clear and convincing to warrant a verdict for plaintiff. The rule that prevails in this jurisdiction is, ordinarily, in civil actions, that a preponderance of the evidence is all that is required to sustain an issue of fact. This court has, in certain classes of cases cognizable in a court of equity, held that the evidence must be clear and convincing, or, as is sometimes said, clear and satisfactory. All of the cases to which our attention has been called or which we have been able to discover, where the rule has been applied, were equity actions, and, so far as we are advised, the rule has never been applied in an action at law, triable to a jury.

It follows that the former judgment of this court is vacated and set aside, and the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

IN RE ESTATE OF FRANCIS M. AUSTIN. CHARLES M. AUSTIN, EXECUTOR, APPELLANT, V. BERTHA CHALFANT ET AL., APPELLEES.

FILED NOVEMBER 10, 1927. No. 25128.

1. **Statutes:** AMENDMENT. Where the title to an act is one for the amendment of an existing statute or section thereof, any legislation may be included in the amendatory act which is germane to the subject of the statute or section thereof sought to be amended.
2. ———: VALIDITY. Chapter 205, Laws 1921, is not broader than its title, and does not violate the constitutional provision that no bill shall contain more than one subject and the same shall be clearly expressed in the title.
3. ———: ———. Chapter 104, Laws 1923, is not broader than its title, and does not violate the constitutional provision that no bill shall contain more than one subject and the same shall be clearly expressed in the title.

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

John E. Kelley, for appellant.

Scott & Scott, contra.

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

GOOD, J.

Charles M. Austin, as executor of the will of Francis M. Austin, deceased, made application to the district court for Red Willow county for a license to mortgage the real estate of his trust estate, for the purpose of paying debts and costs of administration. Two of the children and heirs-at-law of the decedent filed objections in which they averred that there was no law in the state of Nebraska authorizing the district court to grant a license to mortgage real estate belonging to the estate of a deceased person. Trial was had resulting in a judgment for respondents and dismissing the application for the license. The applicant for license has appealed.

This cause was previously submitted to division No. 1 of the supreme court commission and an opinion prepared by Commissioner Sandall reversing the judgment of the district court. Because a constitutional question was involved and some doubt entertained as to the validity of the statute on which applicant based his right to a license, a reargument of the cause has been had before the court. Upon an examination and consideration of the questions involved, the court has reached the same conclusion as did the commission, and the views hereinafter expressed are, in a large measure, a restatement of the views expressed in the opinion prepared by Commissioner Sandall.

Chapter 104, Laws 1923, purports to confer power upon district courts to grant licenses to executors, administrators and guardians to mortgage the real estate of their trust estates upon the conditions therein set forth. The question presented is whether or not chapter 104, Laws 1923, is violative of the constitutional provision that no bill shall contain more than one subject and the same shall be clearly expressed in the title. For an understanding of the real point relied upon by respondents, it is necessary to review somewhat the history of the legislation upon the subject of licensing executors, administrators and guardians to mortgage their trust estates.

Sections 344 and 345, ch. 23, Comp. St. 1903, gave power to county judges to grant authority to executors, administrators and guardians to mortgage any real estate, belonging to their trust estates, upon prescribed conditions. These sections of the statute were amended by the enactment of chapter 62, Laws 1905, with the following title: "For an Act authorizing county courts to empower executors, administrators and guardians to mortgage real estate and to appoint an administrator for that purpose, and to repeal section 344 and 345 of section (chapter) 23 of the Compiled Statutes of Nebraska of 1903." This act later appears as section 1491, Rev. St. 1913.

Said section 1491 was amended by the enactment of chapter 25, Laws 1915, under the following title: "An Act to

amend section 1491, Revised Statutes of Nebraska for 1913, relating to right to mortgage trust estates, and to repeal said original section." Neither of the foregoing acts or sections of the statute purported to confer any authority upon the district court to license executors, administrators or guardians to mortgage their trust estates.

The law was again amended by the enactment of chapter 205, Laws 1921, which bore the following title: "An Act to amend section 1491, Revised Statutes of Nebraska for 1913, as amended by section 1, chapter 25, Session Laws of Nebraska for 1915, relating to the right to mortgage trust estates, and to repeal said original section." This act, after providing that county judges, upon prescribed conditions, might license executors, administrators and guardians to mortgage real estate of their trust estates, contained this further provision: "The district court or a judge thereof may under like circumstances, upon petition supported by competent testimony, showing that the best interests of the estate demand it, grant authority to the executors, administrators or guardians of estates, to mortgage any real estate belonging to such estate for such sum as may be required to pay or redeem existing mortgages on the real estate of said estate, to pay cash bequests provided for by will, federal transfer tax, state inheritance tax, costs of administration and outstanding debts of the estate." Chapter 205, Laws 1921, later appears as section 1436, Comp. St. 1922.

This statute was further amended by the enactment of chapter 104, Laws 1923, with the following title: "An Act to amend section 1436, Compiled Statutes of Nebraska for 1922, relating to mortgages by executors, administrators and guardians of estates, to provide that executors, administrators and guardians may extend times of payment of any note or notes secured by such mortgages, and to repeal said original section."

The contention of respondents seems to be that the act of 1921 is invalid because it was sought to include in that act matter which was not, and could not have been, included

in the act of 1905, or in the act of 1915, and that if the act of 1921 was invalid then the act of 1923 would also be invalid as an attempt to amend a void statute. Respondents seem to rely upon the proposition that nothing could be inserted in the act of 1921 which could not have been included in the act of 1905, and, the act of 1905 bearing a restricted title, that no authority could, in that act, have been conferred upon the district court. We think it may be conceded that under the restricted title of the act of 1905 no power could have been conferred upon the district court to grant licenses to executors, administrators or guardians to mortgage the real estate of their trust estates, because that act, by its title, purported to give authority only to county courts to grant such license. We do not think it follows, however, that the legislature could not, thereafter, amend the law, as it existed in 1915, by a statute with an amendatory title. The rule is that an act, with a title purporting to amend a statute or section thereof, may contain only such matter as is germane to the subject of legislation contained in the statute or section sought to be amended. *Miller v. Hurford,* 11 Neb. 377; *Trumble v. Trumble,* 37 Neb. 340; *State v. Tibbets,* 52 Neb. 228; *State v. Cornell,* 54 Neb. 72; *State v. Bowen,* 54 Neb. 211; *Armstrong v. Mayer,* 60 Neb. 423; *State v. Barton,* 91 Neb. 357; *State v. Hevelone,* 92 Neb. 748; *Sinclair v. City of Lincoln,* 101 Neb. 163; *Allen v. Trester,* 112 Neb. 515.

The object of the constitutional provision that no legislative act shall contain more than one subject and the same shall be clearly expressed in the title was generally to prevent surreptitious legislation. It was intended that the title to an act should be an indication and guide to those interested in legislation so that they might give or withhold support as they deemed advisable and proper.

The subject of the legislation, the history of which has been somewhat reviewed, in all its stages has been the granting to executors, administrators and guardians authority or license to mortgage the real estate of their trust estates for the purposes specified in the legislation. The

subject-matter of chapter 205, Laws 1921, and of chapter 104, Laws 1923, and all the provisions thereof relate and are germane to the general subject. It follows that under the general rule above announced the legislation, authorizing the district court to grant licenses, was germane to the subject-matter of the previous acts which were amended. Neither chapter 205, Laws 1921, nor chapter 104, Laws 1923, is broader than its title and neither violates the constitutional provision invoked.

Since the judgment of the district court seems to have been based solely upon the assumption that chapter 205, Laws 1921, and chapter 104, Laws 1923, were violative of the constitutional provision, above referred to, it follows that the judgment is erroneous and should be and is reversed, and the cause remanded for further proceedings.

REVERSED.

R. W. BOURNE V. STATE OF NEBRASKA.

FILED NOVEMBER 10, 1927. No. 25852.

1. Criminal Law: BURDEN OF PROOF. Where a plea of not guilty is interposed on the part of the defendant in a criminal trial, he is clothed with the presumption of innocence which stands as evidence in his favor, and so remains until the state by its proof shows him to be guilty beyond a reasonable doubt. The burden of furnishing such proof is with the prosecution throughout the trial, and never shifts.
2. ———: EVIDENCE. In such a case, if the evidence or any material part thereof is fairly susceptible of two constructions, one in favor of the state, and the other in favor of the defendant, the doubt must be resolved in behalf of the innocence of the accused, as every intendment or inference under the evidence, considered in its entirety, must be construed in his favor.
3. ———: TRIAL. Further, it is the duty of the court, as well as of the attorneys, to endeavor to surround the trial with an atmosphere of fairness, undisturbed by prejudice, passion or ill will.
4. ———: MOTIVE: SUFFICIENCY OF EVIDENCE. Evidence as to motive examined, and *held* insufficient. Further, the court erred

in refusing to give instruction No. 13 considered in the opinion, which would have withdrawn such evidence from the jury's consideration.

5. ———: INSTRUCTIONS. It is the duty of the court, with or without request, to instruct the jury as to the law of the case.

6. ———: ADMISSIONS: REFUSAL OF INSTRUCTIONS. Under the reflected facts the court erred in not giving the requested instruction: "The jury are instructed that evidence has been introduced tending to show that the defendant made certain admissions of statements appearing in evidence. Verbal statements or admissions should be received by you with great caution, as they are subject to much imperfection and mistake, owing to the person speaking not having clearly expressed his own meaning, or the person spoken to not having clearly understood the speaker. It frequently happens, also, that the witness, by unintentionally altering a few words or expressions really used, gives an effect to the statement entirely at variance with what the speaker actually did say. In this connection the jury should bear in mind the infirmity of memory and that the mind of the prisoner himself is often oppressed by the calamity of the situation, and that he is sometimes influenced by motive of hope or fear to make statements."

7. **Homicide**: DEGREES: INSTRUCTIONS. Ordinarily, in a case charging first degree murder, where there is no eye-witness to the act, and the evidence is largely circumstantial, the jury should be instructed as to the law governing murder in the first degree, second degree, and manslaughter.

8. ———: ———: ———. The court erred in not instructing the jury as to the law inherent in the crime of manslaughter.

ERROR to the district court for Sheridan county: WILLIAM H. WESTOVER, JUDGE. *Reversed.*

A. C. Plantz, E. D. Crites, F. A. Crites and *M. F. Harrington*, for plaintiff in error.

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

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

THOMPSON, J.

The defendant was charged in usual form, in case of death by gunshot wounds, with murder in the first degree

of Ferris C. Westervelt on the 8th day of October, 1925, in Sheridan county, to which a plea of not guilty was entered by defendant, who was not examined as a witness. Trial to a jury, and verdict returned finding defendant guilty of murder in the second degree, on which judgment was entered, and sentence imposed of imprisonment in the state penitentiary for a term of 30 years; to reverse which error is prosecuted. The claimed errors, being numerous, for sake of brevity, will be omitted, save and except as indicated in the course of this opinion.

The record reflects the following salient facts, in substance: The deceased and defendant were each between 24 and 25 years of age, were personal friends, and had been such for a number of years. The deceased resided upon a farm in Sheridan county with his parents, about 4½ miles northwest of Rushville, his usual occupation being that of a farmer or farm laborer. The defendant resided at Gordon, and at the time, and for some time prior to the incident in question, was engaged in the sale of real estate and insurance. The distance between their homes was about 25 miles. The usual route from Gordon to the home of deceased was by and through Rushville. In furtherance of their mutual interests, they desired to purchase a ranch situate over 28 miles north of Rushville, Nebraska, in Shannon county, South Dakota, and on the 7th day of October, 1925, they made arrangements to visit such land, all of which was well known to the father of deceased and other members of the family. Each of them was of limited means. This ranch stood in the name of Roy S. Ross, whose father, Ed T. Ross, had carried on negotiations with reference to the sale thereof with defendant, who was acting for both himself and the deceased, and so informed the elder Ross. In the purchase thereof they were to pay $15,000, of which $1,500 was to be in cash, they to assume a mortgage of $7,500 on the land running 5 years, and pay the balance of $6,000 on March 1, 1926. In furtherance of this purchase, there was a meeting of the deceased and defendant on the farm of the father of deceased on Octo-

ber 7, 1925, following up a telephone conversation between the two on October 6, in which defendant agreed to come to the farm home on the morning of the 7th with his Chevrolet roadster, a one-seated automobile, having a receptacle on the back thereof. In pursuance of arrangements theretofore made, the two got into the car, in which there was a yellow horse blanket and a horsehide robe with lining, the deceased taking with him the shotgun in question, and a cartridge belt with shells. This gun, which was introduced in evidence, is a breech-loading, double-barreled shotgun, which deceased had obtained some four years previous from his uncle. Thus it was a secondhand gun, but the record does not disclose how long it had been in use prior to the time that deceased had received it. It is provided with rebounding hammers, so when either thereof is discharged, it is supposed to automatically bound back to safety; this accounting for the fact that the gun was stated to be on safety at the time defendant and deceased stopped for repairs at the Gordon garage on the night of the shooting, as hereinafter indicated. The right hammer of the gun is defective, and it was this hammer that the deceased himself had riveted and repaired, long prior to the evening in question. The defendant was without firearms, or other instruments of destruction. The two proceeded on their way to the land in South Dakota, and after having visited it, and without having contracted for the same, they returned to Gordon the evening of the same day, and deceased stayed that night at the hotel, and defendant stayed at his home with his family. The next day deceased was in Gordon, and at about 3 p. m., with defendant, was in the office of Mr. Leedom. The two had supper at defendant's home about 6:30 p. m., and left there about 7:30 p. m.; the night being cool, as testified by some of the witnesses, and cold and windy, as testified by others. They stopped at the garage in Gordon to have the lights of the automobile repaired, at some time after 7 p. m., and in fixing the lights the garage man observed the gun in the car, and asked if it was loaded, to which defendant replied that he thought

it was, and deceased was then asked, and he stated he thought it was, but, if so, it would not do any harm because it was on safety. When they left the garage at Gordon the gun was on the left side of the car, between the driver and the door, and remained there, so far as the record shows, until after their arrival at the Westervelt home. They then proceeded to Rushville, where, according to the sheriff's testimony as to defendant's statements to him, they stopped, and defendant asked deceased if he did not want to see his girl, who lived there, and deceased said it was too late. The father also testified that defendant told him they stopped at Rushville. Then they proceeded on their way to the Westervelt home. On their arrival the car was stopped in front of the gate leading to the residence, which gate was about 30 feet from the house, the usual place for stopping such vehicles. This was about 9 p. m. The father and mother had retired about 8:30 p. m., as had also their three daughters, and were each asleep at the time defendant opened and entered the front door of the house, and, in a loud voice, called out: "Come quick; Ferris is shot." No one of the family had heard any gun shots or similar noise. The father was the first to go out; the family arose, and certain of them went out to the automobile with defendant, and found the deceased lying on the ground at right angles to the car, his head almost straight in front of the gate, his feet very near, if not a little under, the left-hand running board, his right arm lying alongside his body, and the left slightly over his head; he was clothed with a heavy overcoat, under coat, vest, hat, and usual other clothing; his hat was still caught on the back of his head, and his overcoat thrown open; the horsehide robe was on the ground and the yellow blanket was in the car. Defendant and a sister of deceased carried the body into the house, laid it on the bed, at which time it was noticed that defendant's index finger on the right hand was lacerated, powder-marked, and bleeding, and from which he was suffering pain. They then telephoned for the doctor. The father had picked up the cartridge belt, which lay on the ground close

by the car, and had thrown it under the porch in front of the house. Defendant took the same car and drove to a neighbor's house with a sister of deceased to get her brother, driving along the highway until he reached a lane leading up to the neighbor's house, which he took, and on arriving there he stopped at the usual place in front of the house provided for that purpose, got the brother, and returned to the Westervelt home. The ground at and around the place where the body lay was without any indication of a scuffle, or show of blood. Neither the clothing of the deceased, nor that of the defendant, was in any manner torn, save and except there was a large hole in the overcoat around which the cloth was powder-burnt, where the shot entered near the shoulder, and on the deceased's other clothing where the shot had entered the left side. The shot which penetrated the overcoat necessarily punctured the clothing between it and the body. Undoubtedly the collar of the overcoat was raised, as the lapel of the coat covers the hole made by the shot, and such lapel was not touched either with shot or powder. There was no indication of any kind of a struggle. There was no blood on the defendant's clothing, or in, on, or around the automobile, save and except that which was found on the instrument board where the switch is, and on the gear-shifting lever; places where the operator would necessarily put his hand in running the car. The door on the left-hand side of the car was provided with a curtain, but none had been placed on the right-hand side. The doctor, on arrival about 9:30 that night, found two bullet wounds in the body and pronounced the man dead, and the undertaker was called. In the meantime the doctor had given the defendant antitoxin to prevent lockjaw, and had dressed defendant's finger. The body with the clothing on was then removed from the bed by the undertaker, and transported to Rushville, all the clothing by him removed, and later all but the overcoat burned; the body was embalmed, prepared for burial, and then interred in the cemetery at Tilden. On the removal of the body by the undertaker from the home of the father, so much of the bedding

as consisted of a pair of blankets, a feather tick, and a pillow slip, having been saturated with blood flowing from deceased's wounds, and through his clothing, including the heavy overcoat, were ordered destroyed by the family, and were taken out and burned.

As to the condition of the body of deceased when it was first viewed and examined: Dr. Broz testified that he arrived at the Westervelt home about 9:30 p. m.; examined the body; found it was warm and rigor mortis (stiffness of death) had not set in at that time; and it usually sets in from two to three hours after death; further, that the body still retained its glow, its body warmth; and hence the death must have occurred very shortly before he got there; that, after a death of this sort, the feet and hands would become cold in a very few minutes, although the body would remain warm.

Mr. Baker, the undertaker, testified that he was called about 10 p. m., and reached the Westervelt home about 11 p. m.; that rigor mortis had not set in, and the body was some warm at 11 p. m.

The father of deceased, on direct examination, testified, in substance, that he touched the right hand and face of deceased, and knew as quick as he touched him that he was dead. "There was that cold. While the body wasn't rigid, the flesh had the clammy, cold feeling to it, and his hand was cold." On cross-examination, he stated, in substance, that the body was still soft and limp; it was not warm; his face and hand were cold.

Eunice Westervelt, a sister of deceased, on direct examination testified, in substance, that she helped carry the body into the house; that she picked up the lower part and held his right hand all the way in the house; the right hand was cold; no heat at all in it. And, on cross-examination, testified, in substance, that she could not exactly say the body was limp when she helped carry it in, but it was not stiff like a board; that she laid her hand on his forehead, and it was the same then as his hand, cold.

The gun was not seen, or its whereabouts inquired into,

at the time of removing the body into the house. However, we find from the testimony of Elmer Johnson, given on the part of the state, that he was asked by Will Westervelt, the night of the death, to look for the gun when he went home, as defendant had been to Carl Johnson's that night to get Will Westervelt, and had driven into the Johnson yard and turned around therein immediately prior to starting on his return trip to the Westervelt home. This witness testified that he looked for the gun, as requested, and saw it in Carl Johnson's yard the next morning about 5:30, about 100 yards from the house; that he picked it up and laid it on the porch, after examining it; that the gun, when so found, was at the end of the lane or branch road leading from the main road to the house, and at a point where vehicles usually stopped and turned around in front of the Johnson house. He also testified that he heard some one say the night of the shooting that defendant had laid the gun on the car when he went after Will Westervelt, and it might have dropped off. And, further, that he believed he had heard Mr. Westervelt, the father, ask defendant that night where the gun was, and defendant said he thought he laid it on the back of the car.

Some months after the burial, to wit, March 12, 1926, at the request of the father, and without the defendant or those interested in his behalf having been notified, the body was exhumed and an examination thereof by a physician had, in which he described the wounds as follows: "One on the left side of the anterior axillary line, penetrating the fifth rib, passing upward and terminating at the second dorsal vertebra at the back, and going to within one inch of the skin on the back. The other one was on the right side just below the clavicle, four inches from the nipple, passing backward and inward and terminating at the second dorsal vertebra." Thus placing the wounds at their inner termination about an inch apart.

There was no eye-witness to the shooting in question, or where or when it occurred, and no evidence relating thereto except statements claimed to have been made by the defend-

ant to different witnesses examined on the part of the state, which statements are as follows:

Jeffrey Westervelt, father of deceased, testified: "Q. In the conversation you had with Wayne Bourne that night, do you remember whether or not anything was said whether he came through Rushville, he and Ferris? A. Yes, sir. * * * He said they stopped in front of the picture show down here, and one or the other of them looked at the time there, and he asked Ferris if he wanted to stop in town, and Ferris said, 'No, it was too late.'" Further: "Q. Just what did he say about how he claimed the shooting occurred? A. He told me that they were standing beside the car, Ferris and he were standing side by side at the car, and he said he didn't know which it was, whether it was he or Ferris pulled the gun from the car, and he said when the two barrels were discharged they were so close together he could hardly distinguish them from one report. * * * He told me he couldn't figure out how it could happen, because both he and Ferris spoke about it as they were coming up, that there was no loads in the gun."

Will Westervelt, a brother of deceased, testified: "He (Bourne) said they drove up in front of the house. He got out on the left-hand side of the car; my brother got out on the right-hand side of the car. He (deceased) got out and walked around that car to help take the ammunition and gun out of the car; he reached over with his left hand and took hold of the gun and pulled it out, and it was discharged. That is the way he explained it to me."

Witness Bruce, the sheriff, testified: "Q. Now, did he tell you which road they took in coming from Gordon to the Westervelt home? A. In the conversation he claimed by the highway, the way I understood it, because they came through Rushville. * * * And he brought Ferris up, and I know that Wayne said when they got to Rushville he asked Ferris if he wanted to stop and see his girl, a young lady that Ferris was going with, and Ferris said, 'No, he thought it was too late,' and they stopped down here in

front of the opera house, I think, just a minute, about the time they was speaking about the girl, and then drove on out home and drove into the yard. * * * And he said he got out from under the wheel on the left-hand side. He was driving and he got out on the left-hand side. * * * He walked around in front of the car, and just as he got in front of the car Ferris had reached in to get this gun; and he told me there was a blanket in there, and Ferris had reached in to get the gun and was pulling it towards him, and just as he was in front of the car this first shot went off, and he runs around and Ferris started to drop back, and he runs around and put his hand under his arms, and just as he got his hand under his arms the second shot went off and Ferris just dropped on back, he said. Well, he spoke about as he run his hand under his arms, holding him, at that time is when he got his finger powder-burnt, or shot, but that happened as he run his hand under his arms to hold him. And he laid him down, and he said he went in then and called Mr. Westervelt, or called the family. * * * I asked him what became of the gun, and he said he remembered picking the gun up and taking the shells out of it and laying it on the back of this car, the roadster he was driving; and I asked him what became of the gun, and he said he didn't know whether some one had taken it or whether it was lost off of the car; that he drove down to one of the Johnson's for young Westervelt. *. * * I asked him what became of the shells. * * * He said he took the shells out of the gun and put them in his pocket. * * * He said later on, when he was at Gordon, he got his raincoat, or light coat, and was looking at the shells, and he burnt them."

The witness C. W. Pace testified: "Well, I don't know whether he said he was still sitting in the car or not. I understood him to say this fellow was taking the gun out by the end of the gun barrels, and they was caught in a robe in the car, and he was jerking on them and the gun went off; then he went around the car and picked him up and asked if he was hurt, and he said he didn't say anything,

just kind of made a gurgling noise in his mouth, then the gun went off again."

The witness Albert Austin testified: "He said when he stopped the car out in front of Westervelt's house that Westervelt got out and pulled the gun out towards him and the first shot went off; and he run around the car and put his hands under his arm pits and lifted him up and asked him if he was hurt, and he didn't answer him, just made a kind of gurgling sound; then the gun went off again and shot him on the right side, and that was when Mr. Bourne got the shot in the hand."

Eunice Westervelt, a sister of deceased, testified: "He told me that they drove into the yard and stopped in front of the gate; that Ferris got out first and was standing there at the car talking, just as they always did, and he went to lift the gun from the car and in doing so it caught on the robe and fired once; and he was still in the car and he seen what was the matter, so he got out as quickly as possible and went around behind the car, and he put one hand under Ferris' arm and the other above his shoulder and as the second shot was fired it shot his finger; and he laid the body down and came to the house to call mother and dad."

The state was permitted to prove that, the day following that of the death of deceased, a person, traveling the highway leading from Gordon to Rushville, observed three men standing at the side of the highway near an automobile; that near them, and in such highway, was a moist looking spot, and of a color resembling that of blood; that there were some footprints around it. The record is lacking in proof that it was blood, further than the fact of its resemblance to it, and entirely lacking in proof that it was human blood, or that the defendant was in any manner connected with it, save and except that it was on the same highway defendant said he and deceased had traveled the night before. The record does not disclose but what these two proceeded from the garage at Gordon to the home place of the father, not only unaccompanied by any other person or persons, but also without leaving the automobile.

We will first give consideration to the challenge that the court erred in its refusal to give instruction No. 13 tendered by the defendant, which covers the question of the claimed motive for the commission of the alleged crime on the part of the defendant. In this consideration, the record, and that alone, must be that which impels our conclusion.

The state sought to prove a motive on the part of the defendant, and was permitted for that purpose, over objection, to introduce evidence seeking to prove that the accused was indebted to different persons, unconnected with deceased, to the extent of several thousand of dollars, and was without funds or assets to meet the payment thereof, and had committed numerous forgeries and was by reason thereof liable to be prosecuted and convicted under our statutes for each; that to enable him to pay such indebtedness, and to cover up such forgeries, insurance on the life of Ferris Westervelt in the amount of $15,000, if he died a natural death, and $30,000, if from accidental cause or causes, payable to defendant, had been procured to be issued. To which offer of proof, and to each step leading up to and including the introduction of such evidence, proper challenge was lodged by way of objection, motion to strike, and instructions tendered. However, each and all thereof were overruled, or refused, on which error is predicated.

Does the record before us show this insurance to have been so procured or issued? It reflects: That the insurance company in question was the Old Line Insurance Company of Lincoln, Nebraska; that Dr. Broz was its local medical examiner at Rushville; that Ferris C. Westervelt, personally and unaccompanied by another, presented himself at Dr. Broz's office for examination for life insurance on June 27, 1925; that such an examination was had, and a written report thereof made by the doctor, wherein it is stated, under the amount of insurance applied for, $2,500 and $15,000. This instrument purports to have been signed in the presence of the examining physician by the deceased signing his name thereto "Ferris C. Westervelt," and is

certified to by the doctor as a part of such report after the same was completed. It was introduced in evidence, and contains the following provision: "This report is confidential and, regardless of the request of any person, must, upon completion, be forwarded to the medical department, Old Line Insurance Company, Lincoln, Nebr. The examination should be made in private. Check report for omissions. Forward promptly." The approval stamp on this report by the home office is as follows: "Approved 10 day of Aug. 1925. C. F. Chapman, Medical Director." Thus indicating that such report was to be, and was, forwarded by Dr. Broz to the home office, which, from the above, we are warranted in concluding was done. It was introduced in evidence as state's exhibit 12. There is no evidence which shows, or tends to show, that such medical report was ever in the possession of the defendant, or that he ever saw the same. Afterwards, on the 27th day of July, 1925, said Westervelt executed an application for insurance on his life in this company for the sum of $2,500, payable to his mother, with double indemnity if death was accidental, signing the same "Ferris C. Westervelt," and another application for insurance on his life in the sum of $15,000, payable to his estate, with double indemnity in case death resulted from accidental cause or causes, and signed this application "Ferris C. Westervelt." These applications were afterwards by the defendant, who at the time was a subagent of the company under one Frank L. O'Rourk, who was the general agent thereof at that place, to wit, Gordon, delivered to O'Rourk, and he forwarded each thereof to the home office of the company at Lincoln, which office, after due consideration of the medical examiner's report, and the applications, issued two policies, one for $2,500 payable as above indicated to the mother of the deceased, and the other for $15,000 to the estate of Ferris C. Westervelt. These policies were transmitted by the company to its general agent O'Rourk at Gordon, and by him received August 12, 1925, and by him placed in a safe in the office of the defendant, together with a directory com-

munication from the company to O'Rourk as to the delivery of the policies, and the execution of a blank assignment accompanying the same; which safe, however, while being that of the defendant, was used, as was the office in which it was situate, by both O'Rourk and the defendant, and each had equal access thereto, and control thereof, as well as of the things placed therein. Such applications for insurance were on printed blanks in usual form and were each, as completed, introduced at the trial, the $2,500 one being state's exhibit 11, and the $15,000 one being state's exhibit 10. As to the policies, the state offered to introduce in evidence certified copies thereof, to which respectively the defendant objected as not being the best evidence, and no proper foundation laid for their introduction, which objections were sustained. While these policies were called for at different times on the part of the defense, and at the time objections were lodged as to the introduction of certified copies thereof, they were never introduced in evidence, notwithstanding the fact that such introduction was promised at each of these times on the part of the state, and notwithstanding they were each admitted to be at the time in the possession and under the control of the company, whose representative was the state's witness at the trial and testified that he could, and would, produce the original policies. Neither was the directory communication accompanying the policies at the time they were delivered to O'Rourk introduced in evidence, nor the blank assignment included therewith, notwithstanding a promise on the part of the state at different times during the trial that it could, and would, produce them before the close thereof. Hence, the trial court, including the jury, as well as this court, is denied an inspection of either. The signatures "Ferris C. Westervelt," forming a part of the medical report, and attached to each of the respective applications, are identical in form, even when viewed through a magnifying glass, or as near so as is usual in signatures, and withstand the test of comparison as to their genuineness. No one testifies, and neither are they asked, as to whether

or not in their opinion such signatures or either thereof is, or is not, that of such Westervelt. Certainly the burden of proving the forgery of the application in question, as well as the fact that the $15,000 appearing in the medical examiner's report was not therein at the time it was signed and executed, and further that the $15,000 was written in such report by the defendant, was at all times on the state, and this being a criminal action, such proof must be convincing beyond a reasonable doubt. This burden was not met, and must have been so assumed by the trial court, as the record is without an instruction to the jury as to the law applicable to the comparison of handwriting, and this, notwithstanding the fact that it is admitted all through the trial that the name attached to the application for the $2,500 policy is the genuine signature of Ferris C. Westervelt, the deceased, and, as above indicated, the record is without evidence to the contrary as to either of the other two signatures. If the state claims that this question was material, then it was a material part of its case, and by reason thereof the law applicable thereto became a part of the law of the case, and it was the duty of the court, with or without request, to instruct the jury in reference thereto, and its failure so to do was prejudicially erroneous. However, as above indicated, we conclude that each of the signatures so attached to such respective instruments is the genuine signature of Ferris C. Westervelt. We are confirmed further in the above conclusion by the statement of the mother, that the deceased son had informed her of the insurance taken out in her favor, but did not inform her of the amount of the insurance, and later she asked and was told by the doctor that the amount was $2,500 and this was while the son was still living. She further testified: "Q. Did he tell you who he had the insurance with? A. Well, I knew who wrote the policy; in that way I knew what the policy was, because our other boy had a policy in the same company. * * * Q. And written by this same Gordon agency? A. I supposed it was." The father also testified that the mother had told him of this $2,500 policy,

all of which happened prior to the death of the son. The mother testified further that she learned of the $15,000 policy when the note given to pay the premium for it was sent to the home by the insurance company for collection. Further, the witness Leedom, on the part of the state, testified that defendant and deceased were in his office at Gordon about 3 p. m. of the day in question, and the witness, not being very well acquainted with deceased, told him to look out or defendant would load him up with life insurance like he had done some of the rest, and deceased stated that he would bet a nickel he had more insurance than Leedom had, and Leedom told them then that he, Leedom, was worth more dead than alive.

It is true that in the $15,000 application, being state's exhibit 10, as introduced in evidence, it is stated that it is for the benefit of "Estate." and just below this word there had been at one time written in the words "creditors and partner," but through the words "creditors and partner" a line had been run apparently canceling such words. There is also in paragraph 8 of the application for $15,000 the following words, in print, "I hereby request," which are followed by the words, "Beneficiaries. Roy S. Ross to extent of indebtedness to him. Bal. to partner R. W. Bourne." This clause is undoubtedly what gave rise to the directory communication accompanying the policies as they were mailed to O'Rourk, and this we conclude also gave rise to the blank assignment accompanying such policies. While neither the assignment, nor the communication, was introduced at the trial, we have in the record the following evidence: The state's witness Frank O'Rourk, on cross-examination, testified that the two policies, together with a directory communication and a blank assignment, came to him on August 12, 1925, from the home office of the insurance company, and he put the same in the safe in the office, to which he and defendant had equal access; that he told the defendant of receiving the policies, the letter and the blank assignment from the home office, and further: "I told him that when he saw Westervelt to tell him the policies were here,

and there were assignments that would have to be signed up on the big policy before it could be delivered. * * * That the company refused to issue the policy as applied for, payable to Mr. Bourne and Mr. Ross, and had made it payable to the estate of Ferris Westervelt, and it would be necessary to have an assignment signed by Mr. Westervelt, showing the amount to Mr. Bourne and to Mr. Ross." That is, the amount payable, if any, to each. And he further testified that such assignment had never been executed or signed by Ferris C. Westervelt.

It will be noticed that this information was conveyed to the defendant nearly two months before the incident in question took place, and from that time on defendant was possessed of full knowledge and could not have but realized that, if Westervelt should die, such insurance of $2,500 would go to the mother, and the $15,000 to the estate of Ferris C. Westervelt, and not to him. Such determination is strengthened by the record, which further shows that shortly after the burial of Westervelt, to wit, November 2, 1925, the father filed an application for the appointment of Bourne as administrator, and, as he says, he did so at the request of defendant. In this application the father stated that the estimated value of the personal property of deceased was the sum of $2,500, or thereabouts. There is in the evidence testimony of the father indicating that he knew of the $15,000 policy both before and after he filed his application for the appointment of Bourne as administrator; that the defendant never laid claim to such $15,000, and later, at the instance of the father, testified that he had no interest in the policy, and never claimed any interest therein. On November 30, 1925, defendant was appointed, and qualified and entered upon the discharge of his duties; and on the same day he filed an inventory of the estate, in which he stated that the personal property coming into his hands was an "insurance policy in the Old Line Insurance Company of Lincoln, Nebraska, with double indemnity clause in case of accidental death, in the sum of five thousand dollars, $5,000." On this same day, to wit, November 30, 1925,

a meeting was had, at which defendant, as administrator, the father and mother of deceased, and the insurance company, by its president, were present, and an adjustment was had, which was reduced to writing, and signed by the mother, the administrator, and the company, and received as evidence on the part of the state at the trial, wherein we find: "Whereas, Mildred Westervelt claims that a certain policy of insurance in the sum of $2,500, policy numbered 20891, was issued upon the life of Ferris C. Westervelt, by the Old Line Insurance Company, payable to said Mildred Westervelt, upon which policy the Old Line Insurance Company denies any and all liability; and, whereas, R. W. Bourne is the administrator of the estate of Ferris C. Westervelt, deceased, and claims that a certain policy of insurance in the sum of $15,000, policy numbered 20892, was issued upon the life of Ferris C. Westervelt by the Old Line Insurance Company, payable to the estate of said Ferris C. Westervelt, upon which policy the insurance company denies any and all liability." This agreement of settlement also shows that it was the desire of all parties to settle completely and finally all matters in reference to such claims, and it was therefore mutually agreed that $5,000 should be paid by the company to Mildred Westervelt and R. W. Bourne, administrator, and the company should be released, and in furtherance thereof the $5,000 was paid to the mother and by her retained, and the two insurance policies turned over to the president of the company. The record is without evidence showing that at the time of this settlement, to wit, November 30, 1925, there was even any suspicion that defendant was guilty as charged in the complaint in this instant case, or otherwise. The court appointing Bourne as administrator, being informed of such settlement, was dissatisfied therewith, and, upon Bourne filing his resignation as such administrator on January 12, 1926, the same was accepted and he was discharged; and on February 1, 1926, the father was appointed in his stead. Afterwards, and before complaint was filed against this defendant, the father, as administrator of the estate of the deceased son, instituted an ac-

tion on the $15,000 policy seeking to recover under the accidental clause thereof the sum of $30,000; and settlement between the parties was had of such action. The amount received by such administrator by reason of the settlement is not disclosed. On March 2, 1926, the defendant filed his report as administrator, in which is shown his expenditures, including his attorney fees paid out.

Therefore, as before concluded, it is clear that the defendant was without interest in the policy for $15,000, and could in no manner benefit by Westervelt's death, which fact he was cognizant of long prior, up to, and at the time of the death of deceased. Thus, from what has been said herein in reference to the $15,000 policy forming a basis of a motive for the act charged, it follows that the state failed in its proof of a basis for such claimed motive, and, having so failed on a point so vital, prejudicial error was committed by the trial court in refusing to give instruction No. 13, offered by the defendant, which reads as follows: "The jury are instructed that the state claims and has offered evidence in support of the claim to the effect that the motive for the alleged offense was an attempt on the part of the defendant to insure the life of the said Ferris Westervelt in favor of the defendant, or in such manner that the defendant could profit thereby. With reference to such claim, the jury are instructed that the state has proved that at the time of the death of the said Ferris Westervelt there was no insurance on his life in favor of the defendant, and that the defendant had no interest in any of said insurance at the time of the death of said Ferris Westervelt, which facts the defendant well knew at and more than a month prior to the death of the said Westervelt, and that therefore the state has failed to support its claim of such motive, and all evidence on that topic is hereby withdrawn from the jury and said jury are instructed to disregard the same." We might state further that no instruction was given which cured this error.

At the trial the defendant tendered, and the court refused, the following instruction: "The jury are instructed

that evidence has been introduced tending to show that the defendant made certain admissions of statements appearing in evidence. Verbal statements or admissions should be received by you with great caution, as they are subject to much imperfection and mistake, owing to the person speaking not having clearly expressed his own meaning, or the person spoken to not having clearly understood the speaker. It frequently happens, also, that the witness, by unintentionally altering a few words or expressions really used, gives an effect to the statement entirely at variance with what the speaker actually did say. In this connection the jury should bear in mind the infirmity of memory and that the mind of the prisoner himself is often oppressed by the calamity of the situation, and that he is sometimes influenced by motive of hope or fear to make statements."

The weight to be given such statements when received in evidence in any trial is quite material, but much more so in a case like this, where there are so few illuminating facts. It is quite elementary that, while such evidence is competent, it has its imperfections, as has been recognized by our courts and text-writers for many generations. In Greenleaf, Evidence (16th ed.) sec. 200, we find:

"With respect to all *verbal admissions*, it may be observed that they ought to be received with great caution. The evidence, consisting as it does in the mere repetition of oral statements, is subject to much imperfection and mistake; the party himself either being misinformed, or not having clearly expressed his own meaning, or the witness having misunderstood him. It frequently happens, also, that the witness, by unintentionally altering a few of the expressions really used, gives an effect to the statement completely at variance with what the party actually did say."

In *Cooper v. Skeel*, 14 Ia. 578, 581, the thought here presented is cogently expressed in the course of the opinion, wherein it is said: "Than this no species of testimony is more dangerous, or received with greater caution." While this statement was made in a civil case, it certainly should

not, and does not, lose any of its forcefulness when applied to a criminal prosecution.

It is well said in 22 C. J. 289, sec. 318: "It is a common experience of those dealing with human testimony that conversations are very imperfectly remembered, particularly where the exact language used is sought to be recalled after a considerable lapse of time." In support of this statement numerous cases of courts of last resort are collated and cited in the note under the text.

This court early adopted the rule above indicated as evidenced in our opinion in *Milton v. State,* 6 Neb. 136, 139, wherein we say: "In *State v. Gardiner,* Wright's Rep. (Ohio) 399, the court, in instructing the jury, say: 'The design or purpose to kill, may be deduced from the attending circumstances; the manner of inflicting the wounds; the kind of instrument with which they are inflicted, and its natural tendency to destroy life. It may be deduced also from the declarations of the prisoner made at the time, or before, or after the deed was done; but where reliance is placed on declarations, a jury should receive them with great caution.' See, also, *State v. Thompson,* Wright's Rep. (Ohio) 623." In the *State v. Gardiner* case, from which we adopted the conclusion as above quoted, the text of the opinion is as follows (page 400): "But where reliance is placed on declarations, a jury should receive them with great caution and scrutinize with care the circumstances under which they were uttered. Declarations made while a prisoner is agitated or depressed, are to be regarded but slightly. They are often made without thought or intention; are heard imperfectly, inaccurately remembered, and carelessly detailed. There is danger that the witness may substitute words of his own for those of the prisoner, and by the employment of his own language, in whole or in part, convey to the mind of the hearer, ideas the prisoner never thought of." Citing *State v. Thompson, supra,* in which language almost identical is used.

While the last two above cited cases were those of a *nisi prius* court, they were approved by the supreme court of

that state (Ohio), as indicated in *Milton v. State, supra,* at page 140. Without question they correctly state the law applicable to such declarations, and care should be taken by the trial court in so informing the jury, and in a way not to weaken its force by omission or condensation. The unreliableness of such evidence, as expressed by Greenleaf, and reaffirmed by us, is reiterated and strengthened, not only in the text, but also by citations in 4 Wigmore, Evidence (2d ed.) 464, and that which follows therein on the subject.

That the foregoing is the law applicable to the instant case is not seriously questioned on the part of the state. However, it claims that error in such refusal to instruct was cured by an instruction given by the court on its own motion. This instruction omits so many of the material features of the instruction tendered as to make it impossible for us, under this record, to hold that such failure did not prejudicially affect the defendant's case.

As there was no eye-witness to the shooting in question, the degree of guilt, if any such is proved, must necessarily be determined largely from the circumstances surrounding the transaction as detailed in evidence. With this thought in view, the defendant asked that the court instruct the jury as to manslaughter, in addition to the charge given as to murder in the first degree, and murder in the second degree, which the court refused. This refusal is also presented as error. Our statute on this subject (Comp. St. 1922, sec. 10155) provides in part: "In all trials for murder the jury before whom such trial is had, if they find the prisoner guilty thereof, shall ascertain in their verdict whether it be murder in the first or second degree, or manslaughter." We have uniformly held that such statute is mandatory. *Parrish v. State,* 18 Neb. 405. The case of *Russell v. State,* 66 Neb. 497, is one directly in point, as to the fact that it was buttressed as to proof largely on facts and circumstances surrounding the felonious homicide charged. The court instructed the jury as to the three degrees of murder. It was held that it did not err in so

doing. In the second paragraph of the syllabi, in construing that which is the section of our statute here under consideration, we said: "By section 489 of the Criminal Code the jury are required, in trials for murder, to declare in their verdict whether the accused, if they find him guilty, is guilty of murder in the first or second degree, or manslaughter."

In *Kraus v. State,* 102 Neb. 690, defendant complained "because the jury was not instructed respecting any degree of homicide save only as to murder in the first degree." A challenge was lodged to this instruction, as in the instant case, which was sustained and the trial court reversed; and, in the course of the opinion, at page 694, we said: "The rule in this country is almost universal that in a case charging first degree murder it is the duty of the court to instruct respecting all of the inferior degrees of homicide to which the evidence is properly applicable, even though such instructions are not requested."

In the instant case, as there was no eye-witness, and the evidence was largely circumstantial, it was error not to instruct as to the law inherent in the crime of manslaughter.

We are sustained also in this conclusion by the following authorities: *Rutherford v. Commonwealth,* 13 Bush (Ky.) 608, wherein it was held: "When no witness saw the homicide committed, or the parties on the occasion when the killing occurred, the law applicable to murder, manslaughter, and self-defense should be given in order to meet any state of fact the jury may find, from the circumstances in evidence, to have existed." The above holding is sustained by *Brown v. Commonwealth,* 117 Ky. 766, and *Stanley and Nix v. Commonwealth,* 184 Ky. 237.

In *Jones v. State,* 13 Ala. App. 10, 26, it was held: "Where the evidence is wholly circumstantial, and the character of the weapon, the circumstances attending the homicide, and the motive therefor rest in inferences to be drawn by the jury from the circumstances proved, the court should give in charge to the jury the law on all degrees of intentional

homicide." To the same effect are *Aguilar v. Territory of New Mexico*, 8 N. M. 496, 507, and *State v. Crockett*, 39 Or. 76.

In this, we in no manner run counter to our holdings in *Rhea v. State*, 63 Neb. 461, *Simmons v. State*, 111 Neb. 644, or *Davis v. State, ante*, p. 90.

This opinion is now of too great length, and hence we will not extend it further with a discussion of the other alleged errors complained of, but simply state that they have each received due consideration. Notwithstanding this. it must be remembered that the defendant is clothed with the presumption of innocence which stands as evidence in his favor, and that this presumption remains until the state by its proof shows him to be guilty beyond a reasonable doubt; that the burden of furnishing such proof is with the prosecution throughout the trial, and never shifts; that if the evidence or any material part thereof is fairly susceptible of two constructions, one in favor of the state and the other in favor of the defendant, the doubt must be resolved in behalf of the innocence of the accused, as every intendment or inference under the evidence, considered in its entirety, must be construed in defendant's favor; and that it is the duty of the court and the duty of the prosecuting attorney, whether he be one elected or one selected by the court, to endeavor to surround the trial with an atmosphere of fairness toward the defendant, and one not disturbed by prejudice, passion or ill will, as far as each can reasonably do so. With these thoughts in view, we cannot say that this record, taken as a whole, is persuasive as to the guilt of the defendant. *Casey v. State*, 20 Neb. 138; *Lowe v. State*, 110 Neb. 325. However, as the judgment of the trial court must be reversed, and the case may be retried, we refrain from further comment.

REVERSED AND REMANDED.

STATE, EX REL. O. S. SPILLMAN, ATTORNEY GENERAL, PLAINTIFF, V. SECURITY STATE BANK OF EDDYVILLE, DEFENDANT: F. J. CLEARY, RECEIVER, APPELLEE: GEORGE JOHNSON, CLAIMANT, APPELLANT.

FILED NOVEMBER 10, 1927. No. 25079.

Banks and Banking: GUARANTY FUND: CLAIMS NOT ALLOWED. A deposit represented by a time certificate, in usual form, issued by a state bank, but which, by express terms, is made to bear interest anterior to its date, to its maturity, at 5 per cent. per annum, where the transaction relating to its issuance, including the agreement as to its terms, occurred wholly on the date of the instrument, is not within the protection of the depositors' guaranty fund, the transaction being in violation of section 8008, Comp. St. 1922.

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

John A. Miller and *E. L. Randall,* for appellant.

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

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

EBERLY, J.

This is an appeal from an order of the district court for Dawson county, Nebraska, disallowing a claim in favor of the claimant, designated herein as plaintiff, and against the depositors' guaranty fund in the sum of $5,000.

The following facts are disclosed by the record: For a number of years the plaintiff had deposits with the Security State Bank of Eddyville. These were evidenced by the usual form of certificates, upon all of which interest in excess of 5 per cent. per annum had been received by plaintiff. Plaintiff claims that the excess interest had been promised and paid him by the officer in charge of the bank in his private capacity. However, there is no question but what the excess interest was, in fact, paid by the bank and credited to plaintiff's account. During this period of time plaintiff also carried a checking account with this bank upon which no

interest was ever promised or paid. On July 7, 1923, there was a balance in this account of $1,132.44. On that date plaintiff cashed a certificate of deposit issued to him by this bank and deposited the proceeds amounting to $4,014.63 in his checking account, making a total then in that account of $5,147.07. On August 4, 1923, a representative of the bank entered into an agreement with the plaintiff by the terms of which plaintiff was to take out a certificate of deposit in the sum of $5,000 and to receive interest thereon from July 7, 1923, at 5 per cent. per annum. Pursuant to this arrangement a check was drawn by the plaintiff, and the certificate was issued by the bank in return therefor to the plaintiff. This certificate of deposit thus issued by the bank bore interest, according to its express terms, at 5 per cent. per annum from July 7, 1923, was dated August 4, 1923, and matured six months after date.

The district court denied recovery against the depositors' guaranty fund, and that ruling as applied to the $5,000 certificate of deposit is the matter presented for determination to this court.

Section 8008, Comp. St. 1922, provides: "No banking corporation transacting a banking business under this article shall pay interest on deposits, directly or indirectly, at a greater rate than five per cent. per annum."

This court is committed to the doctrine that a deposit made in violation of this statute is thereby removed from the protection of the depositors' guaranty fund. The controlling question here presented is, does the certificate of deposit, dated and actually issued pursuant to a contract or arrangement first made and entered into on August 4, 1923, payable six months after date, stipulating on its face for interest at 5 per cent. per annum from July 7, 1923, violate the statute before us? Obviously the effect of the arrangement is to secure for the depositor approximately 6 per cent. interest for the six months during which the bank is entitled to hold the deposit. It would follow therefore that the transaction before us is inhibited by the terms

of the statute, and that the ruling of the district court is right.

We have not overlooked the authorities cited by the plaintiff to sustain his position, viz.: *Ewing v. Howard*, 7 Wall. (U. S.) 499; *Ansley v. Bank of Piedmont*, 113 Ala. 467; *Graham v. Chubb*, 39 Mich. 417. It must be noted, however, that none of these authorities construes statutes similar to the one before us. And, indeed, the principles which they announce do not appear to sustain the position in support of which they are cited.

In *Ewing v. Howard, supra,* the judgment was for the plaintiff in the court below. The defendants in that court sued out a writ of error and removed the cause to the supreme court of the United States. The principal reason urged in the supreme court for the reversal of the judgment of the court below was: "That the first note described in the bill of exceptions is illegal, because the makers of the same promised to pay interest on the principal at the rate of ten per cent. per annum, commencing the computation two months and a half before the date of the note." In discussing the question presented, Justice Clifford, in delivering the opinion of the court, said in part:

"Argument for the defendants is that the contract is usurious, and that, inasmuch as the loaning of money at a greater rate of interest is prohibited by law, and the violation of the provision is declared to be a misdemeanor, the contract expressed in the note is illegal, and that the judgment should have been for the defendants. Suppose it be admitted that the presumption is as contended by the defendants, that the note was given for the loan of money, and that the contract is illegal, still the presumption is not a conclusive one, as the note may have been given for the purchase of goods, chattels, or lands, and the bargain may have been made and the property actually transferred on the exact day specified in the note, as the time from which interest is to be computed. Promissory notes, if given under those circumstances, though bearing interest anterior to their date, are neither usurious nor illegal, unless the day

described in the contract from which to compute the interest is anterior to the actual date of the transaction and the transfer of the subject-matter of the purchase and sale, and it is quite clear that promissory notes in such a case, as between the original parties, are open to explanation."

Under these facts the supreme court of the United States, in view of the reasons advanced, sustained the judgment rendered upon this note.

In the case here presented, it is admitted that the date of the actual transaction was August 4, 1923. So it would appear that the principles announced in the decision quoted are not in point, and, indeed, might be considered as reasoning opposed to defendant's position.

In *Ansley v. Bank of Piedmont, supra,* we have a situation similar to the case last discussed. In fact, the reasoning of the Alabama court plainly appears in the following paragraph of that opinion:

"The plea of usury is objectionable. The note was given for the purchase of land. There was no question of the loan of money in the transaction. It may be that the notes as written represent truly the purchase price as agreed upon. It does not follow as a matter of law that a note antedated is usurious. Much depends upon the nature of the transaction and the intention of the parties. If the note was antedated, merely to avoid the law of usury, it would be usurious, but facts should be averred, followed by an averment that it was done with a usurious intent."

In view of the "nature of the transaction and the intention of the parties" as reflected by the record in the instant case, it can hardly be said that *Ansley v. Bank of Piedmont, supra,* sustains appellant's contention.

Graham v. Chubb, supra, is more nearly in point. In that case the supreme court of Michigan, under the facts before them, and construing the statutes of that state controlling that subject, held: "There is nothing to prevent parties to a note from allowing back interest upon the debt at the same rate that would be lawful for the future." However, in view of the facts of the present record, we are not

able to say affirmatively that the district court erred in its conclusion that the acts of plaintiff in the transaction and the certificate of deposit, itself, was but a device for avoiding the terms of our statute.

In fact, if we are to adopt the conclusion that the authorities on the subject of usury are controlling, the case of *Vail v. Van Doren*, 45 Neb. 450, would appear to be in point. In that case this court held:

"When parties contract for the loan of money at the highest rate of interest allowed by the law, and the note or other evidence of indebtedness is made to bear interest from date and is dated at a time prior to that when the borrower receives the money, as a device to cover usury, and the money was not withheld from investment or otherwise set aside for the use of the borrower during the period between the date of the note and the payment of the money, the transaction is tainted with usury."

In the present case the certificate of July 7, 1923, the proceeds of which entered into the checking account, bore interest in excess of 5 per cent. When it was collected from the bank by the plaintiff, he did not renew the certificate, but placed the moneys received in his checking account. By so doing he retained the absolute disposition of it. He could demand it at any time he desired. He was under no obligation to permit the bank to retain it in its possession. On July 7, 1923, the deposit he made on that date was in no manner set aside for use of the defendant bank as a time deposit. His then contract secured him no interest. Such a contract first came into being on August 4, 1923. Prior to that time the rights of the parties were fixed by the facts surrounding the check deposit. On August 4, 1923, a new deposit was made and new rights were created, and separate, distinct and unconnected arrangements were entered into. One of the essential facts of the changed relation was, that by the terms of the new contract the plaintiff was to receive seven months' interest at 5 per cent. for a six months' deposit. This arrangement, under the circum-

stances of this case, was plainly within the reason as well as within the express prohibition of the statute quoted.

Therefore, the district court was right, and its judgment is AFFIRMED.

J. W. ROGERS, RECEIVER OF THE STATE BANK OF GERING, APPELLANT, V. NATIONAL SURETY COMPANY, APPELLEE.

FILED NOVEMBER 10, 1927. No. 26048.

1. **Banks and Banking**: GUARANTY FUND: SUBROGATION. Section 8035. Comp. St. 1922, construed and *held* to limit by express terms the subrogation therein provided for the benefit of the depositors' guaranty fund, upon payment made to the creditors, to "all the right of the creditors thus paid to participate in the assets of such bank."
2. ———: ———: LIABILITY. The depositors' guaranty fund is a creation of statute, possessing such rights and subject to such liabilities as the legislature has provided; the liabilities thus imposed thereon are analagous to that of a "guarantor" as distinguished from a "surety."
3. **Guaranty**: STATUS OF GUARANTOR. As a general rule a "guarantor" is not in privity with sureties, even on the same obligation, and cannot, when he has paid a debt, claim contribution from a "surety."

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

Butler & James and *Edward J. Lambe*, for appellant.

R. C. Clarke, contra.

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

EBERLY, J.

This is an appeal by J. W. Rogers, as receiver of the State Bank of Gering, plaintiff, from an adverse judgment in an action brought by such receiver against the National Surety Company of New York as defendant. The controlling facts involved in this litigation are as follows: The State Bank

of Gering failed September 28, 1922. In due course of proceedings the plaintiff was appointed and qualified as receiver thereof. From January, 1919, to date of the failure, this bank had a capital of $25,000 and a surplus of $7,500. It had been designated as a depository of public funds by the proper corporate authorities of Scotts Bluff county, and at the time "it closed its doors" there was on deposit therein $49,505.06, and there was owing by it to the county of Scotts Bluff, as interest accrued, an additional sum of $2,414.49. It also appears that on or about January 8, 1921, this bank, as principal, and the National Surety Company of New York, as surety, had executed and delivered to the county of Scotts Bluff a bond in the sum of $10,000. Its conditions were:

"Whereas, the said bank, in consideration of said deposit, and for the privilege of keeping the same, has agreed to pay and will pay to Scotts Bluff county the sum of not less than two per cent. (2) per annum on account of said deposit, the same shall be paid quarterly upon the daily average of the sum of such amount as the said bank shall have on deposit for the quarter or any fraction thereof next preceding the payment of said percentum, which shall be computed and credited to the account of Scotts Bluff county and shall become a part thereof.

"Now, therefore, if the said State Bank of Gering, of Gering, Nebraska, shall at the end of every month render to the treasurer of said Scotts Bluff county and county board a statement in duplicate showing the daily balance of the county of Scotts Bluff moneys held by it during the month next preceding, and the accretions thereof, and how the same has been credited, and shall well and truly keep all said sums of money so deposited, or to be deposited, as aforesaid, subject to the check and order of county treasurer as aforesaid, and shall pay over the same and each and every part thereof, upon the written demand of the county treasurer, and shall estimate, calculate and pay said percentum as aforesaid, and to his successor in office as shall be by him demanded, and shall in all respects save and keep

the county of Scotts Bluff and said county treasurer harmless and indemnified for and by reason of the making of the said deposit or deposits, then this obligation shall be void; otherwise to be and remain in full force and virtue, subject to the limitations and provisions of the rider attached and forming a part hereof."

"Attached to and forming a part of depository bond in the sum of $10,000 on behalf of the State Bank of Gering, in favor of Scotts Bluff county, Nebraska.

"The liability of the surety hereon shall be limited to the deposits of said county in excess of fifty per cent. of the paid up capital stock of said bank.

"Provided, further, that any right of defense to which the surety may be entitled by reason of the deposits being in excess of the statutory limit is hereby waived."

This bond had been accepted and approved.

After the bank's failure the surety company, upon demand, paid the county treasurer of Scotts Bluff county the sum of $10,764.02, and received in consideration thereof from that officer an assignment in writing of the "sum of $10,764.02, with interest, on deposit in the State Bank of Gering, Gering, Nebraska, and thereby subrogated the said surety to all its rights and remedies against said bank."

On this assignment an action was commenced against the receiver of the failed bank, having for its purpose securing a judgment making said claim a charge against the assets of the bank and also against the depositors' guaranty fund. The right of recovery was put in issue by proper pleadings and a trial on the merits was had. After appeal to this court (*State v. State Bank of Gering*, 114 Neb. 213), the action was finally determined in favor of the surety company and adversely to the receiver and the depositors' guaranty fund. The final judgment rendered in said cause in favor of the surety company and against the guaranty fund was paid in full by the guaranty fund on or about April 21, 1926.

The present action was commenced June 1, 1926, as an original action by the receiver in behalf of the department

of trade and commerce for the use and benefit of the depositors' guaranty fund of the state of Nebraska, and was based solely upon the proposition that the depositors' guaranty fund and the National Surety Company were, in view of the facts narrated, in truth and in fact, cosureties for the public funds deposited in the State Bank of Gering, and that the former having paid the entire sum, to wit, $51,919.55, to Scotts Bluff county was, as a cosurety, entitled to contribution from the latter.

The controlling questions presented by the pleadings upon which the case was tried and determined in the district court, and which are now urged by the plaintiff on appeal, are: (1) Is the defendant a cosurety and liable for a contribution to the depositors' guaranty fund? (2) Is the plaintiff foreclosed by the first adjudication and do the principles of *res adjudicata* apply? Of course, if the first question be determined against the plaintiff, it would serve no good purpose to determine the second.

It is to be observed that the questions presented by this appeal arise from, and have their inception in, the operation of our state banking law. Comp. St. 1922, pt. 3, title V, art. XVII, as amended. They pertain particularly to the provisions thereof creating and regulating the operation of the "depositors' guaranty fund." Comp. St. 1922, secs. 8024-8035.

This legislation was enacted pursuant to the police power of the state and is sustainable as, and because of, being a proper exercise of that police power. *Noble State Bank v. Haskell*, 219 U. S. 104; *Shallenberger v. First State Bank*, 219 U. S. 114.

To epitomize briefly, it may be said that section 8024 *et seq.*, Comp. St. 1922, provides for the creation of a guaranty fund for the protection of depositors of a state bank; that when a state bank fails, the claims of depositors for lawful deposits, and the claims of holders of exchange, shall have priority over all other claims, except federal, state, county, and municipal taxes, and shall be a first lien on all of the assets of the failed banking corporation; and the

further provision is made that, when a bank has become insolvent and a receiver therefor has been appointed, it appearing that the cash in the hands of the receiver shall be insufficient to pay the claims of such depositors, the same shall be paid in a manner pointed out from the depositors' guaranty fund. The rights and remedies created in favor of the depositors' guaranty fund and for its reimbursement by reason of this transaction are enumerated in section 8035, Comp. St. 1922, in the following language: "To the extent of the amount paid from said guaranty fund to satisfy the claims of creditors, the department of trade and commerce, for the use and benefit of said fund, shall be subrogated to all the right of the creditors thus paid, to participate in the assets of such bank, and the same shall be enforced and collected by the receiver accordingly and when collected shall be placed in said fund and deposited by the department of trade and commerce in the solvent banks subject to the provisions of the depositors' guaranty fund, proportionate to the several deposits to the assessments levied against each of said banks."

It will be noted that by the language of the above section quoted the right of subrogation in favor of the depositors' guaranty fund is expressly confined to "all the right of the creditors thus paid, to participate in the assets of such bank." This language is plain and unambiguous. *State v. Insurance Co. of North America*, 71 Neb. 320.

If we are to be limited for our remedies to the provisions of the statute, it could hardly be contended that the surety bond executed by the bank and the defendant surety company in this case, and in possession of the county authority, which evidenced an express liability of both, formed any part of the "assets of such bank."

To what extent may the express provisions of this statute before us be enlarged by construction? The statute, itself, is not in any manner intended to be declaratory of common law. It must be deemed exclusively a police regulation having as its well-defined object the enforcement of primary conditions of successful commerce. For this pur-

pose new rights unknown to common law are created, for the enforcement of which express remedies are prescribed; and though new powers are brought into being, as to each, means are expressly provided by the terms of the statute itself to secure their due execution.

If we are correct in this deduction, it would follow that the proper canon of construction applicable and necessitated by the form and purpose and the language of the legislation before us is, "*Expressio unius est exclusio alterius.*" It would follow that the provisions of section 8035, Comp. St. 1922, providing for subrogation by the depositors' guaranty fund to certain rights, must be deemed exclusive. 2 Lewis' Sutherland, Statutory Construction (2d ed.) secs. 493, 572, 627, 633; 36 Cyc. 1122.

This construction is also in accord with the plain words of the statute and in harmony with the views heretofore expressed by this court. *State v. Farmers State Bank,* 103 Neb. 194; *State v. Farmers State Bank,* 113 Neb. 503; *State v. Kilgore State Bank,* 112 Neb. 856. This principle of construction now under consideration was necessarily involved, and by implication approved, in the decision of this court in *State v. Kilgore State Bank, supra.* The controlling facts and circumstances of that case are substantially identical with the case before us. The United States Fidelity & Guaranty Company had executed a bond in behalf of the state bank, and the latter thereby secured certain Indian deposits made by the federal government. The bank failed. The surety company, in strict compliance with the provisions of its bond, paid the deposits to the assured. It thereupon claimed subrogation to the rights of the depositors as against the depositors' guaranty fund. The claim was resisted. Manifestly, if the depositors' guaranty fund was entitled to contribution on the theory of being a cosurety with the "surety bond," it would have been an existing defense *pro tanto* in its behalf. Or, if the equity of the depositors' guaranty fund was superior to that of the bond, it would have been a complete defense. In that action this court, notwithstanding the defense that was presented in

behalf of the depositors' guaranty fund, sustained the right of the insurance company to subrogation as against both the bank and the guaranty fund. In that opinion the following language was used and is applicable to the facts in the instant case:

"This brings us to the second inquiry. The contract was in suretyship. It was so denominated in the bond. The intervener signed as a surety. The requirement of the United States was a suretyship. The contract was not a policy of insurance whereby the company was to pay the United States without recourse. Appellees concede in their brief that the surety company has recourse upon the bank, having paid for the bank. How? Through subrogation to the right of the United States is the only possible way. And since the United States had in that very connection, as we have seen, a right of recourse to the guaranty fund, why should the right of subrogation be abridged in regard to that? Manifestly there is no reason why that should be, since no condition interposes to check the operation of the equitable doctrine of subrogation. The fact that the surety is paid will not do it. That fact does not destroy the inherent nature of suretyship, nor deprive it of its peculiar remedy, which is subrogation. Subrogation follows equity, and it is only where it will be inequitable to permit it to function where it ordinarily does function that its automatic operation is denied. The paid surety is as much entitled to subrogation as the unpaid surety unless some equity intervenes. It must be clear that the guaranty fund protection of the deposit which was to be made was in the contemplation of the parties when the surety company entered upon its suretyship. It was paid for that suretyship, but the terms, as to amount, were made upon the theory that the deposit carried the protection of the fund and that it, the surety, would stand in the shoes of the depositor."

This doctrine by fair implication is a denial of any right of contribution in favor of the guaranty fund as against the bond company, and is strictly consistent with section 8035, Comp. St. 1922.

But even if the statute involved is construed as not in any manner restrictive in and by its terms, is the plaintiff herein now entitled to relief against the bonding company in the form of contribution as between cosureties? The doctrine of contribution rests on the principle that, when the parties stand in *æquali jure,* the law requires equality, which is equity, and one of them shall not be obliged to bear a common burden in ease of the rest. It is founded on principles of equity and natural justice and does not arise from contract. The principle of equity on which the right of contribution is founded can apply only in cases where the situations of the parties are equal, for equality among persons whose situations are not equal is not equitable. Within the meaning of this rule, the situations of the parties are equal when the parties are under a common burden or liability, and it is immaterial whether that liability is joint or joint and several. 13 C. J. 821, sec. 2.

It is obvious that the obligation imposed upon the depositors' guaranty fund by the terms of the statute is quite different from that which the conditions of the bond impose upon the surety company in this case. The terms of the statute speak of a "guaranty fund." This fund briefly is not a party to the bank's contract, and is not precluded by the results of any legal action brought thereon. It only becomes liable after and when a state bank has failed which has complied with the conditions of the statute, a receiver has been appointed, and it has been determined that the cash on hand is insufficient to pay the bank's depositors and the holders of the bank's exchange.

The National Surety Company's liability, on the other hand, is in no manner dependent on the insolvency of its principal or of the condition of its assets, but wholly upon the "failure" of its principal to comply with the conditions of the bond which it executed with him. Whether its principal be solvent or insolvent, whether a bankrupt institution or a going concern, the conditions of that instrument which evidence its primary liability to the obligee alone determine its validity. It may be termed, therefore, strictly

a surety within the restricted meaning of that term. The liability of the guaranty fund is therefore not identical with that of the surety company. Neither can it be said that the burdens are common. While both as to the principal are collaterally liable, as to the creditor or obligee, the latter is primarily and directly liable on its contract from the beginning, whereas the liability of the guaranty fund is secondary and is fixed only by the happening of the prescribed statutory conditions. The surety company is bound with the principal on the identical contract under which the liability of the principal accrues. The guaranty fund is bound for the performance of a collateral contract on which the principal alone is obligated. The contract of the surety company is a direct, original agreement with Scotts Bluff county that the very thing contracted for shall be done, whereas the guaranty fund is bound by a statutory, cumulative, collateral obligation by which it, in effect, is bound that its principal is able to, and will, perform the contract, and that if the principal defaults the guaranty fund, after statutory steps have been taken, must pay to the extent provided by law. In short, the National Surety Company is the insurer of the debt or obligation evidenced by its bond, while the guaranty fund, as to deposits lawfully made, was the insurer of the ability or solvency of the bank.

In view of the statutory provision, the term "depositors' guaranty fund" is no misnomer and functions strictly as a "guarantor" as the nature of its obligations is strictly secondary. The obligation of the National Surety Company being strictly primary, it may properly be termed a "surety" in the technical sense of that term. This is in accord with the decisions of this court. *Mowery v. Mast & Co.*, 9 Neb. 445; *Barry v. Wachosky*, 57 Neb. 534; *Ayres v. West*, 86 Neb. 297; *Schultz v. Wise*, 93 Neb. 718; *Anderson v. Hall*, 4 Neb. (Unof.) 494.

If we are correct in this conclusion, it follows "as a general rule a guarantor is not in privity with sureties, even on the same obligation, and cannot, when he has paid the debt, claim contributions from such surety."

Or, as we find it stated in *Monson v. Drakeley*, 40 Conn. 552; "A guarantor of the ability of the maker is in no sense in privity with the sureties. His undertaking is collateral and independent. He is not chargeable by them with contribution and cannot claim it; and if he pays the debt his remedy is against the principal alone for indemnity."

As this case is presented in behalf of the plaintiff solely on the theory that the depositors' guaranty fund is entitled to contributions from defendant as between cosureties, it would seem that the above principle would be determinative of the controversy, and that such action cannot be sustained.

The judgment of the district court is right, and is

AFFIRMED.

J. W. ROGERS, RECEIVER OF THE FARMERS & MERCHANTS BANK OF MORRILL, APPELLANT, V. NATIONAL SURETY COMPANY, APPELLEE.

FILED NOVEMBER 10, 1927. No. 26049.

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

Butler & James and *Edward J. Lambe*, for appellant.

R. C. Clarke, contra.

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

EBERLY, J.

This is a companion case of *Rogers v. National Surety Co.*, *ante*, p. 170.

It involves substantially similar, controlling facts and is determined by the opinion in the foregoing case. For the reasons stated therein, the judgment of the district court must be affirmed.

AFFIRMED.

MAE ELIZABETH EMERSON, APPELLANT, V. WESTERN SEED & IRRIGATION COMPANY, APPELLEE.

FILED NOVEMBER 10, 1927. No. 24849.

1. **Husband and Wife:** PERSONAL INJURIES: RIGHT TO SUE. The statutes of this state enabling a married woman to sue do not authorize a suit by the wife against the husband to recover damages for injuries to the person.
2. **Master and Servant:** PERSONAL INJURIES: RIGHT TO SUE. Nor do these statutes permit a recovery against the husband's employer for damages caused by the husband's negligence, where the husband is liable to the employer.

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

Abbott & Dunlap, for appellant.

J. C. Cook, contra.

Heard before GOSS, C. J., ROSE, DAY, THOMPSON and EBERLY, JJ., RAIT and SHEPHERD, District Judges.

RAIT, District Judge.

On rehearing of an affirmance, entered without opinion, of an appeal from dismissal by trial court following order sustaining demurrer to petition.

The petition states that the plaintiff was injured through the negligent driving by her husband of an automobile; that the automobile was the property of the defendant and was being operated in the conduct of its business by her husband as an employee and agent of defendant, and that defendant knew that she was accompanying her husband and consented thereto.

The question presented is whether an employer is liable to the wife, where the negligence of the husband and employee was the cause of her injuries.

This question is new in this state, but has been presented on many occasions in other courts and involves always the construction of local legislation respecting the purpose and scope of statutes granting new rights to or removing the

common-law disabilities from married women. While purely a question of local law, the statutes of all the states have some similarity in language and clearly have a common object in the removal of the disabilities of married women and the placing of both sexes in equality respecting their rights and the manner of enforcing them.

The Nebraska statutes are as follows (Compiled Statutes 1922):

Section 8529. "A woman may while married sue and be sued, in the same manner as if she were unmarried."

Section 8530. "If a husband and wife be sued together, the wife may defend for her own right; and if the husband neglect to defend, she may defend for his right also."

Section 1241. "And any married woman may devise and dispose of any real or personal property held by her, or to which she is entitled in her own right, by her last will and testament, in writing, and may alter or revoke the same in like manner that a person under no disability may do, and subject to the same restrictions."

Section 1509. "The property, real and personal, which any woman in the state may own at the time of her marriage, and the rents, issues, profits, or proceeds thereof, and any real, personal, or mixed property, which shall come to her by descent, devise, or the gift of any person except her husband, or which she shall acquire by purchase or otherwise, shall remain her sole and separate property, notwithstanding her marriage, and shall not be subject to the disposal of her husband, or liable for his debts: Provided, all property of a married woman not exempt by law from sale on execution or attachment, shall be liable for the payment of all debts contracted for necessaries furnished the family of said married woman after execution against the husband for such indebtedness has been returned unsatisfied for want of goods and chattels, lands and tenements whereon to levy and make the same."

Section 1510. "A married woman, while the marriage relation subsists, may bargain, sell and convey her real and personal property, and enter into any contract with refer-

ence to the same in the same manner, to the same extent, and with like effect as a married man may in relation to his real and personal property."

Section 1511. "Any married woman may carry on trade or business, and perform any labor or services on her sole and separate account; and the earnings of any married woman, from her trade, business, labor, or services, shall be her sole and separate property, and may be used and invested by her in her own name."

Section 1512. "Any woman who shall have been married out of this state, shall, if her husband afterwards becomes a resident of this state, enjoy all the rights as to property which she may have acquired by the laws of any other state, territory, or country, or which she may have acquired by virtue of any marriage contract or settlement made out of this state."

Section 8837. "The husband can in no case be a witness against the wife, nor the wife against the husband, except in a criminal proceeding for a crime committed by the one against the other, but they may in all criminal prosecutions be witnesses for each other: Provided, however, the wife shall be a competent witness against the husband in all prosecutions arising under section thirty-nine of the Criminal Code (9584)."

These statutes have been interpreted by this court in the following cases:

Aultman, Taylor & Co. v. Obermeyer, 6 Neb. 260;
Dayton Spice-Mills Co. v. Sloan, 49 Neb. 622;
First Nat. Bank v. Havlik, 51 Neb. 668;
Studebaker Bros. Mfg. Co. v. Welch, 51 Neb. 228;
Godfrey v. Megahan, 38 Neb. 748;
Trayer v. Setzer, 72 Neb. 845;
Bohner v. Bohner, 46 Neb. 204;
Dunn v. Bozarth, 59 Neb. 244;
In re Estate of McCormick, 100 Neb. 669;
Greene v. Greene, 42 Neb. 634;
Stenger Benevolent Ass'n v. Stenger, 54 Neb. 427;
Kerner v. McDonald, 60 Neb. 663;

Smith v. Dean, 15 Neb. 432;
Goken v. Dallugge, 72 Neb. 16.

In other jurisdictions statutes somewhat similar have been construed:

Strom v. Strom, 98 Minn. 427, 6 L. R. A. n. s. 192;
Peters v. Peters, 42 Ia. 182;
Freethy v. Freethy, 42 Barb. (N. Y.) 641;
Longendyke v. Longendyke, 44 Barb. (N. Y.) 366;
Bandfield v. Bandfield, 117 Mich. 80, 40 L. R. A. 757;
Main v. Main, 46 Ill. App. 106;
Nickerson v. Nickerson, 65 Tex. 281;
Peters v. Peters, 156 Cal. 32, 23 L. R. A. n. s. 699;
Thompson v. Thompson, 218 U. S. 611, 30 L. R. A. n. s. 1153;
Lillienkamp v. Rippetoe, 133 Tenn. 57, L. R. A. 1916B, 881;
Abbott v. Abbott, 67 Me. 304;
Schultz v. Christopher, 65 Wash. 496, 38 L. R. A. n. s. 780;
Keister v. Keister, 123 Va. 157, 1 A. L. R. 439;
Austin v. Austin, 136 Miss. 61, 33 A. L. R. 1388;
Heyman v. Heyman, 19 Ga. App. 634;
Woltman v. Woltman, 153 Minn. 217;
Oken v. Oken, 44 R. I. 291;
Brown v. Brown, 88 Conn. 42, 52 L. R. A. n. s. 185;
Mathewson v. Mathewson, 79 Conn. 23, 5 L. R. A. n. s. 611;
Muller v. Witte, 78 Conn. 495;
Fiedler v. Fiedler, 42 Okla. 124, 52 L. R. A. n. s. 189;
Gilman v. Gilman, 78 N. H. 4, L. R. A. 1916B, 907;
Sykes v. Speer, 112 S. W. (Tex. Civ. App.) 422;
Maine v. Maine & Sons Co., 198 Ia. 1278, 37 A. L. R. 161;
Perlman v. Brooklyn City R. Co., 191 N. Y. Supp. 891;
Harvey v. Harvey, 239 Mich. 142;
Wait v. Pierce, 191 Wis. 202;
Prosser v. Prosser, 114 S. Car. 45;
Crowell v. Crowell, 181 N. Car. 66;
Johnson v. Johnson, 201 Ala. 41.

An examination of the decisions of other jurisdictions discloses a great weight of opinion opposed to opening a field of litigation between spouses in tort actions by means of judicial interpretation and without unmistakable legislative action. The procedural difficulties, the dangers of disrupting the secrecy and serenity of marital relations, the avenue for fraud, the startling innovation in permitting such controversies, and the lack of clear legislative indorsement have all been assigned as ample reasons for the refusal of the courts to sanction, by supplying statutory interpretation, a new form of litigation manifestly requiring unequivocal legislation for its existence. An illustration of this reluctance is found in *Thompson v. Thompson*, 218 U. S. 611, where the statutes under consideration come close to an authorization. The opinions cited from other jurisdictions give all the reasons that may well be urged from either viewpoint and need not be repeated here.

The Nebraska decisions are confined to contract actions and such other actions as are expressly authorized by statute. The legislation of this state apparently was designed to remove disabilities from married women, so as to place the sexes in equal position before the law. This was fully attained. The husband may not sue the wife for tort. Both spouses have the same disability and the equality is complete. If this situation is to be disturbed, the change should come by legislation.

Although the statutes authorize suits against third persons, the question now arises whether they may be maintained in cases where they are grounded upon the negligence of the husband when employed by the third person. The employee is liable to the employer for his negligence.

In *Doremus v. Root*, 23 Wash. 710, 54 L. R. A. 649, it is said: "The act of an employee, even in legal intendment, is not the act of his employer, unless the employer either previously directs the act to be done or subsequently ratifies it. For injuries caused by the negligent act of an employee not directed or ratified by the employer, the employee is liable because he committed the act which caused the injury,

while the employer is liable, not as if the act was done by himself, but because of the doctrine of *respondeat superior*, the rule of law which holds the master responsible for the negligent act of his servant, committed while the servant is acting within the general scope of his employment and engaged in his master's business. The primary liability to answer for such an act, therefore, rests, upon the employee, and when the employer is compelled to answer in damages therefor he can recover over against the employee."

In 18 R. C. L. 502, sec. 13, it is said: "An employee is directly liable to his employer for any damage occasioned by his negligence or misconduct, whether such damage be direct to the property of the employer, or arise from the compensation which the employer has been obliged to make to third persons for injuries sustained by them."

If recovery may be had by the wife against the employer, and he in turn may recover from the husband-employee, then the family wealth remains the same save as diminshed by the expenses of the litigation. It would seem that to permit a recovery against the employer results simply in countenancing an encircling movement where a frontal attack upon the husband is inhibited. *Maine v. Maine & Sons Co.*, 198 Ia. 1278.

Suits between spouses should be confined as heretofore to those having contractual elements or where there is direct statutory authorization, and suits by a spouse against third persons grounded upon the tort of the other spouse, and without contractual elements, fall in the same category.

AFFIRMED.

GOOD, J., dissents.

EDWARD KRUG V. STATE OF NEBRASKA.

FILED NOVEMBER 28, 1927. No. 25825.

1. **Rape**: EVIDENCE: CORROBORATION. In a prosecution for statutory rape on a female under 18 years of age, the testimony of

the prosecutrix to the effect that she was not previously unchaste need not be corroborated.

2. ———: ———: ———. Nor is it necessary that such a prosecutrix be corroborated by other witnesses as to the particular act constituting the offense; but, if the defendant testifies and explicitly denies the commission of the offense, the prosecutrix must then be so corroborated, as to the material facts and circumstances tending to support her testimony as to the principal fact, that from all such testimony the guilt of the defendant is established beyond a reasonable doubt.

3. ———: ———: ———. The positive and unequivocal testimony of the prosecutrix as to the main fact constituting the offense will be sufficiently corroborated, if opportunity and disposition on the part of the defendant to commit the offense are shown and if the circumstances proved by other witnesses tend to corroborate the testimony of the prosecutrix.

4. ———: ———: ———. In a prosecution for rape, the prosecutrix may testify in chief, if within a reasonable time under all the circumstances after the act was committed she made complaint to another, to the fact and nature of the complaint, but not as to its details; and that other may likewise testify in chief to such fact and nature of the complaint, but not as to its details. Such testimony, together with all other facts and circumstances in evidence, may be considered by the jury in corroboration of the testimony of the prosecutrix as to the main fact in issue.

ERROR to the district court for Richardson county: JOHN B. RAPER, JUDGE. *Reversed.*

F. A. Hebenstreit, for plaintiff in error.

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

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

GOSS, C. J.

Edward Krug prosecutes error from a conviction for statutory rape. The defendant being over 18 years of age and the prosecutrix under that age, the requirements of the statute would be met by proof beyond a reasonable doubt that she was not previously unchaste, and that the parties had

sexual intercourse at or about the time alleged in the indictment.

The essential facts to be stated from the record to illustrate the chief error assigned are as follows: One evening about 7:45 early in January, 1926, Dorothy Crews and Hazel Davis were walking along the street in the village of Shubert, when the defendant in a small roadster drew up at the curb and invited them to ride. Hazel Davis did not accept, but the prosecutrix did. The defendant had recently come to town and worked in his grandfather's meat market. The grandfather had introduced him to Dorothy in the store a few days before this occurrence. Dorothy testified that the defendant drove out of town about half a mile, stopped his car, and after some objection on her part had sexual intercourse with her. They then returned to town after an absence of about 25 minutes and she found Hazel Davis and spent some time with her and others, as detailed in the evidence. The state claims a complaint was made by the prosecutrix to Hazel Davis soon after she returned from the ride, telling her friend that the defendant had intercourse with Dorothy since they last separated. This is all the record shows of the examination of Dorothy by the state on this point (omitting objections and rulings):

"Q. Now, did you tell anybody of this occurrence between yourself and the defendant that night, did you tell the Davis girl? A. Yes, sir; I did." The following is all the record shows of the cross-examination of prosecutrix on this point (omitting inapplicable matter): "Q. You say you told Miss Davis about this when you were going to the depot? A. Before I went to the depot. Q. What time was it you told her that? A. Well, it must have been about eight twenty. Q. Now, then, you say you went up in the barber shop didn't you after this happened? A. Yes, sir. Q. And who was in the barber shop? A. Her mother and Billy McArdle and herself was all. Q. Billy McArdle is Hazel Davis' step-father? A. Yes, sir. Q. And you stood there talking a while? A. Not very long. I told her I was thirsty; then we went into the kitchen and I got a drink and then I told her." The follow-

ing is the entire record of the testimony of Hazel Davis when examined by the state as to the complaint of the prosecutrix (omitting objections and rulings): "Q. Now, did you have a conversation with Dorothy? A. Yes, sir. Q. Did she tell you what took place between her and Eddie Krug? A. Yes, sir." The prosecutrix testified that she never told any of her family of the outrage until the last of May, after she discovered she was pregnant; and that she never told Eddie Krug about her pregnancy. Her child was born October 6, 1926.

The defendant denied any act of intercourse with the prosecutrix, and testified that, on the occasion in question, they drove around in the town about 15 minutes and never left the corporate limits. There was testimony by others as to his good character. No witness testified to anything unusual in the appearance or clothing of the prosecutrix, and witnesses who saw her just after the return from the ride with defendant testified that there was nothing out of the ordinary in her appearance, that she seemed to be in good humor, that neither her hair nor clothing were ruffled, and that she looked as if she had just come from home.

In this state of the record the court gave instruction No. 12, which reads as follows: "If you find that Dorothy Crews made complaint to Hazel Davis of the alleged intercourse with defendant soon after the time she testifies the act of intercourse took place with defendant, such may be received and considered by the jury in corroboration of her other testimony given in the case."

It is argued that this instruction assumes a condition not in evidence; that is to say, that it assumes that Hazel Davis testified that the prosecutrix, in complaining to her, told her that the defendant had intercourse with the prosecutrix.

Under our decisions the testimony of the prosecutrix in a rape case to the effect that she was not previously unchaste need not be corroborated. *Leedom v. State,* 81 Neb. 585; *Miller v. State,* 112 Neb. 243. Nor is it necessary that she be corroborated by other witnesses as to the particular act constituting the offense; but, if the defendant testifies

and explicitly denies the commission of the offense, the prosecutrix must then be so corroborated, as to material facts and circumstances tending to support her testimony as to the principal fact, that from all such testimony the guilt of the defendant is established beyond a reasonable doubt. *Fager v. State,* 22 Neb. 332; *Miller v. State,* 112 Neb. 243. We have further held that her positive and unequivocal testimony as to the main fact constituting the offense will be sufficiently corroborated, if opportunity and disposition on the part of the defendant to commit the offense are shown and if the circumstances proved by other witnesses tend to corroborate the testimony of prosecutrix. *Aller v. State,* 114 Neb. 59; *Whetstone v. State,* 99 Neb. 469; *Dawson v. State,* 96 Neb. 777. In a prosecution for rape, the prosecutrix may testify in chief, if within a reasonable time under all the circumstances after the act was committed she made complaint to another, to the fact and nature of the complaint, but not as to its details; and that other may likewise testify in chief to such fact and nature of the complaint, but not as to its details. Such testimony, together with all other facts and circumstances in evidence, may be considered by the jury in corroboration of the testimony of the prosecutrix on the trial as to the main fact in issue. 2 Wigmore, Evidence (2d ed.) secs. 1134, 1137; *Dunn v. State,* 58 Neb. 807.

"In a few jurisdictions the details of the complaint are held admissible for the purpose of corroborating the prosecutrix in a trial for rape, but the rule supported by the weight of authority is that the prosecutrix may testify merely to the fact of making a complaint, and on the direct examination the usual practice is merely to ask whether she made complaint that such an outrage had been perpetrated upon her, and to receive in answer only a simple yes or no. And a person to whom complaint has been made by the victim of a rape, when placed on the witness-stand, cannot be permitted to repeat all the details of the outrage as reported to the witness." 22 R. C. L. 1213, sec. 48.

The most applicable case we find in Nebraska is *Oleson v. State*, 11 Neb. 276, and relates directly only to the testimony of the prosecutrix. We think it contains the principle involved. The second point of the syllabus says: "In a prosecution for rape, the prosecutrix may be asked whether she made complaint of the injury; but the particulars, when not a part of the *res gestæ*, are not evidence of the truth of her statement, and cannot be given as evidence in chief."

Maxwell, C. J., who wrote the opinion, quotes, page 279, from Greenleaf, the following: "Though the prosecutrix may be asked whether she made complaint of the injury, and when and to whom, and the person to whom she complained is usually called to prove that fact, yet the particular facts which she stated are not admissible in evidence, except when elicited in cross-examination, or by way of confirming her testimony after it has been impeached. On the direct examination the practice has been merely to ask whether she made the complaint that such outrage had been perpetrated upon her, and to receive only a simple yes or no"—citing 1 Greenleaf, Evidence, sec. 213.

The prosecutor had in mind, and was attempting to follow, this rule, with which, as we understand its position, the state agrees. However, the answer of the witness, Hazel Davis, does not show that Dorothy Crews told her that she had had "intercourse with defendant," as implied in the instruction given by the court. The question asked her by the prosecutor did not contain any terms referring to any criminal act. He merely asked her if the prosecutrix told her what took place between the prosecutrix and defendant. So far as this record of Hazel Davis' examination shows, Dorothy may have told her that Eddie Krug kissed her, or proposed marriage to her, or refused to take her to the movie, or any of many things other than the fact of having committed the offense charged in the indictment and singled out in the instruction. He should have followed it up and put before the jury and into the record the nature of what the prosecutrix complained of to the witness. This instruction and a colloquy shown in the record between counsel,

in which the court participated, while the county attorney was making his argument, led several jurors to believe that Hazel Davis testified that Dorothy told her that the defendant had had intercourse with her while out on the ride in question, as is shown by their affidavits used in an attempt to obtain a new trial. To justify such an instruction, the record of the examination of Hazel Davis should have shown that she had testified to enough to indicate by itself that Dorothy Crews had complained to her that the defendant had raped her or had had intercourse with her at the time in question. We think the instruction was prejudicial to the rights of the defendant. Other errors are assigned and argued, but we do not deem it necessary to discuss them, in view of the fact that the case is for reversal.

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

REVERSED.

C. H. RUNYAN V. STATE OF NEBRASKA.

FILED NOVEMBER 28, 1927. No. 25932.

1. **Homicide**: ELEMENTS OF CRIME: PROOF. Under section 9545, Comp. St. 1922, a purpose to kill and malice are essential elements of murder in the second degree and, under a charge therefor, both must be proved beyond a reasonable doubt.
2. ———: MALICE: PRESUMPTION. Malice is never implied or presumed as a matter of law, where the circumstances of the killing are testified to on the trial by eyewitnesses.
3. ———: INSTRUCTIONS. "Where the evidence does not prove a higher degree of homicide than manslaughter, it may be prejudicial error to submit to the jury the issue of murder in the second degree, though the trial results in acquitting the accused of the graver offense and in finding him guilty of the lesser. *Whitehead v. State*, 115 Neb. 143.

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

Hoagland, Carr & Beck and *Brown & Dibble*, for plaintiff in error.

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

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

GOSS, C. J.

Defendant prosecutes error from a conviction for manslaughter for which he was sentenced to a term of seven years in the penitentiary. The amended information is in two counts. The first count charges the defendant, Runyan, in conventional terms, as a principal, with second degree murder of John Harold Sollars, by shooting him. The second count charges that one Harry Johnson, purposely and maliciously, but without deliberation and premeditation, shot and killed Sollars with a rifle, thus committing murder in the second degree, and that Runyan was present, unlawfully, purposely and maliciously aiding and abetting Johnson in the commission of the murder. The second count was authorized by section 9541, Comp. St. 1922, as amended by chapter 89, Laws 1923, which reads: "Whoever aids, abets or procures another to commit any offense may be prosecuted and punished as if he were the principal offender." Throughout the trial, and in the instructions to the jury, the two counts were treated as if each charged the defendant as a principal, and, taken together, "as charging but one offense, as though both were included in one count." The defendant moved to require the state to elect on which count it would prosecute. This motion was overruled and no error has been argued in the briefs on this account. This is mentioned, and the counts of the information have been described, because of a certain bearing they will have on a later discussion of error relied on by the plaintiff in error.

The act resulting in this deplorable tragedy occurred in the country north of, but not far from, the city of North Platte, on the night of May 13, 1926. Those present were the defendant, who was an undercover man employed and paid by the city to aid in matters of violation of laws relating to intoxicating liquors, two police officers of the city,

a railroad special officer, who was also a deputy sheriff, and Harry Johnson, who was not an officer. In the afternoon of that day, Runyan and Hedrick, one of the officers, had gone out and seized a car, transporting liquor in this neighborhood. While taking it into the city they heard that another car, a Ford sedan or coupé, carrying liquor, was coming in from the north. On reporting to the chief of police, they were instructed to seize it. On the way out they discussed the need of more help and Hedrick telephoned for it. Greene, the other police officer, and Frahm, the deputy sheriff, came. On their way, Runyan and Hedrick picked up Harry Johnson, who was an acquaintance of Runyan, and who took them in his car. He took along his sporting rifle. The three drove to the neighborhood where the contraband car was expected and parked Johnson and his car in a gateway. As cars would approach, Runyan and Hedrick would walk forward and flag the cars and Johnson would drive his car into the roadway so as to block it. After stopping several cars in this way, the three went over to another point where Greene and Frahm were operating at the intersection of two roads. Frahm parked his car, facing south, on the east side of a north and south road, and Johnson's car was on the south side of the east and west road, but turned toward the other car, so as to leave from eight to twelve feet for a car to pass on the roadway between them. About the time these positions were taken, a car approached. Johnson remained in his car, but the other four were on the ground as a car approached, which later proved to be a Maxwell coupé with Harry Sollars and a young lady in it. The testimony shows that they were estimable young people who lived in North Platte and who were out for an innocent evening ride. Greene signalled with his flashlight for the car to stop. It slowed down, coming practically to a stop. Runyan stepped forward, accosted the occupants, and expressed a desire to look the car over. Sollars suddenly applied the gas, the car shot forward. Runyan said, " 'Stop him,' or something to that effect," and fired two shots with his revolver, one at the

left rear tire, striking the left fender, and one at the gas tank, striking above it. Greene and Hedrick did not shoot. Frahm fired his gun off in the air, not at the car. When Sollars had driven a few hundred feet, Johnson shot at his car. There is testimony that Runyan rebuked Johnson for firing with his rifle, and that shortly thereafter the fleeing car began to wobble. When the last shot was fired by Runyan, the car was not over 25 feet from him. It was conceded by the state that neither of these shots by Runyan killed Sollars, but that he was killed by the rifle shot by Johnson. The record shows that Sollars went to town and to a hospital, where he died later as a result of the shooting. Sollars drove the car part of the way in and his companion drove it the rest of the way.

The original information contained only one count, and charged Johnson, Runyan and Frahm with murder in the second degree by means of a rifle shot. Johnson was separately tried on that information, was convicted of manslaughter, and was sentenced to six years in the penitentiary. Shortly thereafter the information was amended so as to contain two counts, and to charge the defendant Runyan, only, as heretofore set forth.

When the information was amended, so as to charge Runyan alone with second degree murder by shooting with a rifle, the prosecution well knew that this defendant did not shoot Sollars with a rifle and well knew that Johnson had been convicted of manslaughter for that act by that means in this same cause in a separate trial.

Under section 9545, Comp. St. 1922, a purpose to kill and malice are essential elements of murder in the second degree and under a charge therefor, both must be proved beyond a reasonable doubt. Under our decisions, malice is never implied or presumed as a matter of law, where the circumstances of the killing are testified to on the trial as they were in this case. *Vollmer v. State,* 24 Neb. 838; *Lucas v. State,* 78 Neb. 454; *Kennison v. State,* 80 Neb. 688; *Flege v. State,* 90 Neb. 390; *Egbert v. State,* 112 Neb. 129. So the state has to rely on the testimony,

showing the circumstances leading up to the killing, to prove malice. It would have been contrary to the instructions, in all the circumstances shown in this case, for the jury to have found the defendant guilty of murder in the second degree, because, as we view the testimony, the element of malice on the part of the defendant was lacking therefrom. This leads us directly to the question as to whether the rights of the defendant were prejudiced by the refusal of the court to withdraw the charge and the evidence relating to second degree murder from the consideration of the jury.

We have recently held: "Where the evidence does not prove a higher degree of homicide than manslaughter, it may be prejudicial error to submit to the jury the issue of murder in the second degree, though the trial results in acquitting the accused of the graver offense and in finding him guilty of the lesser." *Whitehead v. State,* 115 Neb. 143. See *Botsch v. State,* 43 Neb. 501; *Williams v. State,* 103 Neb. 710; 30 C. J. 398, sec. 642. This tendency toward error in submitting the graver charge was accentuated by submitting to the jury a form of "verdict finding the defendant guilty of murder in the second degree, as charged in the information," and was emphasized all through the closing address to the jury by the able, eloquent and vigorous special prosecutor, who said in his peroration to the jury: "It doesn't make any difference whether it was Kelly Sollars, whether it was your boy or my boy that was in that car, an awful crime was committed in Lincoln county on the 13th of last May, and the man who is responsible for it has not yet received his punishment. An awful crime. Think about that poor boy, suffering untold agonies, shot with a bullet practically tearing his abdomen to pieces; a boy just grown to manhood. I want to say to you men, you have a duty to perform. It is a duty to convict Runyan of murder in the second degree."

While the charging of the defendant with a higher degree of homicide than he was guilty of, the submitting of that charge to the jury along with a form of guilty verdict,

and the argument of counsel devoted almost exclusively to an advocacy of finding the defendant guilty of murder in the second degree are none of them absolute error, yet their cumulative effect was to wear down the individual wills of the jurors, and perchance to cause them to compromise and agree on a verdict for a lesser degree of homicide, rather than to consider only whether the accused was guilty of manslaughter or was innocent. We think it was prejudicial to the rights of the defendant. The court should, therefore, have eliminated from the consideration of the jury the charge of murder in the second degree. This conclusion renders it unnecessary for us to discuss other errors alleged and argued in the briefs. On a new trial they may not again occur.

On account of the prejudicial error found, the judgment is reversed and the cause remanded for further proceedings.

REVERSED.

IN RE ESTATE OF CARL BRONZYNSKI. WAYNE COUNTY, APPELLEE, V. ESTATE OF CARL BRONZYNSKI ET AL., APPELLANTS.

FILED NOVEMBER 28. 1927. No. 25283.

1. **Taxation**: INHERITANCE TAXES. Lands conveyed by delivered deeds in which grantor retained life estates and lands conveyed by absolute deeds delivered after his death, and not intended to take effect previously in possession or enjoyment, may be subjected to inheritance or succession taxes under the Nebraska statute.
2. ———: ———: EVASION. The Nebraska statute authorizing inheritance and succession taxes was enacted in a form intended to prevent evasion of such taxes. Comp. St. 1922, sec. 6153.
3. ———: ———: ———. A deed executed and delivered with the intention of evading the inheritance tax law does not necessarily prevent taxation of the succession after the death of grantor.
4. ———: ———: CONVEYANCES IN "CONTEMPLATION OF

DEATH." Whether duly executed and delivered deeds absolute in form were made in "contemplation of death," within the meaning of that term as used in the statute authorizing inheritance and succession taxes, is a question of fact for determination in each particular case.

5. ———: ———: ———. An absolute deed not made in contemplation of death, but in good faith without any intention of evading taxation of the transfer after the death of grantor, is free from that burden, unless the transfer itself is subject to a succession or inheritance tax under specific provision of statute.

6. ———: ———: ———. In determining whether a duly executed and delivered deed absolute in form was made by grantor in "contemplation of death," within the meaning of the inheritance or succession tax law, the condition of his health, the surrounding circumstances, and how long he survived the transfer are material subjects of inquiry.

7. ———: ———: ———. Under the evidence outlined in the opinion, absolute deeds, executed and delivered by a grantor 66 years of age, who was always in good health prior to his last illness, which lasted 48 hours only, and who survived the transfers seven years, *held* not made in contemplation of death within the meaning of the statute authorizing inheritance and succession taxes.

8. ———: ———. A transfer of land by absolute deed, conveying a present life estate and the estate in remainder to different grantees, *held* free from a succession tax under facts stated in opinion.

APPEAL from the district court for Wayne county: ANSON A. WELCH, JUDGE. *Reversed in part for correction of judgment.*

H. W. Siman, for appellants.

Fred S. Berry, James E. Brittain and *C. H. Hendrickson, contra.*

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

ROSE, J.

This is a controversy between the county of Wayne and the widow and children of Carl Bronzynski, deceased, over

inheritance or succession taxes. March 14, 1916, and January 17, 1917, Carl Bronzynski conveyed in different parcels by individual deeds to his wife and children 2,640 acres of land in Wayne county, all he owned. He executed a will May 24, 1923, bequeathing to them in different amounts his personal property. He died December 20, 1923, at the age of 73 years, leaving surviving him his widow and all of their children—five sons and four daughters. His will was probated. The value of his personal property at the time of his death was $86,210.62 and of the real estate previously transferred $311,250. The county court of Wayne county found that the deeds were executed by grantor in contemplation of death and subjected both the real estate and the personal property to which grantees and legatees succeeded, less exemption, to succession or inheritance taxes aggregating $2,574.71. Upon appeal to the district court these taxes were sustained. From the judgment of the district court the widow, the children and the executors of decedent's will appealed to the supreme court.

The taxes pertaining to the personal property are not questioned. In deeds conveying 720 acres, life estates were retained and the taxes on these transfers are also conceded to be valid. Deeds for 320 acres were delivered after the death of grantor and these lands too were properly subjected to succession or inheritance taxes. *People v. Shutts*, 305 Ill. 539; *Arnold's Estate*, 83 Pa. Super. Ct. 264; *In re Jones' Estate*, 120 N. Y. Supp. 862; *In re Sharer's Estate*, 73 N. Y. Supp. 1057; *People v. Shaffer*, 291 Ill. 142. Of the entire 2,640 acres, therefore, 1,040 acres acquired by grantees through deeds "intended to take effect, in possession or enjoyment after such death," were chargeable with succession or inheritance taxes under the statute so providing. Comp. St. 1922, sec. 6153. The real controversy involves the rest of the land or 1,600 acres. The fee to this portion of grantor's real estate, except 160 acres, was conveyed without any restrictions to the five sons by duly executed and immediately delivered warranty deeds, dated March 14, 1916, or January 17, 1917. Under them grantees took immediate

possession and thereafter exercised exclusive dominion and control, enjoying the rents and profits as absolute owners. The grantees in these deeds for 1,440 of the 1,600 acres paid grantor $25,000, the payments varying from $4,000 to $6,000 each. The value of the land far exceeded the payments, but the consideration in each instance was a valuable one. Was the succession to the 1,440 acres subject to the taxes imposed? The material part of the statute under which the county acted provides:

"All property, real, personal and mixed which shall pass by will or by the intestate laws of this state from any person who may die seised or possessed of the same while a resident of this state, or, if decedent was not a resident of this state at the time of his death, which property or any part thereof shall be within this state, or any interest therein or income therefrom, which shall be transferred by deed, grant, sale or gift made in contemplation of the death of the grantor, or bargainer or intended to take effect, in possession or enjoyment after such death, to any person or persons or to any body politic or corporate in trust or otherwise, or by reason thereof any person or body corporate shall become beneficially entitled in possession or expectation to any property or income thereof, shall be and is subject to a tax, at the rate hereinafter specified." Comp. St. 1922, sec. 6153.

A purpose of the legislature in enacting the law in this form was to prevent evasion of inheritance or succession taxes. Of course, a deed made for the purpose of evading the statute does not prevent the taxing of the succession. As a general rule, the character of a deed in that respect is a question for determination in each particular case. 37 Cyc. 1567; *People v. Danks*, 289 Ill. 542, 7 A. L. R. 1023. The deeds to 1,440 of the 1,600 acres in controversy do not show on their face that they were made in contemplation of death. The issue therefore is one of fact determinable from the evidence and surrounding circumstances. Conveyances not made in contemplation of death, but in good faith without any intention of evading taxation, unless the

transfers themselves are subject to succession or inheritance taxes under specific terms of the statute, are free from such burdens. In determining whether a duly executed and delivered deed absolute in form was made by grantor in contemplation of death, within the meaning of the inheritance or succession tax law, the age of grantor, the condition of his health, the surrounding circumstances, and how long he survived the transfer are material subjects of inquiry. In the present instance, in addition to deeds indicating sales for valuable consideration, grantor's intention is indicated by a conversation with an executor of his will, who testified that grantor said, in substance, March 14, 1916:

"That he, Carl Bronzynski, had too much land to look after and that his boys were then old enough to assume part of the responsibility and that with the money he would get from his boys as consideration for the land, together with other assets, he would have plenty for himself and wife."

Grantor was then about 66 years of age. Previous to his final illness, which lasted 48 hours only, his health had always been good. He lived more than seven years after the making of the deeds. The evidence does not show that he made them "in contemplation of death," as that term is used in the statute. He did not strip himself of property. In providing for the future of both himself and his wife, he retained in his own name under his own control income property worth perhaps $100,000—a competence sufficient for a long period of life. He evidently wanted his sons to share with him the benefits and responsibilities of a large estate—a natural and lawful impulse of a father—but he made ample provision for his own future. The expression, "contemplation of death," is not defined by statute. The universal apprehension of final dissolution is not what the legislature meant. The term may apply to transfers in pursuance of a purpose to defeat inheritance or succession taxes when death occurs in the future. It may also apply to transfers prompted by impending danger, by fatal bodily injuries or afflictions, and perhaps by other conditions, but

does not include absolute and irrevocable deeds not made in contemplation of death and not within any statutory provision authorizing such taxes. This view of the law is supported by the weight of authority and by the better reasoning.

It is argued, nevertheless, that the motive which prompted grantor to make absolute deeds to his five sons was the same motive that prompted him to retain life estates in making other transfers properly taxed. The succession under the transfers retaining life estates was taxable under a statutory clause which does not necessarily apply to the absolute deeds. In effect, the statute provides for a tax on transfers of property by deeds made in contemplation of death and also on transfers intended to take effect in possession or enjoyment after the death of grantor. The undelivered deeds and the deeds retaining life estates were not intended to take effect in possession or enjoyment until after the death of grantor and were therefore properly subjected to the taxes, while the absolute deeds were intended to, and did in fact, take immediate effect in possession and enjoyment upon their execution and delivery, and consequently were not taxable, since they were not made in contemplation of death. The position of the county on this point is therefore untenable.

Was the remaining quarter section included in the 1,600 acres in controversy properly subjected to a succession or an inheritance tax? A life estate therein was transferred by deed to Anna Bronzynski, a daughter, and the remainder to her heirs or, if none, to children of grantor. The consideration for this conveyance beyond the natural love and affection of a father for a daughter was, according to the deed, one dollar. The deed was recorded. Through it grantor parted irrevocably with all his right, title and interest in the 160 acres thus transferred. For the purposes of that conveyance he divided the 160 acres into two estates—the life estate and the remainder. The life estate he deeded to his daughter Anna and the remainder he deeded to her heirs, if any at her death, otherwise to children of grantor. These

two estates in the 160 acres comprised the entire fee which was irrevocably transferred. Except for the difference in considerations, the reasons for holding that the 1,440 acres conveyed by absolute deeds to the five sons of grantor were not taxable apply generally to the transfer of the life estate in the 160 acres to Anna Bronzynski. The right to make in good faith an absolute gift of unincumbered property during the life of the donor is an attribute of ownership and, if not made for the purpose of evading inheritance or succession taxes, or in contemplation of death, or to take effect in possession or enjoyment after the death of donor, the gift is not subject to those burdens. In this view of the law the gift of the life estate to Anna Bronzynski was not taxable under the Nebraska statute. Was the estate in remainder pertaining to the 160 acres exempt under the circumstances? The deed for the remainder did not necessarily mean that estate was intended to, or would, take effect in possession or enjoyment after the death of grantor. Those entitled to the remainder under the deed would have received it before the death of grantor, had the life tenant died first. The life tenant may live beyond her expectancy and in that event the right to possession of the remainder will be postponed to an indefinite time in the future, a contingency which seems too remote and uncertain as a basis for a separate tax on the succession. The conclusion is that the trial court erred in permitting the tax on these transfers to stand. It follows that the taxes on the 1,600 acres in controversy are reversed and the cause remanded for the purposes of a judgment conforming to the views herein expressed.

REVERSED IN PART FOR CORRECTION OF JUDGMENT.

STATE, EX REL. SCHOOL DISTRICT NO. 67, KEARNEY COUNTY, ET AL., APPELLANTS, V. SCHOOL DISTRICT NO. 2, KEARNEY COUNTY, ET AL., APPELLEES.

FILED NOVEMBER 28, 1927. No. 26026.

Schools and School Districts: ORGANIZATION: PRESUMPTION. "After a school district has exercised the franchises and privileges

thereof for the period of one year, its legal organization will be conclusively presumed, whatever may have been the defects and irregularities in the formation or organization of such district." *State v. School District*, 42 Neb. 499.

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

Lewis C. Paulson, for appellants.

C. P. Anderbery and *J. L. McPheely, contra.*

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

DEAN, J.

This is a suit in *quo warranto*. The nature of this suit, as stated by the parties in their respective briefs, is, in substance and effect, to test the legality of the organization of the Lowell rural high school district, and that school district number 67 may be dissolved from school district number 2 of Kearney county.

In their amended petition plaintiffs pray that all of certain described territory, "constituting more than four (4) sections of land, be reorganized and established and its former boundaries, as they existed at the time said territory was known as district number 67, be established and restored, and that said territory be established as a school district independent from all other districts and from district number 2, all of which territory is rural territory and outside of the limits of any incorporated city or village."

In their brief the plaintiffs argue that in 1914 an attempt was made to organize "Lowell rural high school district," but there is no record of such organization in the county superintendent's office. They also argue that no organization of such district "was ever made as by law provided," and that ever since 1914 taxes have been illegally levied for school purposes against the property of the taxpayers resident or owning property therein. We think that, under the law and the decided cases in this jurisdiction, the plaintiffs have not maintained their suit. The school district in ques-

tion has been in active operation for more than 12 years. Section 6300, Comp. St. 1922, contains this provision:

"Every school district shall, in all cases, be presumed to have been legally organized when it shall have exercised the franchises and privileges of a district for the term of one year."

It was in its solicitude that mere technical rules of legal practice shall not interfere with the operation of the school system of our state that the legislature, in its precautionary wisdom, enacted the foregoing act.

The same statute, now under consideration, was construed in *State v. School District No. 24*, 13 Neb. 78, in an opinion by Lake, C. J., wherein this language was used:

"This section is exceedingly comprehensive. Its terms are sweeping. It applies, as its language clearly imports, 'in all cases' wherein the doings of a district, as such, are called in question or in any way involved, as well to acts during the first year, and from which this presumption arises, as to those performed afterwards."

This act was also construed in *State v. School District*, 42 Neb. 499, in an opinion by Norval, C. J. The court quoted with approval the above quotation and added:

"Had the legislature intended that the section should apply alone to the districts where but mere formal defects or irregularities appear in their organizations or formations, it would have said so; but instead it has used language susceptible of but one construction, and that is, that the presumption of legal organization after the lapse of a specified period applied to 'every school district' and 'in all cases.'"

The Lowell rural high school was officially recognized and approved by the state superintendent's office in 1914 and 1915. And in 1926 and 1927 the official "Nebraska Educational Directory" recognized the school district in question along with 21 other high schools of the state. And there is an exhibit in the record "containing the names of pupils (110) who have attended the Lowell rural high school from 1912 to 1926." It is stipulated that, for the year 1926, the

assessed value of property in district number 2 was $419,920, and in district number 67 for the same year was $225,940. And it is shown by a certificate of the county treasurer that, for the years 1912 to and including 1925, a total of $28,541.19 in tax levies had been made for the support of this school.

In the present case it is pointed out that at times, and perhaps at the present time, the school attendance dropped to an attendance of five pupils, and even less. But whether the school attendance is large or small is not, under the law, a controlling factor in the present state of the record. The school system of our state recognizes the vitally important fact that education is for all persons within such school age as has been fixed by the legislature. Obviously this priceless boon cannot be regulated by the number of pupils who may attend the district school. And if by chance there should be but one pupil of school age in any school district of this state, that pupil is entitled to the benefit of the school privileges which the law guarantees for the education of all the school children of the state.

In view of the facts before us and of the law applicable thereto, we conclude that the judgment of the district court is right and it must be and it hereby is

AFFIRMED.

C. N. DEITZ LUMBER COMPANY, APPELLEE, V. A. C. ANDERSON, APPELLANT.

FILED NOVEMBER 28, 1927. No. 24946.

Husband and Wife: LIABILTY OF WIFE FOR NECESSARIES. Where a debt is contracted by the husband for necessaries of life used by the family, the wife having no separate property at the time, and where thereafter she is divorced from her husband, the property acquired by her after the divorce is not liable under the provisions of section 1509, Comp. St. 1922, for the payment of such debts.

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

Anson H. Bigelow, for appellant.

McGilton & Smith, contra.

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

DAY, J.

C. N. Deitz Lumber Company, plaintiff, brought this action against Mrs. A. C. Anderson, based on the provisions of section 1509, Comp. St. 1922, to recover for coal sold and delivered to A. C. Anderson who at the time of the purchase was the husband of present defendant. The case was tried upon an agreed statement of facts. The only issue therefore presented was one of law. The trial court rendered judgment in favor of plaintiff, from which defendant has appealed.

This case was heretofore submitted to the supreme court commission and an opinion affirming the judgment of the district court was approved by us. On motion for rehearing, the case has been argued and submitted to us.

It appears from the stipulation that on September 27, 1921, plaintiff sold and delivered to A. C. Anderson coal in the amount and value of $75.60. The coal was furnished for necessaries of life and used by the family of A. C. Anderson. At the time of the furnishing and using of the coal, the present defendant was the wife of A. C. Anderson and a member of his family. Subsequently and before this action was commenced the present defendant obtained a divorce from A. C. Anderson. At the time of the sale and delivery of the coal Mrs. A. C. Anderson was possessed of no property of any nature whatsoever and all of the property which she now possesses has been acquired by her since her divorce from her husband and since the sale, delivery and use of said coal.

Thereafter plaintiff obtained a judgment against A. C. Anderson for the amount of the claim and, after having an execution returned *nulla bona* on its judgment, commenced the present action against defendant based upon the

provisions of section 1509, Comp. St. 1922, which reads as follows:

"The property, real and personal, which any woman in the state may own at the time of her marriage, and the rents, issues, profits, or proceeds thereof, and any real, personal, or mixed property, which shall come to her by descent, devise, or the gift of any person except her husband, or which she shall acquire by purchase or otherwise, shall remain her sole and separate property, notwithstanding her marriage, and shall not be subject to the disposal of her husband, or liable for his debts: Provided, all property of a married woman not exempt by law from sale on execution or attachment, shall be liable for the payment of all debts contracted for necessaries furnished the family of said married woman after execution against the husband for such indebtedness has been returned unsatisfied for want of goods and chattels, land and tenements whereon to levy and make the same."

Under the common law, the wife is not liable for debts of the husband. The law imposes upon him the legal duty of supplying the family with the necessaries of life. The property of a wife is not liable for debts of the husband unless made so by the terms of the statute.

It will be observed that the liability of the defendant for the debts of her husband involves a construction of the provisional portion of the section of the statute above quoted. This provides:

"All property of a married woman not exempt by law from sale on execution or attachment, shall be liable for the payment of all debts contracted for necessaries furnished the family of said married woman after execution against the husband for such indebtedness has been returned unsatisfied."

The precise question presented is whether the property of a divorced woman, acquired after the divorce, is liable for debts contracted by her husband for necessaries of life used by the family during the period of coverture. It will be noted that the statute in question renders the property

of a married woman liable for debts contracted for necessaries of life for the family and is not a personal liability imposed upon her. Strictly speaking, the property now sought to be applied to the payment of this debt never was the property of defendant as a married woman. It was all acquired by her after the dissolution of the marrage relation. We have recently held in *Giltner State Bank v. Talich*, 115 Neb. 236, that, where a judgment was rendered against a married woman on a contract executed by her during coverture, wherein she bound her separate estate, such judgment could be enforced only against the property or proceeds thereof which she possessed at the time of the execution of the contract. In the case now before us, when the debt was contracted by the husband, the wife had no property. All the property which defendant now possesses was acquired by her after the dissolution of the marriage relation. We hold, therefore, that when a debt is contracted by the husband for necessaries of life and used by the family, the wife having no separate property at the time, and where thereafter she is divorced from her husband, the property acquired by her after the divorce is not liable under the provisions of section 1509, Comp. St. 1922, for the payment of such debts.

From what has been said, it follows that the judgment heretofore entered in this court should be, and is, vacated and set aside, and the judgment of the district court is reversed and the action dismissed.

REVERSED AND DISMISSED.

ARTHUR HOLST, APPELLEE, V. HULDA J. WARNER, APPELLANT.

FILED NOVEMBER 28, 1927. No. 24484.

1. **Trial**: REFUSAL OF INSTRUCTION. Error cannot be predicated on the refusal of the trial court to instruct the jury as to the law relative to a defense which is not raised by the pleadings nor supported by the evidence.
2. **Appeal**: INSTRUCTIONS: ASSIGNMENT OF ERROR. An assign-

ment of error in a motion for a new trial, to the effect that the trial court erred in giving a group of instructions, does not require a consideration of such assignment further than to ascertain that any one of the instructions was properly given.

3. ———: CONFLICT OF EVIDENCE. In a law action, the verdict of a jury, based upon conflicting evidence, will not be disturbed on appeal to the supreme court, unless it is clearly wrong.

4. **Husband and Wife:** ALIENATION OF AFFECTIONS: DAMAGES. A verdict for $5,000 in favor of plaintiff, in an action for alienation of his wife's affections, under the facts outlined in the opinion, *held* not excessive.

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

John W. Yeager, for appellant.

Hainer, Flansburg & Lee and *Peterson & Barta, contra.*

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

GOOD, J.

Plaintiff brought this action against his mother-in-law, to recover damages for the alienation of his wife's affections. In a general way he alleged that the acts and conduct of defendant were wilful and malicious and such as to, in fact, alienate the affections of his wife. In her answer defendant admitted the relationship of the parties; denied that she had alienated the affections of plaintiff's wife or done any act calculated to bring about that result; and alleged that the affections of plaintiff's wife were alienated by his own misconduct; that plaintiff had no affection for his wife, and for that reason she had lost her affection for him; that plaintiff had made use of his marital relationship to obtain money and property from defendant, who was in comfortable circumstances; that plaintiff did not properly support his wife; that defendant had done all that she could to make the married life of plaintiff and his wife happy. The reply was in the nature of a general denial. A trial of the issues resulted in a verdict and judgment thereon

for plaintiff in the sum of $5,000. Defendant has appealed.

This cause has been heretofore submitted to and an opinion prepared by the supreme court commission reversing the judgment of the district court, and is now before us upon a motion for rehearing.

The assignments of error are numerous and may be summarized as follows: That the court erred in refusing to give instructions Nos. 1 and 2, requested by defendant; erred in giving instructions Nos. 5, 7 and 8, given by the court on its own motion; that the court erred in not directing a verdict for defendant; that the verdict is not supported by the evidence and is excessive.

The instructions requested by defendant and refused by the court related to the right of defendant to give parental advice to her daughter and would have informed the jury that, if defendant did give such advice without malice and with intent to benefit her daughter, plaintiff could not recover, even though such advice resulted in the separation of plaintiff and his wife.

From an examination of the answer, it is apparent that parental advice, given in good faith, was neither pleaded nor relied upon as a defense, and in her testimony defendant categorically denied giving any advice to her daughter, or that she counseled her in any way with reference to a separation from her husband. The instructions, therefore, were not applicable to the issues or to the evidence given by defendant. It may be observed that, although such issue was not presented by the pleadings, the court did instruct upon the question and gave the defendant the benefit of a defense which she had not pleaded, and which was not supported by her evidence.

With respect to the instructions given by the court on its own motion, the record discloses that the only assignment in the motion for a new trial, relating to that subject, is as follows: "That the court erred in giving instructions numbered 1 to 10, inclusive, of its own motion." It has long been the rule that such an assignment will be considered no further than to ascertain that any one of the instructions

was properly given. *Hiatt v. Kinkaid,* 40 Neb. 178; *McDonald v. Bowman,* 40 Neb. 269; *Armann v. Buel,* 40 Neb. 803; *Mattern v. McCarthy,* 73 Neb. 228. We have carefully examined the entire charge, given by the court to the jury, and find no error in any of the instructions, save, possibly, one, wherein it gave to the defendant the benefit of a defense which she did not plead. Of course, defendant cannot predicate error upon the giving of an instruction more favorable to her than she was entitled to under the law. It follows that this assignment of error is not well taken.

The next two assignments may be treated together. It is not practicable to outline all of the great volume of evidence in this case. We will, therefore, summarize some of the more important parts, as disclosed by the record.

Plaintiff and defendant both resided in the village of Wausa, Nebraska, and their residences were in close proximity to each other. Plaintiff and his father, as copartners, were engaged in the hardware business. For a little more than a year after the marriage of plaintiff and defendant's daughter, the young couple appeared to live happily together. They went frequently to places of entertainment, to parties, social functions, moving picture shows, picnics, and, in turn, entertained their friends at their home. Many of the immediate neighbors and friends of plaintiff and his wife were called as witnesses, and they testified to the happy relationship existing between plaintiff and his wife.

It appears that something like 14 months after the marriage some feeling arose between plaintiff and his mother-in-law. She came to his home one Sunday morning, according to his testimony, and there upbraided him in the presence of his wife, charging that he had not been properly attentive to his wife; that he did not take her to places of entertainment and amusement and did not treat her as a husband should treat his wife; that he then informed her that he thought they were getting along very well and would get along better if there was no intermeddling. Plaintiff's testimony tends to show that the defend-

ant immediately departed, slamming the door as she went out. On the following day, when plaintiff came home from the store in the evening, his wife was not at home. He searched about the house and premises and did not find her. He went to the home of defendant and inquired if his wife were there, and defendant informed him that she was not and that she did not know where his wife was. A little later plaintiff learned that his wife was and had been at the home of the defendant all the time. He visited with her there and finally, some 10 days later, secured her consent to return to his home. Plaintiff's testimony tends to show that, at the time, defendant stated that, if her daughter went home to her husband, she would do so against defendant's wish and without her consent. Plaintiff's wife did return to him and they lived together for several months thereafter.

It also appears from the record that some months after the marriage plaintiff borrowed from defendant $600 and evidenced the loan by his promissory note, payable to her and bearing 10 per cent. interest from its date. On one occasion, a little more than two years after the marriage, defendant called at plaintiff's place of business, when a number of customers were in the store, and there she again upbraided him, in the presence of others, for not properly treating his wife and for not taking her to places of amusement and entertainment, and told him that she would not stand such treatment from him or anyone like him, and demanded payment of his note. Defendant's testimony tends to show that at the time all she was asking was for the interest. Plaintiff's testimony shows that, at that time, the interest and one-fourth of the principal had been paid. A short time later the remainder of the principal was paid. On the above occasion, as defendant was leaving the store, the evidence tends to show, she remarked, in substance: "You'd better do what I tell you or you will lose your happy home." Plaintiff's testimony tends to show that, for some months prior to the final separation of plaintiff and his wife, defendant would not speak to him when she met him; did not go to

his home when he was there, but frequently visited his home when he was at his place of business; and that, as he would be returning to his home, he would observe the defendant leaving by a side or back door, going across the yard to her own home; that on such occasions he would find his wife silent and moody, which would be her mood only after her mother's visits; that, when he inquired the cause, she would state that there was no trouble.

The evidence further shows that a few weeks later plaintiff's wife commenced an action for divorce; that defendant and her daughter went together to the county seat to consult a lawyer, following which the action was instituted; that for a week or two prior to the commencement of the divorce action, without plaintiff's knowledge, his household goods and furnishings were moved from plaintiff's home to the home of defendant; that defendant participated in such removal and helped to carry away the household goods. The evidence tends to show that defendant employed men to help carry the furniture from plaintiff's to her home, and actively assisted in such removal; that the action for divorce was tried, and the evidence also shows that plaintiff and his wife are still undivorced, from which it must be inferred that the trial of the divorce action resulted favorably to the husband, plaintiff in this action.

While being cross-examined as a witness, defendant gave the following testimony: "Q. You remember the time you were in the store and asked Arthur (plaintiff) for the payment of this note, do you? A. I do. Q. You say that you never made a statement that, if he wasn't careful, he was going to lose his happy home? A. I didn't say that. Q. You heard his father testify to that and you heard him testify to that? A. I didn't say it. Q. What did you say when you went out of that store and passed his father? A. I didn't say anything like that. I don't know what I said. I knew it would be the breaking up of my daughter's home. Q. That is what you have been trying to do continuously? A. Yes; I have." This testimony was not qualified or explained by defendant.

It is true that the evidence upon many of the points is in hopeless conflict. It is perfectly clear from the record that for a year or more plaintiff and his wife lived together happily, without any trouble or difficulty; that they are now separated and the home broken up. Whether the home was broken up by plaintiff's misconduct, as claimed by defendant, or by defendant's misconduct, as claimed by plaintiff, was a question peculiarly for the jury. It may be further observed that in some respects the defendant's testimony was contradicted on material points by her own witnesses; also that six of her neighbors, who had known her for many years and who lived in the vicinity, were called, and they testified that her reputation in the community for truth and veracity was not good. No witness was called to sustain her reputation in this respect.

Under all the circumstances, we cannot say that the jury were not warranted in disregarding her testimony or giving it but little weight. There is sufficient competent evidence to require the submission of the case to the jury. Their finding upon a disputed question of fact is conclusive upon this court.

It is urged that the verdict is excessive, and that no witness has testified as to the amount of pecuniary damages that plaintiff has sustained by losing the affections of his wife. We think it is the rule in cases of this class that it is unnecessary, and it would be improper, for any witness to testify as to the amount of damage which plaintiff has sustained. Plaintiff and his wife were under 30 years of age. Until his marital affairs were interfered with by defendant, he had prospects of many years of happy married life. Now he and his wife are separated and estranged, and his life embittered. The amount of damages which should be awarded under the circumstances is left to the sound discretion of the jury, which they must determine from all the facts and circumstances proved. We are not warranted in saying that $5,000 is more than a fair pecuniary award for the injury which plaintiff has suffered. In a case quite

similar to the instant case, this court sustained a recovery of $10,000. *Stocker v. Stocker,* 112 Neb. 565.

No error prejudicial to defendant has been pointed out. It follows that the judgment heretofore entered in this court should be and is vacated and set aside, and the judgment of the district court is

AFFIRMED.

THOMPSON, J., dissenting.

Upon a careful consideration of the record, I am constrained to disagree with the majority opinion, as from such record I am convinced that the defendant did not exceed her lawful authority and duties as a parent in the premises, and that the verdict was one prompted by passion or prejudice.

DEAN, J., dissenting.

This dissent is respectfully submitted in the belief that the judgment of reversal rendered by the commission rightly determined the issues as between the parties. And, in respect of the merits, it fairly appears to the writer that the defendant acted nothing more than the part of a reasonably indulgent mother toward the plaintiff and his wife, and not that of a malicious, interfering, neighborhood busybody, as the plaintiff son-in-law contends. And, besides, the burden of proof was erroneously imposed on this woman defendant by at least one instruction. The fact that no children were born to this union doubtless added to the discontent and the unhappiness of the plaintiff and his wife. But the plaintiff testified that the defendant's estate was worth $150,000, "or about that sum." Was this fact the inducement for a suit for the stupendous sum of $40,000 as remunerative damages?

In *Trumbull v. Trumbull,* 71 Neb. 186, this is said:

"There is a well-defined distinction between the privileges accorded to parents and guardians in their communications with children and wards, with reference to their domestic relations, and that which exists between strangers."

The judgment from which the defendant appealed, how-

ever, appears to be a far cry from the beneficent rule announced in the *Trumbull* case.

In respect of the material facts, it is uncontradicted that, on an evening in May, 1921, the defendant mother-in-law called at the Holst home and found her daughter ill and alone and lying on the floor. She was gasping for breath and was unable to speak and her mother believed that she was dying. As soon as her daughter's physical and generally distraught condition would permit, she was removed to her mother's home, the same day, and a physician was summoned and he corroborated the defendant's material evidence in respect to her daughter's condition in every essential particular. The physician testified:

"I found her in a typical hysterical convulsion, hands clenched, muscles tense, and crying. Q. Did you treat her at that time? A. Yes, sir. Q. What treatment? A. I gave her a hypodermic of morphine. Q. Did you prescribe? A. Yes, sir." He testified that, in his opinion, her illness was caused by "family troubles—worry." He advised a rest or a change for his patient, and his advice was followed.

While yet the plaintiff's wife was lying sick and bedfast at her mother's home, where she remained almost two weeks after her illness began, her husband came to see her. But she called her brother to her bedside and told him to go and tell him that she did not then want to see him. On the cross-examination of the plaintiff, it was developed that on another occasion he called at the defendant's home during the succeeding period in which his wife was convalescing. The defendant was in the sick-room taking care of her daughter. In the course of his cross-examination, the plaintiff testified that he had a talk with the defendant in which, according to his own evidence, she said this to him:

" 'Just see the condition Ethel is in, Art, and to think you are the cause of it all.' Q. What did you say? A. I don't believe I answered Mrs. Warner on that. Q. You didn't reply to that at all? A. I don't think I did. Q. Then, you permitted her to accuse you of being the cause of her

daughter's condition without making any reply. A. I believe I did."

The plaintiff was then a mature man of affairs and about 30 years of age. And yet, by a silence which he confessed in open court, he failed to breathe so much as a word in denial of the charge that he was the cause of the nervous collapse and the subsequent serious illness of his wife. And upon an insistent and prolonged cross-examination of the defendant these facts were developed and they appear to go to the very heart of this controversy:

"Q. You like Art, don't you, Mrs. Warner? A. I never had anything against him. Q. You like him? A. Yes. Q. You would like to see him live with your daughter? A. Yes. Q. Have you done anything toward trying to reconcile them since the divorce action was brought? A. I have. Q. You have never talked to him since that time? A. He has not talked to me. Q. He meets you on the street and speaks and you don't speak to him? A. He doesn't speak to me. Q. He doesn't? A. No."

Further continuing the defendant's cross-examination, these facts were also brought out:

"Q. Did you have any talk with Arthur Holst before he went home? A. He begged me to come to the house and visit Ethel and do just as I had always been doing. * * * He said it was all his fault, he was sorry, and things would be better."

The plaintiff testified that when he went to bring his wife home the defendant said: "If you do, it is not with my consent." And the plaintiff complains of this. But what would be more natural than that a mother, in her solicitude for the welfare of a convalescent daughter, should indicate that she feared for her well-being, if not indeed for her ultimate recovery, if she should, within so short a time after so serious an illness, undertake the burdensome duties of a housewife. And in respect of the separation of the parties, and as a part of a cross-examination which doubtless appeared to the defendant to be intensely severe, she was asked: "Q. That is what you have been trying to do con-

tinuously? A. Yes, I have." This question as put to the defendant by an alert cross-examiner, and the answer, is the plaintiff's peak point of attack against this mother. In the brief, this feature is emphasized, and there presented, as an italicized introduction to the plaintiff's argument, and, from the plaintiff's insistent viewpoint, it appears to be the *ultima thule* of this legal engagement. The answer, however, appears to be so plainly at variance with the defendant's material evidence on the direct examination, and especially on the cross-examination, that it is only reasonable to conclude that this mother, now no longer a young woman, and apparently unused to the publicity of a crowded courtroom, was either confused at the time or she did not understand the question as put to her near the close of an apparently exhaustive cross-examination.

When the taking of testimony was concluded, defendant's counsel announced that he was "completely taken by surprise" in respect of the alleged impeaching testimony. The court thereupon stated that he was willing to continue the case until the next day, but concluded the offer with this statement: "However, it looks as though the whole town of Wausa is here in the courtroom. I will give you a recess of ten minutes and possibly you can find witnesses here who would willingly go on the stand in behalf of your client." But counsel for defendant, a nonresident of Wausa, and doubtless therefore unacquainted with, and unknown to, the Wausa parties who were present, could not reasonably avail himself of the court's offer and the case was closed. This unfortunate feature of the case must be dismissed with the observation that much of the defendant's material evidence was corroborated.

The instructions were objected to *en masse*, and four cases, or perhaps more, have been cited which hold that such an assignment will be considered no further than to ascertain that any one of the instructions was properly given. And the latest cited decision, in point of time, was rendered more than twenty years ago. But a better and a more salutary rule of practice was provided by an act of the legis-

lature that is addressed to and is binding on all courts. The act follows:

"The court, in every stage of an action, must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect." Comp. St. 1922, sec. 8657.

This act, too seldom invoked, is a legislative protest against technical construction in the application of fundamental principles of justice and equity to the affairs of men, when life, liberty, or fortune, may be at stake in the outcome of a trial in court. By the application of just such a technical rule of practice, a party litigant, though clearly in the right, might by inadvertence or mistake or oversight of the pleader be deprived of his entire estate. It fairly appears to the writer that the trial court erred in denying a retrial.

OSCAR NELSON V. STATE OF NEBRASKA.

FILED NOVEMBER 28, 1927. No. 25778.

1. **Intoxicating Liquors: TRANSPORTATION.** To constitute the offense of unlawful transportation of intoxicating liquors, there must be a substantial movement or transporting of the liquor from one place or vicinity to another. A mere handing of the liquor by defendant from his barn to one standing outside of and near the barn door is not such a transportation as is contemplated by chapter 106, Laws 1925.

2. ———: ———. In a prosecution for unlawfully transporting intoxicating liquors, in violation of chapter 106, Laws 1925, whether there has been a sufficient movement of the liquor from one place to another to constitute an offense must be determined by the facts shown in the particular case.

3. **Criminal Law: PREVIOUS CONVICTION: PROOF.** In a prosecution for the violation of the liquor laws, as for a second or third offense, evidence of a previous conviction is not competent, where proceedings in error for a reversal of the judgment of such conviction are pending and undetermined.

ERROR to the district court for Phelps county: WILLIAM A. DILWORTH, JUDGE. *Reversed, with directions.*

Bernard McNeny and *S. A. Dravo,* for plaintiff in error.

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

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

GOOD, J.

Plaintiff in error, hereinafter referred to as defendant, was convicted of violations of the liquor laws and prosecutes error to review the record of his conviction.

The information contained two counts. The first count charged unlawful transportation of intoxicating liquors, in violation of chapter 106, Laws 1925, and further charged that it was a second offense. The second count charged unlawful possession of intoxicating liquors, in violation of section 3288, Comp. St. 1922, and further charged that it was a third offense. Defendant was convicted upon both counts and sentenced to a term of two years in the penitentiary upon each count; the two sentences to run consecutively, and not concurrently.

The record discloses that persons engaged in the enforcement of the liquor laws went to the home of defendant and purchased two bottles of intoxicating liquor. At the time, the parties were all in defendant's barnyard, near the barn door. Defendant, or his brother, went into the barn and brought out the liquor. It was there delivered to the purchaser, who paid defendant therefor. The only transportation shown was bringing the liquor out of the barn and handing it to the purchaser near the barn door.

Taking a bottle of liquor from a cupboard or locker and handing it to another in the same room is not such transportation as is denounced by the statute; nor does the moving of liquor from a barn and handing it to another at the barn door constitute such an unlawful transportation, within the meaning of the law. It is difficult, if not impossible,

to fix a hard and fast rule as to how extensive the movement or transportation must be, to constitute a violation of law. There must be a substantial movement of the liquor from one place or vicinity to another. Whether there is a violation of the statute must be determined by the facts shown in the particular case.

Counsel for defendant, while conceding that the record shows that defendant was guilty of unlawful possession of intoxicating liquor, contends that the evidence does not warrant his conviction as for a third offense. Counsel for the state concede that this contention is well-founded. The record shows that more than two years previous to the acts charged in the instant case defendant was convicted of a violation of the liquor law, and paid his fine. Evidence was also introduced showing that, subsequent to that conviction and prior to the instant prosecution, defendant had been arrested and convicted in the district court of a violation of the liquor laws and a sentence there imposed, and that proceedings in error were then pending in the supreme court for a review of defendant's conviction in that case. It was admitted on oral argument that since the trial of this case the error proceedings in the former case have resulted in a reversal, so that there is now no judgment of conviction against the defendant in that case.

The rule is that in a prosecution for violation of the liquor laws, as for a third offense, where the evidence of one of the former violations charged shows that proceedings in error are pending and undisposed of which might result in a reversal of such judgment, such evidence is insufficient and incompetent to establish a former conviction. *McAlester v. State,* 16 Okla. Cr. Rep. 70; *Long v. State,* 17 Okla. Cr. Rep. 672; *Commonwealth v. McDermott,* 224 Pa. St. 363, 24 L. R. A. n. s. 431.

From the record it appears that defendant is guilty of unlawful possession of intoxicating liquors in the instant case, has been once previously convicted of a violation of the liquor laws in this state, and is liable therefore to a pen-

alty as for a second offense, which is a misdemeanor, carrying a more severe penalty than for a first offense.

The judgment of the district court, as to the first count of the information, is reversed and dismissed, and the judgment upon the second count is reversed and remanded to the district court, with directions to sentence defendant upon said count as for a second offense.

REVERSED.

PETER O'SHEA ET AL., APPELLANTS, V. COMMODORE C. HAMPTON ET AL., APPELLEES.

FILED NOVEMBER 28, 1927. No. 24779.

APPEAL from the district court for Scotts Bluff county: WILLIAM G. HASTINGS, JUDGE. *Appeal dismissed, with directions.*

J. M. Fitzgerald, for appellants.

White & Lyda, L. L. Raymond and *William H. Heiss, contra.*

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

THOMPSON, J.

This case was submitted on briefs filed and oral arguments had in *Hampton v. O'Shea, post,* p. 230. It involves a general demurrer to an amended petition, which petition is buttressed on the facts involved in the above cited case, and, as we determine, is governed by the conclusions therein reached. Hence, it presents but a moot question for our determination.

The appeal is dismissed, with directions that each party pay the costs by them made in this court.

APPEAL DISMISSED.

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

FILED NOVEMBER 28, 1927. NO. 25085.

1. **Banks and Banking:** GUARANTY FUND: CLAIMS: PROOF. One who claims to have deposited money in a state bank, commercial, and seeks to have such claim allowed and ordered paid out of the depositors' guaranty fund after the bank has become insolvent and the receiver thereof has objected to it as an invalid claim, must prove, not only that a deposit of money or its equivalent was made, but, further, that it was made under circumstances which do not transgress specific limitations of the bank guaranty law.
2. **Case Distinguished.** The opinion in *State v. Farmers State Bank of Bushnell*, 114 Neb. 826, examined and distinguished.
3. **Case Overruled.** *Globe Publishing Co. v. State Bank of Nebraska*, 41 Neb. 175, in so far as it conflicts with this opinion, and with that of *Lower v. State*, 109 Neb. 590, is overruled.
4. **Evidence** examined, and judgment of trial court affirmed.

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

Gurley, Fitch & West, for appellant.

C. M. Skiles and *J. L. Cleary, contra.*

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

THOMPSON, J.

The record shows that the Security State Bank of Eddyville was a corporation organized for the purpose of and was doing a commercial banking business, as indicated by its name: that on its becoming insolvent a petition for the appointment of a receiver was duly lodged in the district court for Dawson county: that a receiver was appointed on or about September 17, 1923, and entered upon the discharge of his duty, and in the course of administering such trust the Omaha Life Insurance Company filed a claim in

October, 1923, alleging that there was a balance due it of $413.01 on its general checking account. To the allowance of such claim, other than as a general claim against the trust, the receiver objected, for the reason, in substance, that such deposit was made and received under a collateral agreement which contravened section 39, ch. 191, Laws 1923, passed with an emergency clause and becoming effective April 7, 1923, which provides:

"No state bank shall receive any deposit upon any collateral agreement or condition other than an agreement for length of time to maturity and rate of interest, and no money deposited in any such bank, upon any such collateral agreement or condition, shall be guaranteed by the depositors' guaranty fund."

After such objection was filed, the insurance company lodged what it called an answer, but in effect, not including the denials therein contained, it was an amendment of its original claim, which amendatory part was as follows: "Alleges that said money was deposited by the Omaha Life Insurance Company in said bank in good faith and without any agreement of any kind between the said Omaha Life Insurance Company and the said bank other than the agreement that is always implied when a person deposits money in a bank in the general course of business. Wherefore, said Omaha Life Insurance Company prays that its claim may be allowed as a prior claim and as a claim entitled to payment from the guaranty fund of the state of Nebraska."

On the issues as thus presented, the case came on for hearing upon an agreed statement of facts, and the following judgment, in substance, was entered: That the claim of $413.01 be allowed as a general claim against the bank, but that it be disallowed as a claim entitled to priority and to payment out of the guaranty fund.

The claimant interposed a motion for a new trial, presenting as grounds therefor, in substance, that the judgment of the court is contrary to the evidence, and to the law applicable to a case of this nature. This motion was overruled, and claimant appeals, seeking reversal for the rea-

sons substantially as indicated by the above motion.

Before considering the evidence in this case, and the question of the burden of proof, it might be well to state that, in this class of actions, "The receiver takes and holds the bank assets, as to liens, rights and liabilities, as they exist at the time the business is turned over to him, to be administered for the uses and benefits of the creditors and stockholders of the institution. * * * The receiver is at all times an officer of the court, subject to its orders and directions, an agent, the scope of whose authority is limited by law." *State v. Farmers & Merchants Bank of Morrill,* 114 Neb. 378-381. Thus, it will be seen that the receiver, as such, is without authority to impose a liability upon the guaranty fund.

Further, section 39, ch. 191, Laws 1923, involved in this case, was repealed, without a saving clause, by section 18, ch. 30, Laws 1925, which became effective April 1st of that year. However, such repeal did not affect the matters involved herein, as section 3097, Comp. St. 1922 (which section took effect February 21, 1873, after *Bennet v. Hargus,* 1 Neb. 419, was decided) provides: "Whenever a statute shall be repealed, such repeal shall in no manner affect pending actions founded thereon, nor causes of action not in suit that accrued prior to any such repeal, except as may be provided in such repealing statute." This section was construed by us in *Lower v. State,* 109 Neb. 590, wherein we gave it a literal interpretation. It follows that our holding in *Globe Publishing Co. v. State Bank of Nebraska,* 41 Neb. 175, filed June 6, 1894, in so far as the same conflicts with our conclusion herein, and with *Lower v. State, supra,* is overruled.

As heretofore denoted, the only evidence material to the questions here presented is that of an agreemnt as to facts, the material parts of which are as follows: That the claim of the insurance company represents a balance shown on the books of the bank as credited to it on a checking account, as of the date of the closing of the bank; that exhibit 1 is a record of the bank showing the deposits of such insurance

company from February 27, 1922, to August 6, 1923, being a record of debits and credits; that letters, exhibits 2, 3, 4, and 5, passed between the bank and the insurance company, as they each indicate, and that each thereof refers to the account in question. This account, as it was at the time of the appointment of the receiver, was evidenced by exhibit 1, which reflects transactions indicated by the debits and credits covering nearly $2,000, and left remaining at the time of the closing of the bank, in appearance, the sum of $413.01.

Exhibit 2 purports to be a letter written by the insurance company to the bank, as follows: "February 25, 1922. Security State Bank, Eddyville, Neb. Friend O'Meara: Inclosed find our check for $1,000 which please place on open account. This is sent at the request of our Mr. Trumbo. He tells me he will call on you later and anticipates doing a nice business in connection with yourself. I appreciate this connection very much as you will probably recall I visited you in December. Yours very truly, E. M. Searle, Jr., President."

Exhibit 3 is a letter from the bank to the insurance company, as follows: "October 17th, 1922. Omaha Life Insurance Co., Omaha, Nebraska. Gentlemen: We are low on our reserve today and we were wondering if you could accommodate us with a deposit of say $2,000 for thirty or sixty days. The crops and live stock are not moving the way they should here on account of the shortage of cars. We can send you a time certificate or place it on open account at 5% interest. Yours very truly, Cashier."

Exhibit 4 purports to be in answer to exhibit 3, and is as follows: "October 23d, 1922. Security State Bank, Eddyville, Nebraska. Friend O'Meara: I have your letter of the 17th, requesting a deposit of $2,000. The only way I could comply with this request would be to draw money from some other country bank; then I would have a deuce of a time explaining why I did so to the other fellow. We are making several farm loans which is using all of our money available at the present time. However, I am inclos-

ing you our check for $500 which please place to open account as per your letter. Yours very truly, E. M. Searle, Jr., President."

Exhibit 5 is a letter from the insurance company to the bank, as follows: "February 17, 1923. R. O'Meara, Cashier, Security State Bank, Eddyville, Neb. Dear Mr. O'Meara: We have maintained a deposit in your good bank for some time past. This was either placed with you or increased on account of Mr. John F. Trumbo, who was working in your vicinity at that time. Will you please state to me, using the self-addressed stamped envelope enclosed, whether Mr. Trumbo's services for us in your vicinity were satisfactory and also whether or not our method of handling the deposit and maintaining it with you has been to your advantage and to your satisfaction? Yours very truly, H. E. Worrell, Sec'y-Treas."

Under the record thus submitted, has the claimant furnished proof entitling it to share in the guaranty fund?

As we conclude, one seeking to recover, as the claimant in this case, carries the burden of furnishing proof, not only that cash or its equivalent was deposited in the bank, but, further, that such deposit was made under conditions and circumstances which do not transgress specific limitations of the bank guaranty law.

In thus concluding, we are in harmony with our previous holdings on the question. The purpose and scope of the bank guaranty law was announced by us in *Iams v. Farmers State Bank*, 101 Neb. 778-782, as follows: "The act creating the depositors' guaranty fund was intended by the legislature to be a shield of protection against loss to those who in good faith deposit their money in state banks in compliance with the terms of the statute. Unless its provisions are fairly construed and impartially enforced, this salutary law might become a destructive sword in the hands of unscrupulous persons having unlawful designs on the depositors' guaranty fund." The law thus expressed has been approved and followed by many courts, and has been in no manner modified by us.

In *State v. Banking House of A. Castetter,* 110 Neb. 564-567, we, in effect, approved the above quotation, and further said: "Speaking generally, to create a deposit, within the meaning of the statute, money or the equivalent of money must in intention and effect be placed in or at the command of the bank, under circumstances which do not transgress specific limitations of the bank guaranty law"—which was virtually a quotation and adoption of the law as announced in *Fourth Nat. Bank v. Bank Commissioner,* 110 Kan. 380.

This same language was adopted and approved by us in *State v. Farmers State Bank of Halsey,* 111 Neb. 117, and in that case, at page 126, we further held: "They (the certificates) were issued in violation of law, and cannot be considered as deposits within the meaning of that term as used in the guaranty law."

In *State v. Peoples State Bank,* 111 Neb. 126, 132, we said: "The guaranty fund is not liable beyond the terms of the statute which is in point of law the contract. The guaranty fund is a creature of the statute, and the legislature, by fair construction of the statute, has fixed the conditions upon which deposits in banks are protected. The guaranty fund is not available as security in every case where money is put into a bank. Its liability extends only to those transactions which under the law may be said to be deposits." While the conclusion arrived at in the case last cited was overruled by us on rehearing (111 Neb. 136), the language above quoted was in no manner criticised or modified, is forceful, and we adopt it as a part of this opinion.

The above holdings in regard to creating a deposit were readopted by us in *State v. Farmers State Bank of Winside,* 112 Neb. 380, in which latter case we further held: "In determining whether a transaction creates a 'deposit' within the protection of the guaranty fund, the law will look through all semblances and forms to ascertain the actual facts as to whether there has been a *bona fide* deposit, and,

if not, the guaranty fund does not protect the transaction, no matter how it may be evidenced."

Then, again, in *Rogers v. National Surety Co., ante,* p. 170, we held: "The depositors' guaranty fund is a creation of statute, possessing such rights and subject to such liabilities as the legisature has provided; the liabilities thus imposed thereon are analogous to that of a 'guarantor' as distinguished from a 'surety.'" That is, under the statute the guaranty fund is an independent entity, and only those who bring their right of recovery within the statutory limitations are entitled to share therein.

It must further be remembered that, as to the burden of proof, the law was announced in *State v. Farmers State Bank of Halsey,* 111 Neb. 117, 122, as follows: "A holder of a certificate of deposit in a bank who seeks to hold the guaranty fund liable for its payment must show that the transaction leading up to the issuance of the certificate was such that the law holds the guaranty fund liable for its payment." This holding was reaffirmed by us in *Kuhle v. Farmers State Bank of Cotesfield,* 115 Neb. 648, and made syllabus No. 1 thereof, our last expression on the subject. In the *Kuhle* case we further held by paragraph 3 of the syllabi: "Neither banks nor their officers can impose a liability upon the guaranty fund; such obligation is one fixed by statute alone."

Thus, it will be seen that the right to participate in this beneficent provision of the statute, to wit, the depositors' guaranty fund, is not open to a claimant merely by reason of his holding a certificate of deposit issued by the bank in question, or that the books of the bank on their face show a deposit to have been made by him, or that he actually made a deposit of money or its equivalent in such bank. Such claimant must, by his proof, go farther and show that the deposit was one made under facts and circumstances which do not transgress specific limitations of the law giving rise to such guaranty fund.

Considering the record as a whole, we must conclude that the claimant has not met the burden cast upon it by

the statute. In this we are strengthened by the fact that the letters, heretofore quoted, indicate that a collateral agreement was had between the bank and the claimant, which contravened section 39, ch. 191, Laws 1923.

Our attention has been called to *State v. Farmers State Bank of Bushnell*, 114 Neb. 826, wherein in the course of the opinion the words "*prima facie*" are used in discussing the evidence. It may be said, however, that this was simply part of the argument leading up to the final conclusion reached; but it is not controlling in arriving at the conclusion therein, as both the claimant and the representative of the bank testified that the transaction was one in the ordinary course of business, and without a collateral agreement.

The judgment of the trial court is right, and is,

AFFIRMED.

GOOD, J., dissents.

COMMODORE C. HAMPTON ET AL., APPELLANTS, V. PETER O'SHEA ET AL., APPELLEES.

FILED NOVEMBER 28, 1927. No. 25996.

1. **Courts: POWERS: APPOINTMENT OF RECEIVER.** A court sitting in one judicial district is without authority to appoint a receiver in a suit pending in another judicial district, even though the parties may consent thereto.
2. **Record** examined, judgment of the trial court affirmed in part, reversed in part, and cause remanded, with directions.

APPEAL from the district court for Scotts Bluff county: J. LEONARD TEWELL, JUDGE. *Affirmed in part, and reversed in part, and remanded, with directions.*

White & Leyda and *William H. Heiss*, for appellants.

J. M. Fitzgerald, contra.

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

THOMPSON, J.

This is an appeal from a decree determining that the district court for Banner county was without jurisdiction to appoint a receiver in a suit pending in the district court for Scotts Bluff county, as such counties were not in the same judicial district. The facts are so involved as to require a detailed statement thereof.

In March, 1920, Peter O'Shea and Matilda O'Shea, his wife, and Charles L. Schuler and Sophia C. Schuler, his wife, appellees, made, executed and delivered to Commodore C. Hampton and Martha E. Hampton, husband and wife, appellants, their promissory note for the sum of $25,000, payable ten years after date, with interest payable annually as per coupons attached. To secure the payment thereof they executed and delivered to the Hamptons their certain mortgage deed on 248 acres of land in Scotts Bluff county. The note and the mortgage each contained an accelerating clause, and the latter an additional clause which provided that the mortgagors should pay "all taxes and assessments levied upon said real estate."

On September 7, 1922, this action was instituted by the Hamptons against the mortgagors and Anna M. Taylor et al., in the district court for Scotts Bluff county, to foreclose the mortgage. The petition contained the usual allegations, both as to the unpaid taxes, the execution of the note, coupons and the mortgage, the conditions therein, and a breach thereof on the part of the mortgagors by reason of their not having paid interest and taxes when due; also the necessary facts usually alleged for the appointment of a receiver; and that the defendant Taylor claimed some interest in the premises by reason of a tax sale certificate issued to her by the county treasurer of Scotts Bluff county for taxes due on the premises for the year 1920, and a receipt for taxes for the year 1921, but that her lien was inferior to that of plaintiffs' mortgage. The petition also contained the usual prayer for ascertainment of the respective amounts due, priority of liens, that the property be sold, proceeds first applied to the payment of the costs, and then

to the payment of the amount found due and owing to the plaintiffs, and for a deficiency judgment; and that in the meantime a receiver be appointed to take possession of the lands and collect the rents and profits thereof. Legal service of summons was had on each of the defendants. Anna M. Taylor filed an answer and cross-bill, alleging, among other things, that her tax lien covered all the lands described in plaintiffs' mortgage, except lot 6, section 31, township 22 north, range 54; that she had paid the taxes for the year 1920, amounting to $1,795.49 on May 4, 1922, and on May 8, 1922, had paid the taxes for 1921, amounting to $1,485.02, and by reason thereof she asked judgment for $1,795.49, with 15 per cent. interest from May 4, 1922, and $1,485.02, with 15 per cent. interest from May 8, 1922, and also an attorney's fee equal to 10 per cent. of the amount allowed, and prayed that her lien might be determined to be the first and best lien on the premises and prior to that of the plaintiffs' mortgage.

On November 29, 1922, all defendants, save Taylor, having failed to plead, their default was entered; evidence was introduced by plaintiffs covering the facts set forth in their petition, and by defendant Taylor as to her tax lien; and the court entered the ordinary decree of foreclosure and sale, finding generally in favor of plaintiffs, save and except that the tax lien of defendant Taylor was the first lien in suit on the lands in question, and ordered the property sold and the proceeds applied to the payment of the plaintiffs' mortgage, the amount so found due plaintiffs being $29,427.77, with 10 per cent. interest thereon, and costs; and a stay of nine months at request of defendants was made a part of the decree, which decree was on the same day journalized. However, such decree did not respond to that part of plaintiffs' prayer asking for the appointment of a receiver. The land was sold in the usual manner on January 5, 1925, and was bid in by plaintiff Commodore C. Hampton, in behalf of himself and wife, for the sum of $35,000, which sale was duly and legally confirmed on February 20, 1925. A sheriff's deed was issued to the pur-

chaser May 26, 1926, which was duly recorded, and possession of the premises taken.

In law the decree as entered, until modified or set aside, determined the status of the parties before the court, and their respective interests in the lands involved at the time of its rendition. *Yates v. Jones Nat. Bank*, 74 Neb. 734; *Trainor v. Maverick Loan & Trust Co.*, 92 Neb. 821; *Lackey v. Yekel*, 113 Neb. 382; *Union Central Life Ins. Co. v. Saathoff*, 115 Neb. 385; 15 R. C. L. 430. Hence, that part of the decree determining that defendant Taylor, by reason of her respective tax purchases, had a lien on the lands in suit superior to that of plaintiffs, and this whether such taxes were of a general or special nature, becomes and is immaterial for our consideration, as does also the question as to whether or not the taxes were levied on the mortgage or levied on the land. When, at the sale under the decree, the plaintiffs purchased the premises, they made such purchase subject to the provisions of the decree, and neither party could be heard to gainsay or deny the force of the decree so rendered at the hearing of the application under consideration.

The record also shows that on June 28, 1923, a petition was filed in this case in the district court for Scotts Bluff county, one of the counties of the seventeenth judicial district, by plaintiffs, seeking the appointment of a receiver of the lands involved, and that such receiver be empowered to collect the rents and profits thereof and apply the proceeds to the payment of the taxes against the land; alleging that the land was owned by the mortgagors and was rented by them to certain tenants to be cultivated to sugar beets, and had been under such lease so cultivated; that the amount due plaintiffs, principal and interest, as evidenced by the decree of foreclosure, was $31,144.38; that the taxes against the land for the years 1920, 1921, and 1922 were the sum of $5,415.41, which included that covered by the decree in behalf of defendant Taylor, with interest thereon; that the mortgagors, defendants, had threatened to, and would, appropriate the rentals to their own individual use

and not to the payment of such taxes, and that the property covered by the decree was insufficient to pay the mortgage debt; together with other allegations usually contained in such applications; also in the notice suggested the appointment of J. P. Westervelt as such receiver, and submitted the names of certain ones as bondsmen, which notice and suggestion were served on each of the mortgagor defendants demanding their appearance at the courthouse in Scotts Bluff county, where the case was pending, on July 10, 1923, when the matter of appointing such receiver would be heard. On this petition the defendants joined issue by way of answer filed July 12, 1923, in which they and their wives lodged a general denial; alleging, further, that the premises were their homestead and so occupied; that the premises were not deteriorating, but were being enhanced in value by way of valuable and permanent improvements being then placed thereon; that the premises were worth more than the amount of the incumbrances; that each of the defendants was solvent, and prayed that the petition be dismissed. On the same day it was agreed by and between the plaintiffs and such answering defendants that the application to take charge of the rents and profits accruing on the lands in question "shall be heard before the Honorable J. L. Tewell, district judge presiding at Harrisburg, Banner county, Nebraska (one of the counties of the thirteenth judicial district), on the 12th day of July, 1923; that all matters pertaining to said application be presented to said court, and that the same be disposed of in all things as though said court were sitting in Scotts Bluff county, Nebraska; that all discrepancies of said notice with respect to the time and place of the hearing therein specified be and the same are hereby waived." This stipulation was entitled as in the original suit, and was duly signed by plaintiffs and defendants by their respective attorneys. In pursuance of this agreement, the parties proceeded to Harrisburg, in Banner county, where the entire matter was heard before the court, as indicated in such stipulation, evidence taken, etc. After which, and on the same day, it was found

by the court that such an agreement had been entered into, and that the case was before it by reason thereof; that due and legal notice had been given of the pendency of such application and hearing before such court; that the facts set forth in the application for the appointment of a receiver were true, and found generally in favor of the applicants; ordered that J. P. Westervelt of Gering, Nebraska, be appointed receiver of 175 acres of such real estate, upon which there was at the time a crop of growing sugar beets; but, as to the other portions of the 248 acres, they were exempted from the order as being the homestead of the defendants Charles L. Schuler and Sophia C. Schuler, his wife; further, directed the bonds to be given by applicants and receiver, respectively; and that defendant Schuler might upon proper application to the court make complaint and present same to the court with respect to the land set apart to him as his homestead exemption; that the receiver on his due qualification is ordered to apply any moneys received from the proceeds of such beet crop, first, to the purpose of redeeming the tax sales now against the premises, and that he shall hold the balance of such moneys until the further order of this court; further, that the order shall apply solely to so much of the present beet crop as belongs to defendants O'Shea and Schuler, and shall in no manner affect that portion which belongs to the tenant; that the receiver shall remain in possession of the premises until further order of the court, and shall have full authority to rent the same and apply the proceeds thereof as by the court directed. This order was entered at Harrisburg, July 12, 1923, and on the same day filed and entered upon the journal of the district court for Scotts Bluff county. The respective bonds were duly given and approved, and the receiver entered upon the discharge of his duties, and collected rentals and paid the same out as shown by his report hereinafter referred to, to all of which the defendants, mortgagors, lodged numerous objections and protests, upon which hearings were had, and each thereof overruled. It may be said, however, that in neither of such protests or

objections was the question of the jurisdiction of the court to enter the decree at Harrisburg raised. As lodged, they simply directed the attention of the court to certain reasons previously interposed as to why a receiver should not have been appointed. Finally, on January 7, 1927, and after the receiver had filed his final report and asked the court's approval thereof, the defendants, mortgagors, interposed another petition and objections to the receiver's appointment.

The receiver's report, omitting formal parts, was as follows:

Items of receipt

Nov. 18-24	From tenant for oats	$ 85.92
Dec. 2-24	Clerk of district court	2,150.11
Dec. 4-24	Clerk of district court	418.52
Dec. 13-24	Clerk of district court	102.97
Dec. 13-24	1923 beets and tops	4,785.20
Dec. 31-24	Clerk of district court	419.71
Mar. 26-25	Clerk of dstrict court	419.71
		$8,382.14

Disbursements

Dec. 4-24	Paid on taxes	$ 873.17
Dec. 15-24	On tax sale certificate	6,669.55
Mar. 27-25	Gering Lumber Co., lumber for repairs on tenant house	174.38
Mar. 28-25	L. L. Raymond, attorney fees	200.00
June 3-25	Applied on taxes	419.71
	Balance on hand deposited in Gering National Bank	45.33
		$8,382.14

The facts set forth in the petition and objections of defendants, filed January 7, 1927, as well as those in plaintiffs' answer, and the reply of petitioners thereto, need not be extended herein, as that which was put in issue thereby is

reflected by findings in the decree rendered January 20, 1927, which were, in substance, as follows: A finding generally in favor of defendants, and against the plaintiffs and receiver; that at no time had a final order been made from which an appeal could be had; that the crop of beets was growing on the land at the time of the first application, and was not subject to the mortgage lien; that the proceeds of the 1923 crop received by the receiver was $4,785.20, which was paid into court by the sugar company by agreement of parties, and by the court ordered paid to the receiver, and that defendants are entitled to such proceeds; that under plaintiffs' mortgage they were obligated to pay the general taxes thereon; that the mortgagors' interest in the land was liable for taxes levied for irrigation purposes; that the mortgagees' interest in the land by reason of their mortgage at all times equalled, if it did not exceed, the value of the lands covered thereby, and that all general taxes in question were so levied; that the general taxes levied on lot 6, section 31, township 22 north, range 54, were included in a tax sale certificate issued by the county treasurer to Martha E. Hampton, plaintiff, for the sum of $171.76, was paid by the receiver as such, but that such certificate was in such Hampton's hands uncanceled, and so stood at the time of the sale under foreclosure decree and confirmation of sale; that such amount, with 7 per cent. interest from February 20, 1925, is due defendants, and that it would be inequitable to permit plaintiffs to retain the land without the repayment to defendants of such sum; that the plaintiffs' bid at the foreclosure sale of the premises was $35,000, and sale was so confirmed; that plaintiffs bid in and purchased the lands subject to the tax lien of Anna M. Taylor and her assignees, and are estopped to deny the validity thereof; that they had received the amount thereof with interest from the receiver, and should not be permitted to retain such premises under such sale without paying the sum computed, as evidenced by the respective receipts of the county treasurer, with interest thereon, as by statute provided; that the receiver was without authority to so dis-

burse the money by him received, but that he did, however, apply such funds on the Taylor certificate, without discharging the same, in the sum of $6,669.55 on December 15, 1924, and the sum of $419.71 on June 3, 1925; that he was not authorized to employ an attorney, and must reimburse the fund in his hands by reason of payment made to an attorney, to wit, $200; that the receiver has in his hands, as such, $1,121.12 over and above the amount disbursed on taxes, and should pay such sum without interest to defendants; further, that the judge of the district court for Banner county, in the thirteenth judicial district, as well as the court, was without jurisdiction, and that the order and decree, if any such was entered of record in such court, was without authority, and without jurisdiction on the part of such judge, as well as such court; that the apparent appointment was void, as were all acts of J. P. Westervelt acting thereunder. The court then entered the following judgment:

"(1) That the order dated July 12, 1923, entered in this action and purporting to appoint a receiver over the premises described herein, be and hereby is vacated and set aside as being wholly void. (2) That plaintiffs be and hereby are ordered to comply with (their) bid and pay into court for use of defendants, Peter O'Shea and W. J. Stafford as administrator of the estate of Charles L. Schuler, deceased, the sum of $171.76 with interest from February 20, 1925; $6,669.55 with interest from December 15, 1924; and $419.71 with interest from the 3d day of June, 1925. That the amount of bid applicable on plaintiffs' decree be reduced by said amounts, and said sums shall not be applicable on or considered upon any deficiency herein. That balance of bid after payment of costs be paid and retained by plaintiffs on said decree. That J. P. Westervelt be and hereby is ordered to pay to said defendants the sum of $1,121.12. That said sums exclusive of interest are the total proceeds of crops and rents from said premises for the year 1923 and 1924 received by said Westervelt, and said interest be-

ing from dates that sums were applied to benefit of the plaintiffs herein."

We have carefully examined the bill of exceptions, as well as the transcript, and find that the conclusions of the trial court as to the facts, and the application of the law thereto, are supported by the evidence, and in harmony with the statutes applicable as construed by our previous holdings, save and except as hereinafter corrected and modified.

The law applicable to a receiver acting under a legal appointment, or one holding such position *prima facie* legal, is without application here.

As we conclude, the sum of $873.17 was paid by the receiver on December 4, 1924, in redemption of previous unpaid taxes on lot 6, section 31, township 22 north, range 54, for the years 1920, 1921, 1922, and 1923, and the same was a valid tax on such tract, and that the order to pay the same was included in the original appointment of the receiver, and orders subsequently made by the court in Scotts Bluff county, on application of plaintiffs, the same as in the matter of the other taxes paid by such receiver, and should have received the same consideration and disposition in the decree appealed from. The bid of plaintiffs at foreclosure sale was in law, as well as in equity and justice as between the plaintiffs and this receiver, and the mortgagors, subject to such taxes. Thus, as the payment by the receiver was made at the instance of plaintiffs, and as they and their property were thus relieved from liability to the extent thereof, the plaintiffs, and not the receiver, should be required to reimburse the mortgagors for their money thus wrongfully taken and applied.

We further find that the item of $174.38 for lumber, which forms a part of the disbursements of the receiver, should have been allowed and added to the amount that plaintiffs were required to pay, and not included with that found to remain in the receiver's possession. This lumber was bought, and as we infer the repairs were made, after the plaintiffs had bought the lands and the sale had been con-

firmed, and, as above suggested, such payment was at the plaintiffs' instance.

As to the $200 attorney's fee paid out by the receiver: The record discloses, as above indicated, that the plaintiffs were the moving parties in procuring the appointment of such receiver, as they were as to each and all of the orders directing him as to his duties, and is without evidence showing any necessity on the part of the receiver for an attorney. Further, the record fails to show that an application was made by the receiver for the appointment of an attorney, and we therefore conclude, with the trial court, that an allowance to him should not be made therefor.

The evidence, as well as the findings of the trial court, lead us to determine that, in addition to the amount received by Westervelt, as shown by his report, to wit, $8,382.14, he received $171.76 which he had paid on certificate held against lot 6. Thus, we find that Westervelt received in all the sum of $8,553.90, and that he paid out, and should be credited with having made payments out of such funds in pursuance with orders of the court, the sum of $8,308.57, consisting of the following items:

Dec. 4, 1924,	Paid on tax certificate against lot 6	$ 873.17
Dec. 15, 1924,	On tax sale certificate of Taylor	6,669.55
Feb. 20, 1925,	On taxes against lot 6	171.76
Mar. 27, 1925,	Gering Lumber Co. for repairs on tenant house	174.38
June 3, 1925,	Applied on taxes	419.71
	Total	$8,308.57

Thus, there remains in the hands of Westervelt, to be by him paid over to the defendants without interest, the sum of $245.33.

As all of the aforesaid payments were made at the instance of plaintiffs and for their benefit, out of funds belonging to defendants, and this without defendants' consent and against their wishes, and as each thereof was applied in payment of obligations that plaintiffs, in order to

clear the title to their property, would have had to pay, and as the same were in reference to the lands in question, a lien for that amount should be impressed upon such lands as an entirety, and plaintiffs be required to reimburse the defendants therefor, together with interest as determined by the trial court; and a day certain should be fixed for such payments, and, upon the failure of plaintiffs to pay the sum at such date, foreclosure of such lien could be had as against such lands, or contempt proceedings instituted.

Therefore, the judgment of the trial court is affirmed in part, reversed in part, and the cause remanded, with directions to modify the original decree to conform with this opinion.

AFFIRMED IN PART, AND REVERSED IN PART.

BEN ROSS, APPELLEE, V. JOE DIAMOND ET AL., APPELLANTS.

FILED DECEMBER 9, 1927. No. 25431.

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

Baldrige, Dorsey, Randall & Baldrige, for appellants.

Frank C. Yates, contra.

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

PER CURIAM.

This case has been heretofore submitted to the commission, an opinion prepared and adopted by this court, and is now before us on a motion for rehearing.

The action was upon an alleged oral contract, to recover for a bonus or a sum to be paid in addition to a salary for acting as manager for one of defendants' stores. The plaintiff recovered a judgment for the full amount, and the opinion, heretofore adopted, reversed the judgment and remanded the cause, with directions to dismiss the action.

On the trial defendants produced and introduced in evidence a written contract, by the terms of which the plaintiff would not have been entitled to the bonus. Plaintiff admitted the execution of this contract, but claimed that he was tricked into signing it, and did not know what it contained, and supposed that it contained the oral contract as alleged by him.

We are of the opinion that the evidence upon the point as to whether he was induced by trickery or fraud to sign the contract was insufficient to submit that question to the jury, and for that reason the judgment was properly reversed. However, upon a subsequent trial, additional evidence may be adduced.

Our former judgment is therefore modified, so as to reverse the judgment and remand the cause for further proceedings, and the judgment heretofore entered is modified to that extent.

REVERSED.

WILLIAM C. EDNEY, APPELLEE, V. CARL C. JENSEN ET AL., APPELLANTS.

FILED DECEMBER 9, 1927. No. 25178.

1. **Mortgages:** MERGER. "Ordinarily, when one having a mortgage on real estate becomes the owner of the fee the former estate is merged in the latter." *Wyatt-Bullard Lumber Co. v. Bourke*, 55 Neb. 9; *Citizens State Bank v. Petersen*, 114 Neb. 809.
2. ———: ——: PRESUMPTION. "But the mortgagee may in such case keep his mortgage alive when it is essential to his security against an intervening title. If there was no expression of his intention in relation to the matter at the time he acquired the equity of redemption, it will be presumed, in the absence of circumstances indicating a contrary purpose, that he intended to do that which would prove most advantageous to himself." *Wyatt-Bullard Lumber Co. v. Bourke* 55 Neb. 9; *Citizens State Bank v. Petersen*, 114 Neb. 809.
3. ———: ———: ———. Ordinarily, it is presumed that one must have intended to keep alive his mortgage title, where it was essential to his security against an intervening title; and this presumption applies although the party through ignorance

of such intervening title may have actually discharged the mortgage and canceled the notes and really intended to extinguish them.

4. ———: PRIORITY. A subsequent mortgagee, whose mortgage expressly recites that it is subject to prior mortgages, cannot be heard in equity to say that he is an innocent purchaser and entitled to cancelation of or priority over such other mortgages, where there was no privity of contract or of dealing between him and the prior mortgagee, and where the things relied on by him to entitle him to such priority consist of dealings between his mortgagor and the prior mortgagee, which dealings a court of equity in the same suit does not regard as a proper ground for cancelation of the mortgages as between the mortgagor and prior mortgagee.

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

J. C. Cook and *Munn & Norman*, for appellants.

Davis & Davis, contra.

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

GOSS, C. J.

The appellants, Carl C. Jensen and Emma M. C. Jensen, his wife, and Hans Nelsen, defendants below, appeal from the judgment and decree of the district court foreclosing two mortgages in favor of William C. Edney, plaintiff below, appellee herein, and ranking Hans Nelsen's mortgage inferior to those of plaintiff.

March 5, 1919, Edney sold and conveyed the farm in question to Jensen for $29,750. Jensen paid part cash, and he and his wife, on March 11, 1919, gave to Edney two mortgages for the remainder of the purchase price, one for $15,000 and one for $5,000, to secure two notes for those amounts, both due March 1, 1924, with interest at 6 per cent. per annum, payable annually each March 1, as evidenced by coupon notes attached. Jensen and wife took possession of the premises and remained in possession until March 1, 1925. Jensen paid the interest on the debt

for three years. He did not pay the interest coupons, amounting to $1,200, due March 1, 1923, nor those for the same total due March 1, 1924. So, on March 3, 1924, Jensen and Edney entered into a written agreement under the terms of which Jensen and wife were to execute a deed of the premises to Edney, to be held in escrow at the First National Bank of Ord, and to be delivered if Jensen did not pay the interest on the mortgages by January 1, 1925; Jensen was to continue in possession during 1924 and, if he did not pay the interest, he was to pay $1,200 cash rent for the premises for that year and $50 as interest thereon. The deed was executed by the Jensens to Edney the same day. One of the covenants as to the premises is "that they are free from incumbrances except incumbrances of record." The deed, containing a recited consideration of $22,520, was placed in escrow. Jensen was unable to pay any of the interest, but he paid the cash rental for 1924 as stipulated. The escrow deed was delivered to Edney and it was recorded January 20, 1925. On January 26, 1925, Edney executed releases of the two mortgages and these were recorded February 5, 1925. As before stated, Jensen gave up possession March 1, 1925.

On July 22, 1920, Jensen and wife (and another Jensen and wife) had executed and delivered to Hans Nelsen, the father-in-law of Jensen, a mortgage for $4,000 on these same premises. This mortgage, recorded July 29, 1920, contains a recital that it is "subject however to a prior mortgage of $20,000, to William C. Edney, which mortgage matures on the 1st day of March, 1924, and bears 6% interest."

February 24, 1925, Edney began this suit to foreclose the two mortgages against Jensen and wife, making Nelsen a party defendant by reason of his $4,000 mortgage. The plaintiff alleged that it was the intention of the parties that the deed from the Jensens to him was to be subject only to his two mortgages, that the recital in it that the title was clear except incumbrances of record was a mistake of the scrivener, and that, until after he had released

his mortgage of record, and until February 19, 1925, when he first learned of it, the plaintiff was ignorant of the fact of the execution of the Nelsen mortgage and of the record thereof. The petition alleged that the Jensens fraudulently concealed the fact of the Nelsen mortgage from plaintiff, and that the known purpose of the deed from the Jensens to plaintiff was to save expense of foreclosure, and to put title back in plaintiff, subject only to taxes and to the mortgages held by plaintiff. He prayed that the release be canceled, and that he be decreed prior liens to Nelsen and awarded a decree of foreclosure. The Jensens by their answer traverse the petition of plaintiff and plead estoppel; and Nelsen, by answer and cross-petition, sets up his mortgage, praying that it may be decreed a first lien, traverses the petition of plaintiff on all points prejudicial to him and pleads estoppel.

The trial court found and decreed in substance with the position of the plaintiff as set forth in the petition: That he agreed to accept the deed from the Jensens in the belief that it would operate to reconvey to him a good title, subject only to taxes and to his mortgages, and that when he executed the releases he had no knowledge of the Nelsen mortgage; that the two interests of plaintiff should not in equity merge but remain distinct; that plaintiff should have a decree for $24,081.70, with interest, as a first lien, and Hans Nelsen a decree for $5,509.33, with interest, as a second lien; that the plaintiff credit on said amount so found due him all the rentals received by him from March 1, 1925, less the taxes paid by him; and that an order of sale issue unless the decree be satisfied within 20 days. The amount found due in the decree shows that credit was given for the $1,250 rental paid by Jensen to plaintiff for the use of the premises up to March 1, 1925.

On a perusal of the whole record and of the briefs, we find very little dispute between the parties as to the facts. The only one of consequence, as we view it, is that as to whether the plaintiff had knowledge of the Nelsen mortgage at the time he consummated his settlement with Jen-

sen and until after plaintiff had released his mortgages and obtained an abstract of title. On this point there is an issue of fact between Edney and Jensen. There is no other affirmative oral testimony directly on the subject. Edney testified that no one ever told him of the $4,000 mortgage, and the only other oral testimony as to such fact is that of Jensen, who says that when they were negotiating a settlement in 1924 he told Edney that his "father-in-law had $4,000 on the place." The plaintiff denied this categorically, and another witness who was present at the time does not remember anything being said about any other than the Edney mortgages on the premises, though he was there with Edney and Jensen at the Jensen home "negotiating with Mr. Jensen or trying to place a loan on the place." We find on this and on the other facts for the plaintiff, as did the trial court.

The appellants state their errors relied on and follow them by this very practical statement of the meat of the controversy: "In a nut shell, the sole question is whether or not the plaintiff, when he accepted the deed, took possession of the land subject to the mortgage of Hans Nelsen." While appellants assert that it is not a question of merger but of contract between Edney and Jensen, yet the ultimate question to be determined is whether, in all the circumstances shown in the record, there was a merger of the two mortgages with the title conveyed by the deed and that the mortgages were thus discharged.

The following general rules as to merger are well established: "Whenever a person acquires a greater and a lesser estate in the same property and there is no intervening estate, the lesser does not further exist as a separate estate but is destroyed by or is considered in law as merged in the greater, but when, in such a case, an intention that the estates remain separate and distinct is expressed or may be implied or inferred, no merger can ensue but the intention will prevail." *Mathews v. Jones*, 47 Neb. 616. See *Miller v. Finn*, 1 Neb. 254; *Wyatt-Bullard Lumber Co. v. Bourke*, 55 Neb. 9; *McLaughlin v. Nelson*, 113 Neb. 308;

Citizens State Bank v. Petersen, 114 Neb. 809; 19 R. C. L. 484, sec. 276; 27 Cyc. 1381; 41 C. J. 775, sec. 869; 19 R. C. L. 484, sec. 276.

In *Citizens State Bank v. Petersen*, 114 Neb. 809, the court, in a discussion of the method of arriving at the intention, quoted *Wyatt-Bullard Lumber Co. v. Bourke*, 55 Neb. 9, saying:

"Ordinarily, when one having a mortgage on real estate becomes the owner of the fee the former estate is merged in the latter.

"But the mortgagee may in such case keep his mortgage alive when it is essential to his security against an intervening title. If there was no expression of his intention in relation to the matter at the time he acquired the equity of redemption, it will be presumed, in the absence of circumstances indicating a contrary purpose, that he intended to do that which would prove most advantageous to himself."

We find from the evidence, as did the trial court, that Edney had no actual knowledge of the Nelson mortgage prior to the time that Edney released of record his two prior mortgages, and that he released his mortgages through ignorance that Nelsen's mortgage intervened between his mortgages and the title reconveyed to him by the Jensen deed. The pertinent question then is, whether his act, in this respect, in equity, manifested an intention to take title subject to the mortgage held by Nelsen.

"It is presumed, as matter of law, that the party must have intended to keep on foot his mortgage title, when it was essential to his security against an intervening title, or for other purposes of security; and this presumption applies although the parties, through ignorance of such intervening title, or through inadvertence, have actually discharged the mortgage and canceled the notes, and really intended to extinguish them." 2 Jones, Mortgages (7th ed.) sec. 873, and cases cited.

When Edney took the land by deed from Jensen, the condition, as understood by him, was that he was getting

the land free of incumbrance, except his own mortgages, in consideration of the satisfaction of the mortgage indebtedness and an entire settlement between him and Jensen. He discharged the mortgages in pursuance of that belief. If the condition as to the title has failed, then the consideration for the agreement has failed to the same extent. So far as Nelsen's mortgage is involved, Edney's mortgages are unpaid and he may enforce them as against Nelsen's mortgage lien. *Smith v. Swan,* 69 Ia. 412; *Linscott v. Lamart,* 46 Ia. 312; *Stimpson v. Pease,* 53 Ia. 572; *Hayden v. Lauffenburger,* 157 Mo. 88; *Sullivan v. Saunders,* 66 W. Va. 350; *Stantons v. Thompson,* 49 N. H. 272.

The appellants argue that Edney is estopped, by his own conduct, to question the validity of the Nelsen mortgage as a first lien, because he took possession of the premises, began foreclosure, collects the rent, and does not offer to resurrender the premises nor return the rent collected. This argument does not attribute proper significance to the fact that the suit was commenced on February 24, 1925; that the plaintiff alleged that the Jensens were the owners and in possession; and that the Jensens held possession until March 1, 1925, when they surrendered it, and answered on March 19, 1925, alleging that plaintiff was the owner of the premises. With each party alleging ownership and right of possession in the other, the land would have been idle pending suit, had not one or the other taken possession and cared for it. The plaintiff did so and the trial court ordered him to account, as heretofore stated, for the rentals less the taxes paid. He did account for the money paid him as rentals for the year the deed was in escrow. He is in effect an informal receiver for the court. When Jensen failed to care for the property and Edney did so, the latter was serving the interests of both by reducing the mortgage indebtedness by so much as will be produced by the use of the property pending the suit.

Nelsen cannot complain of this operation of the equitable rules herein applied. There was neither privity of contract nor of dealing between him and Edney. His mort-

gage was in express terms, recited therein, made subject to the Edney mortgages. His position as a lienor was preserved by the court and he cannot be heard in a court of equity to say that he is an innocent purchaser and as such can profit by the attempt of his mortgagee to advance his interests, so long as he, Nelsen, has been put in no worse position than he was before.

For the reasons stated, we are of the opinion that the judgment of the trial court was right, and it is

AFFIRMED.

Note—See 39 L. R. A. (n. s.) 834; 19 R. C. L. 484; 5 R. C. L. Supp. 1036; 6 R. C. L. Supp. 1123.

STATE, EX REL. LIBERTY HIGH SCHOOL DISTRICT OF SIOUX COUNTY ET AL., RELATORS, V. L. B. JOHNSON, AUDITOR, RESPONDENT.

FILED DECEMBER 9, 1927. No. 26273.

1. **Statutes**: CONSTITUTIONAL PROVISION. The main purpose of the constitutional provision that "No bill shall contain more than one subject, and the same shall be clearly expressed in the title," was to prevent surreptitious legislation, **and not to** put the lawmakers in a straight-jacket.
2. ———: TITLE OF ACT: PUBLIC REVENUE. The title of an act, relating to "public revenue" and covering that entire subject, is comprehensive enough to include legislation both granting and limiting taxing power generally.
3. ———: ———: ———. Under title relating to public revenue, to means of administration thereof, and to the repeal of conflicting provisions in former acts, legislation changing the limitation of bonded indebtedness of school districts, as fixed by the school laws, from 10 per cent. of taxable property to 2 per cent. thereof, to correspond to general limitations in the new revenue act, *held* not inimical to the constitutional provision that "No bill shall contain more than one subject, and the same shall be clearly expressed in the title."
4. ———: REPEAL. An independent act covering the entire subject of legislation may change or repeal conflicting provisions in former acts.

Original proceeding in mandamus to compel respondent to register certain school bonds. *Writ denied.*

Morrow & Morrow, for relators.

O. S. Spillman, Attorney General, and *George W. Ayres,* for respondent.

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

DAY, J.

This is an original application for a peremptory writ of mandamus commanding the auditor of public accounts to register bonds voted and issued by the Liberty high school district of Sioux county in the sum of $30,000 to provide funds for the erecting and furnishing of a high school building. The refusal to register the bonds was based on the sole ground that they exceeded the amount authorized by statute. Five public school districts in Sioux county united to form the Liberty high school district. The latter proceeded under the statute authorizing the issuance of school bonds, but limiting the amount of the bonded indebtedness as follows:

"The bonds so issued shall not when added to the aggregate of the bonded indebtedness of the several school districts so united for high school purposes exceed ten per cent. of the aggregate assessed valuation of the several school districts as shown by the last preceding assessment." Comp. St. 1922, sec. 6383.

The valuation, according to "the last preceding assessment," was $1,382,000. The bond issue of $30,000, when added to the aggregate of the bonded indebtedness of the school districts forming the high school district, amounted to $56,000. This was less than 10 per cent. of the "aggregate assessed valuation of the several school districts as shown by the last preceding assessment." If the limit on the bonded indebtedness was 10 per cent. of the assessed valuation of the taxable property, the bond issue of $30,000 was not excessive. Relying on the provisions of the stat-

ute cited, the high school district contends that it is the duty of the auditor to register the bonds.

On the other hand, the auditor contends that a later statute limited the bonded indebtedness to 2 per cent. of the assessed valuation of the taxable property. Comp. St. 1922, sec. 5912. If the position thus taken is tenable, the bonds, of course, exceed the amount authorized.

The reply to the defense is that the statute limiting the bonded indebtedness to 2 per cent. of the assessed valuation of the property subject to taxation is void, because, as alleged, it violates the following provision of the Constitution: "No bill shall contain more than one subject, and the same shall be clearly expressed in the title." Const. art. III, sec. 14.

The facts, including the history of the bonds presented to the auditor for registration, are fully pleaded by the school district. The question at issue is raised by a general demurrer to the application.

Is the limitation of 2 per cent. an enactment within the title of the bill containing that provision? That limitation originally appeared in the Laws of 1921, under the following title: "An act relating to public revenue; to provide means of administration thereof; to repeal articles I, II, III, VI, VII, VIII, and XI, of chapter 69, and section 6333 and section 6346 of the Revised Statutes of Nebraska for 1913; chapter 162 and 163, Session Laws of Nebraska for 1919; article IV, title II, of chapter 190, Session Laws of Nebraska for 1919; and to provide penalties for the violation thereof and to repeal all acts and parts of acts in conflict herewith." Laws 1921, ch. 133.

Under this title the legislature inserted in the bill the provision which, if valid, changed the former statute limiting bonded indebtedness to 10 per cent. of taxable property and fixed the limitation at 2 per cent. thereof. The earlier limitation was originally imposed in 1901 under a title in these words:

"An act to provide for the organization, government and maintenance of rural high schools." Laws 1901, ch. 64.

The legislation therefore shows that different limitations applicable to school district bonds were imposed at different times under different titles without the formality of a direct amendment by the later act. With the legislation in the condition indicated, it is vigorously argued by counsel for the Liberty high school district that the acts containing different limitations on the power of school districts to issue bonds relate to distinct subjects of legislation; that one subject relates to schools and the other to revenue; that the limitation fixed by the act relating directly to schools was a valid exercise of legislative power; that the limitation in the act relating to revenue is a violation of the constitutional provision that "No bill shall contain more than one subject, and the same shall be clearly expressed in the title;" that the legislation on these subjects has been enacted generally in separate bills, neither encroaching on the subject-matter of the other; that the limitations under the title "Revenue" was an unconstitutional departure from the previous course of legislation. In the argument on these propositions, extensive references were made to the history of the enactments on the subjects discussed and to judicial rulings on constitutional and statutory law, but a decisive precedent showing that the bonds in controversy are invalid has not been observed.

At a time when the school law limited the taxing power for bonding purposes to 10 per cent. of the assessed valuation of taxable property, the basis of assessment generally was 20 per cent. of actual value. Laws 1901, ch. 64, sec. 10; Comp. St. 1922, sec. 6383; Laws 1903, ch. 73, sec. 12; Rev. St. 1913, sec. 6300. The later revenue law now in force changed the basis of assessment generally from 20 per cent. of actual value to actual value. Laws 1921, ch. 133, art. II, sec. 1; Comp. St. 1922, sec. 5820. This change in the revenue law, without any change in that part of the school law relating to school district bonds, would multiply the bonding power of a school district five times. To prevent this increase of power and to preserve the former limitation on the burden of taxation, the legislature inserted

in the new revenue law the provision limiting bonded debts to 2 per cent. of the actual value of the taxable property in the taxing district. Comp. St. 1922, sec. 5912. This view of the change is in harmony with the explanation in a recent opinion. *Drew v. Mumford,* 114 Neb. 100.

Was it competent for the legislature, under the title, "An act relating to public revenue; to provide means of administration thereof, * * * and to repeal all acts and parts of acts in conflict" with the new law, to change the limit on the bonded indebtedness of a school district, as fixed by the school law, from 10 per cent. of the assessed valuation of taxable property to 2 per cent. thereof? The constitutional provision that "No bill shall contain more than one subject, and the same shall be clearly expressed in the title," when the language and the purpose are considered, does not seem to require the legislature to pass two bills, one relating to revenue and the other relating to schools, in order to carry out a legislative purpose to make the limitation of the taxing power of school districts correspond to a proper limitation of the general taxing power in the revenue law. The main purpose of the constitutional provision was to prevent surreptitious legislation, and not to put lawmakers in a straight-jacket. The title of an independent act relating to revenue and covering that entire subject would naturally suggest to legislators the granting of taxing power and the limiting of taxing power. Neither is excluded. Both properly relate to revenue as one subject of legislation. The constitutional provision under consideration does not prevent comprehensive titles. Former legislation, dealing separately with taxation and the limitation of taxing power, did not necessarily prevent the lawmakers from legislating on both under the subject of revenue. The title, however, is not limited to "An act relating to public revenue." It goes further and includes "means of administration" of public revenue and declares a purpose to repeal all acts and parts of acts in conflict with the new revenue law. These phrases in the title gave notice of a legislative purpose to repeal all acts and parts

of acts in conflict with the provisions of the bill. Reference was thus made to the conflicting limitation in the school law under which Liberty high school district proceeded in voting and issuing bonds. In the title, the expression "An act relating to public revenue" and the phrase "to provide means of administration thereof" are broad enough to cover general limitations of taxing power and are germane to "revenue." Any other view would hamper lawmaking to an extent not warranted by the language or the purpose of the constitutional provision that "No bill shall contain more than one subject, and the same shall be clearly expressed in the title." The bill was confined to the one subject of revenue, and that subject was clearly expressed in the title, within the meaning of the Constitution.

It is well-settled law that an independent act covering the entire subject of legislation may change or repeal former enactments in conflict with new provisions. In a recent decision it was properly held that the new revenue law, limiting generally bonded debts to 2 per cent. of the actual value of the taxable property in the taxing district, was an act complete in itself, repealing earlier enactments in conflict with new provisions. Comp. St. 1922, secs. 5910-5912; *Drew v. Mumford*, 114 Neb. 100.

In this view of the law, the bonds of Liberty high school district of Sioux county exceeded the amount authorized by statute and the auditor of public accounts properly declined to register them. The demurrer to the application is therefore sustained, the writ denied, and the action

DISMISSED.

IN RE ESTATE OF WILLIAM HOFERER. CHARLES C. BERLIN, APPELLANT, V. HENRY SCHWARTZ, ADMINISTRATOR, APPELLEE.

FILED DECEMBER 9, 1927. No. 25787.

1. **Executors and Administrators:** LETTERS TESTAMENTARY: VALIDITY. Letters testamentary, issued by a court which has jurisdiction

to grant such letters, are valid unless and until revoked, notwithstanding there may be irregularities in the proceeding for which, in a direct attack, they might be revoked.

2. ———: ———: ———. Unless a statute so requires, the failure of the sureties on the official bond of an executor to make affidavit as to their qualifications to act as such sureties will not render void letters testamentary, issued to their principal; and letters so issued are not vulnerable in a collateral attack because of such failure.

3. ———: CLAIMS AGAINST ESTATE: LIMITATIONS. It is the duty of the county judge, within 40 days after letters testamentary have issued, to make and enter an order limiting the time within which creditors shall present their claims for examination and adjudication, notwithstanding such letters may be subject to revocation, in a direct attack, for irregularities in the proceeding leading up to their issuance.

4. ———: ———: ———: EXTENSION OF TIME. The time within which a creditor of a decedent may make application to the county court for an order extending the time in which to file a belated claim is, by statute, limited to a period of three months after the expiration of the time previously allowed by order of the county court. Comp. St. 1922, sec. 1340.

5. ———: ———: ———: FRAUD. The misconduct or fraudulent acts of a beneficiary of a decedent which prevents a creditor of decedent from filing his claim within the time limited by the order of the county court will not give to such creditor the right to make application for an order extending the time for filing his claim, where such application is not made until more than three months after the expiration of the time previously fixed in the order of the court for filing claims.

APPEAL from the district court for Knox county: ANSON A. WELCH, JUDGE. *Affirmed.*

Peterson & Barta, for appellant.

M. F. Harrington and *J. F. Green, contra.*

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

GOOD, J.

This proceeding was begun in the county court of Knox county, to obtain permission to file and have examined and

adjudicated a claim against the estate of William Hoferer, Sr., deceased. The application was denied and an appeal taken to the district court, where a general demurrer to plaintiff's amended petition was sustained and the proceeding dismissed. Plaintiff has lodged in this court an appeal, as a case stated, under rule 9c of this court.

The record discloses the following pertinent facts out of which this controversy arises: William Hoferer, Sr., a resident of Knox county, Nebraska, departed this life, testate, on the 23d day of April, 1924, and, at the time, he and his son, Henry Hoferer, were indebted in the sum of $4,000 upon a promissory note to the plaintiff, Charles C. Berlin, who was a resident of Tripoli, Iowa. Thereafter, the will of William Hoferer, Sr., was admitted to probate and Henry Schwartz was appointed executor. Schwartz gave an official bond, with two sureties, which was approved by the county judge. The sureties did not qualify in the manner prescribed by sections 9522, 9523, Comp. St. 1922, as amended by chapter 112, Laws 1923. The county court made and entered an order fixing October 6, 1924, as the time within which creditors were required to present claims against the estate of decedent for examination and adjudication. October 7, 1924, the county court entered an order forever barring all claims against said estate not previously filed. On February 19, 1925, plaintiff filed his petition in the county court of Knox county, praying permission to file and have adjudicated his claim, based upon said promissory note.

Some time previous to the 28th of July, 1924, plaintiff learned of the demise of William Hoferer, Sr., and on the last-mentioned date wrote a letter to William Hoferer, Jr., a son of decedent, apparently making inquiries concerning the estate of decedent and the payment of his note. To this letter William Hoferer, Jr., replied under date of August 4, 1924, and, among other things, stated: "I am looking after the administrator part, there is not much cash on hand, as we will have to sell some land before he (meaning Henry Hoferer) can get any money." Plaintiff alleges

that this letter induced him to believe that William Hoferer, Jr., was administrator of deceased's estate and looking after the same. Pursuant to this letter, plaintiff, on the 21st day of October, 1924, mailed to William Hoferer, Jr., his claim and requested its filing. On December 30, 1924, plaintiff received a letter from Henry Hoferer, one of the makers of said promissory note, in which, among other things, he wrote: "Note is filed in estate and I hope we will be able to take care of it real soon as we are planning to sell one farm and the store building. Now I don't want you folks to worry as this will be taken care of just as soon as we can sell anything at all." Plaintiff alleges that this letter caused him to believe that his claim had been duly filed in compliance with law, and he relied thereon until on January 6, 1925, he received another letter from William Hoferer, Jr., which is as follows: "Charles C. Berlin—Kindly make out a new claim against the Hoferer estate as H. Schwartz is Admr. Exec. of Estate and sent (send) same to R. S. Cook, County Judge, Center, Nebr." On January 7, 1925, plaintiff mailed to the county judge of Knox county, to be filed, a claim in proper form. The county judge refused to file it, because presented too late, and, as above stated, on February 19, 1925, plaintiff filed his petition in the county court, setting forth the facts as stated, and praying that the court find that plaintiff was prevented from filing his claim within due time by fraud and misrepresentation on the part of the beneficiaries of said estate, and that the court enter an order or decree permitting the filing of said claim; that the same be adjudicated according to law, and that the order barring the filing of said claim be reversed and set aside.

The following questions are presented by this appeal:

(1) Is a county court empowered to make and enter a valid order, limiting the time within which creditors of a decedent are required to file their claims for examination and adjudication, if the sureties on the official bond of the executor or administrator have not made affidavit as to their qualifications, pursuant to the provisions of sections

9522 and 9523, Comp. St. 1922, as amended by chapter 112, Laws 1923?

(2) Will the misconduct or fraudulent acts of a beneficiary of a testate decedent which prevent a creditor of decedent from filing his claim within the time limited by the order of the county court give to such creditor the right to apply for an order extending the time for filing his claim, where such application is not made until more than three months after the expiration of the time fixed in the order of the county court for filing claims?

Section 1336, Comp. St. 1922, makes it the duty of the county judge, within 40 days after the issuance of letters testamentary or of administration, to give notice of the date for the hearing of claims against the deceased and the limit of time for the presentation of claims by creditors. Pursuant to this statute, such an order was entered within 40 days after letters testamentary had issued. These letters have never been recalled or revoked, nor any attack made upon their issuance.

It is a general rule that letters of administration or letters testamentary, issued by a court which has jurisdiction to grant administration, are valid unless and until revoked, notwithstanding there may be irregularities in the proceeding which would invalidate such letters if attacked in a direct proceeding. 23 C. J. 1081, sec. 231. It is also a well-recognized rule that mere informalities or immaterial omissions will not necessarily invalidate the bond nor defeat the appointment of an executor or administrator, even though the bond is fatally defective as a statutory bond. In such case, a bond may be upheld as a common-law bond, and the appointment of the executor or administrator will not be a nullity, but may be defective and voidable only. 23 C. J. 1075, sec. 206. The failure of an executor or administrator to give bond does not render his appointment void, unless made so by statute. It is not subject to collateral attack. 23 C. J. 1077, sec. 212.

Without so deciding, we may, for the purpose of this discussion, assume that sections 9522 and 9523, Comp. St.

1922, as amended, impose upon the county judge the duty to require sureties on the official bond of an executor or administrator to make affidavits as to their qualifications for suretyship. The statute, however, does not make such a bond void, nor purport to affect the validity of letters of administration or letters testamentary, issued without the making of such affidavits. It will be observed that in this case no proceeding was brought for the purpose of revoking the letters testamentary, or to cancel the bond because the sureties had not made affidavits as to their qualifications to become sureties.

Under the rules above announced, the bond is not invalid; nor are the letters testamentary affected by the failure of the sureties to file affidavits as to their qualifications. Since the letters testamentary were in full force, it was the duty of the county judge to make an order limiting the time for the presentation of claims, pursuant to section 1336, Comp. St. 1922. The first question must, therefore, be answered in the negative.

The power of the county court to extend the time for filing and presenting belated claims against the estate of a decedent is limited by statute. Section 1338, Comp. St. 1922, requires an order of the court limiting the time for creditors to present their claims, which shall not, in the first instance, exceed eighteen months, nor be less than three months. Section 1339 provides: "The court may extend the time allowed to creditors to present their claims, as the circumstances of the case may require; but not so that the whole time shall exceed two years." Section 1340 provides: "On the application of a creditor who has failed to present his claim, if made within three months after the expiration of the time previously allowed, the court may for good cause shown allow further time not exceeding three months for the filing and determination of such claim."

To give the county court jurisdiction to make an order extending the time for filing claims, the application for such order must have been made within three months after the expiration of the time previously allowed, and then

only for good cause shown. In this instance, the original time limit was October 6, 1924, and the application to the court was not made until the 19th of the following February, and after a period of more than four months had elapsed.

The precise question has been heretofore passed upon by this court in the case of *Estate of Fitzgerald v. First Nat. Bank*, 64 Neb. 260. At that time the statute required that the application for extension of time should be made within six months of the original time limit, instead of three months, as by the present statute. In that case it was held: "When the county court fixes a time for the presentation of claims against an estate and enters an order barring all claims not then presented, as provided by section 217, chapter 23, Compiled Statutes, such time may be extended on application of a belated claimant, provided such application is for good cause, and is made within six months of the time first fixed and within two years of the appointment of the commissioners." The courts of last resort of sister states, having similar statutes, have generally held in accordance with the views herein expressed.

Counsel for plaintiff argue that the fraud and misrepresentation of facts made by the sons of decedent should be sufficient excuse for granting the relief for which plaintiff asks. It is possible that claimant may have an action against the sons for fraud. However that may be, it is clear that the judgment of nonclaim effectually bars him from any recovery against the estate of decedent.

From what has been said, it follows that the second question must also be answered in the negative. The judgment of the district court should be and is

AFFIRMED.

Note—See Executors and Administrators, 23 C. J. 1075 n. 8 (New), 16, 1077 n. 45, 1083 n. 36, 24 C. J. 337 n. 91, 366 n. 92, 95, 11 R. C. L. 88, 2 R. C. L. Supp. 1203.

STATE, EX REL. SAMUEL L. O'BRIEN, APPELLANT, V. BOARD OF COMMISSIONERS OF EDUCATIONAL LANDS AND FUNDS ET AL., APPELLEES.

FILED DECEMBER 9, 1927. No. 25116.

1. **Public Lands: CONTRACT FOR LEASING.** Where one seeks to lease school lands and makes statutory application therefor, accompanying the same with rental then due, which are accepted, and a receipt in due form for such rental is issued, the applicant having complied with all conditions precedent, a valid contract is thereby created; provided, always, such transaction is not tainted with fraud or mistake.
2. **Mandamus.** A writ of mandamus will not issue to compel one to do a wrong.

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

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

O. S. Spillman, Attorney General, and *George W. Ayres, contra.*

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

THOMPSON, J.

This is an action brought by appellant, Samuel L. O'Brien, hereinafter called plaintiff, to compel the defendant, Honorable Dan Swanson, commissioner of public lands and buildings, hereinafter referred to as land commissioner, and other officers connected with the administration of his office, to issue to plaintiff a lease of section 16, township 20 north, range 28, of the school lands of Cherry county, and praying that an alternative writ of mandamus issue, and that the same might be made permanent upon a final hearing of the case. Issues were duly joined, trial had to the court, and judgment entered in favor of defendants; to reverse which plaintiff appeals.

The record discloses the following facts: That on April 21, 1924, plaintiff made application in due form to the

county treasurer of Cherry county to lease the school lands above described; that at the time of such application a casual examination of the books was made by the officers, application received, and rental of $61.20 paid by plaintiff; that a duplicate receipt, together with the application, were transmitted by mail to the office of the land commissioner, on receipt of which a lease to plaintiff was immediately executed, signed and sent to the county treasurer for delivery, at which time it was discovered by him that on April 15, 1924, an application to lease the same land had been made by one E. A. Roberts, which was filed and approved by the county treasurer, and the then appraised rental value of such land, to wit, $54.40, paid by Roberts; that this application of Roberts gave him until May 15, 1924, to pay for the improvements which had been placed on the land by a prior lessee, the value thereof to be ascertained by the county treasurer in the meantime, which was done and estimated at $50, which sum Roberts paid on May 15, 1924; that thereupon the county treasurer reported the matter back to the land commissioner, and such report was accompanied with the lease to plaintiff, which had remained undelivered awaiting the valuation of improvements and payment thereof by Roberts; that a cancelation of the O'Brien lease was requested by the county treasurer; that on receipt of this communication the land commissioner canceled the O'Brien lease, approved the application of Roberts and the receipt of the money by him paid, executed a lease of such land to him, and transmitted the same to the county treasurer for delivery, which was done, and the $61.20 paid by plaintiff was tendered him, which he refused; that afterwards Roberts duly assigned his lease to appellee Pierman. Under these conditions this action was instituted.

Section 5197, Comp. St. 1922, clothes the county treasurer with authority to receive applications to lease unsold school lands, and receive the rentals therefor; hence, as to Roberts, that which the county treasurer did, being without fraud or mistake, was clearly within his authority,

and created a binding obligation running from the state to Roberts. *Luse v. Rankin*, 57 Neb. 632.

Section 5198 of the statutes, as amended by chapter 54, Laws 1923, provides the procedure as to the appraisement of improvements on the land, when, as in this case, a forfeiture or expiration of a prior lease has accrued, which accounts for the delay in issuing the lease to Roberts.

It is claimed on the part of plaintiff that the original application made by Roberts was for section 36, and not for section 16. However, we are convinced from a careful reading of the record that such is not the fact, as the evidence plainly shows that, at the time of preparing the Roberts application, the scrivener denoted the section as 36; but, immediately becoming suspicious as to whether or not he had the proper section number, consulted the plat of such lands in the county, determined that the correct number was 16, erased the figures 36, and placed therein the correct number before such application was signed or filed. While it is unfortunate that two applications to lease the same land should have been received and filed, it certainly does not authorize the court to direct the cancelation of a lease legally made, in order to correct such a mistake, the original lessee not being in any manner at fault. And this, notwithstanding we are convinced that the strictest integrity prompted the actions of all parties concerned. It is axiomatic that a writ of mandamus will not issue to compel one to do a wrong. *State v. Cowles*, 90 Neb. 839.

We conclude that a misconception of the records of the county treasurer's office led to the acceptance of the O'Brien application; further, Roberts was prior in time, equal in equities, and without negligence. The writ was rightly denied.

AFFIRMED.

CITY OF PIERCE, APPELLEE, V. ALBERT SCHRAMM, APPELLANT.

FILED DECEMBER 9, 1927. No. 25861.

Municipal Corporations: USE OF STREETS. "The right of a private party to occupy part of a public street in front of his place

of business must yield to public necessity or convenience, and ordinarily the question of public necessity or convenience is for the governing body of the municipality, but such body cannot act arbitrarily and deny to one citizen privileges which it grants to another under like conditions." *Kenney v. Village of Dorchester*, 101 Neb. 425.

APPEAL from the district court for Pierce county: DEWITT C. CHASE, JUDGE. *Reversed and dismissed.*

H. B. Muffly and *E. D. Beech*, for appellant.

M. H. Leamy, contra.

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

THOMPSON, J.

The City of Pierce, situate in the county of Pierce, instituted this action to have the defendant Schramm enjoined from maintaining and operating certain gasoline pumps by him constructed and operated between the graded portion of the street and his lot line, to have such construction declared a nuisance and ordered removed. After the issues were duly joined and evidence submitted, judgment was entered in favor of the plaintiff as prayed. Defendant appeals.

The action is before us for trial *de novo*. This being a suit in equity, equitable principles must control our consideration of the evidence, as well as our application of the law to the facts proved.

Pierce is a city of the second class. The laws governing such cities authorize them to enact ordinances for certain purposes, among which are to regulate and prevent the use of streets, sidewalks, and public grounds, and to remove all obstructions therefrom. Comp. St. 1922, secs. 4182, 4203, 4278, 4304, and 4306. Thus, it will be seen that as to these purposes the city proceeds by and through its ordinances duly enacted. So far as this record shows, no such ordinance was ever passed. The only ordinance introduced in evidence was one which provides: "The curb line in, along

and through all streets and avenues in this city shall be so located as to secure a twenty-four (24) foot thoroughfare for traffic over and upon said streets and avenues, unless a wider thoroughfare be ordered on certain streets by resolution of the mayor and council." The record further discloses that in platting this city it was bounded on the east side by the Meridian highway, which highway was at the time 66 feet in width and had been used prior thereto for public travel for many years, it being situated on the section line, as testified by some, and on the half-section line, as testified by others; that, so far as affects this case, such highway is designated in the pleadings as a street, which had been adopted by the county and the state as a public highway, to wit, United States government No. 81; that the defendant at the times involved herein owned a lot abutting this street or highway for approximately 123 feet (without sidewalk construction), and had erected thereon a building, the outer line of which was the outer line of this Meridian highway; that at the time, at this place and for some distance therefrom, this street was in a condition unsafe for traffic, and the traveled portion thereof was much narrower than at the commencement of this suit; that defendant, desiring to establish and operate what is commonly known as a filling station on his own lot, and to install in connection therewith two modern gasoline pumps connected with underground tanks in the space between his lot line and a then imaginary curb line, and about 8½ feet from such lot line, consulted with the different members of the street committee of the then city council, and informed them of his desire, and at the same time told them that, if they, for the city, would consent, he would widen and grade the street and place the same in condition more suitable for public travel at his own expense, and for these purposes asked them to meet him at such place and view the situation, which they did, and each approved of his proposal, and he, in furtherance thereof, commenced the construction of the pumps, and the grading of the street, and consumed two months time in such work, and expend-

ed in the repairing of the street the necessary and reasonable sum of $500; that each member of the council passed by and observed the above improvements as they were being made, and placed, and knew of the purpose thereof; that the street was greatly improved and rendered more convenient and suitable for travel; that there were three other dealers, competitors of defendant, who maintained and operated gasoline pumps and stations similarly constructed and situated, the defendant's being 8½ feet from the lot line, and the street by him leveled and open to travel to such point, and the others from 14 to 15 feet from such lot line, and thus from 6 to 7 feet farther out in the street than the pumps of defendant; that at each and all of such filling stations the automobiles, while being filled with gasoline or otherwise served, stood in the highway proper and outside of the curb line; that after the pumps were constructed defendant continued to operate the same until just prior to the bringing of this action, when a notice was served upon him to vacate; upon receipt of which notice he offered to remove his pumps, provided that the other dealers similarly situated were required to do the same, and continues such offer. It is further admitted, and made a part of the evidence in this case, "that no notice to remove was ever given to the owners of any other gasoline pumps located within the streets of the city of Pierce between the lot line and the curb line of said streets."

The appellee and, as indicated by its holding, the trial court relied upon the law as announced and applied by us in *Chapman v. City of Lincoln*, 84 Neb. 534. It must be remembered, however, in that case the whole controversy was centered upon the question as to whether or not an ordinance duly enacted could be enforced. In the instant case, a very different situation is presented, as the city is proceeding without an ordinance. Furthermore, the plaintiffs in the *Chapman* case were those who were similarly situated and similarly affected by the ordinance, and they were seeking to enjoin its enforcement. Here, those similarly situated are not even made parties to the suit, and

the defendant is arbitrarily selected out of the group of those similarly situated, and that without any intention on the part of the city of in any manner molesting the others; but, rather, it presents a futile attempt at proof of an excuse for such arbitrary discrimination.

In a case like this, the general holding of the courts is that the owner of an abutting lot has certain proprietary rights in the street, which, however, are subordinate to the public use thereof, when exercised in harmony with statutory direction. Thus, while the consent to the erection and use of the pumps in question was given by the individual members of the city street committee, and the construction thereof observed by each member of the city council, this would in no manner estop the city from enacting an ordinance, general in its character, requiring the removal of such encroachment and all others of a similar nature. However, neither in the passage of such an ordinance, in the attempted enforcement thereof by injunction, or in a proceeding as here under consideration, should one of a number of persons similarly situated be arbitrarily selected as the one to be proceeded against.

As we view the facts and the law applicable, this case is controlled by our conclusion in *Kenney v. Village of Dorchester*, 101 Neb. 425, wherein we held: "The right of a private party to occupy part of a public street in front of his place of business must yield to public necessity or convenience, and ordinarily the question of public necessity or convenience is for the governing body of the municipality, but such body cannot act arbitrarily and deny to one citizen privileges which it grants to another under like conditions."

The judgment of the trial court is reversed, and the suit dismissed.

REVERSED AND DISMISSED.

Note—See 25 L. R. A. (n. s.) 400; 18 A. L. R. 101; 29 A. L. R. 450; 34 A. L. R. 507; 42 A. L. R. 978; 49 A. L. R. 767; 13 R. C. L. 215; 3 R. C. L. Supp. 29; 5 R. C. L. Supp. 688; 25 L. R. A. (n. s.) 400.

MAURICE PETERSON V. STATE OF NEBRASKA.

FILED DECEMBER 9, 1927. No. 25906.

1. **Criminal Law**: CHANGE OF VENUE. "A motion for a change of venue in a criminal case is addressed to the sound discretion of the trial court, and its ruling thereon will not be disturbed unless an abuse of such discretion is disclosed." *Simmons v. State*, 111 Neb. 644.

2. ———: RAPE: ELECTION. While rape is not a continuing offense, and ordinarily upon trial of a charge of statutory rape, set forth in a single count of an information, as committed upon a day certain, where the testimony of the state discloses a number of acts of sexual intercourse between the defendant and prosecutrix, the state is required to elect, on motion, upon which sexual act it will rely for conviction; yet, where the sexual relations of these parties appear from the evidence to be so continuous, and so close in point of time, and so connected with, and related to, each other, and to the surrounding facts and circumstances, contemporaneous therewith, as to constitute substantially one indivisible, criminal transaction, no election will be required.

3. **Rape**: CORROBORATIVE EVIDENCE. "In a prosecution for rape, it is not essential to a conviction that the prosecutrix should be corroborated by the testimony of other witnesses as to the particular act constituting the offense. It is sufficient if she be corroborated as to material facts and circumstances which tend to support her testimony, and from which, together with her testimony as to the principal fact, the inference of guilt may be drawn." *Fager v. State*, 22 Neb. 332.

4. **Evidence** examined, and *held* sufficient to sustain conviction, and that the sentence imposed was not excessive.

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

R. O. Canaday, for plaintiff in error.

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

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

EBERLY, J.

The defendant was convicted of rape upon a female of less than 15 years of age, and sentenced to a term of 5 years in the state reformatory for men. From this conviction and sentence, he appeals.

The defendant presents, as first ground for reversal, the failure of the district court to grant a change of venue.

Thirty-one affidavits were filed in his behalf. A number of counter affidavits were presented in resistance of this motion in behalf of the state. The district court then withheld its ruling until after the examination of the jury upon *voir dire* had been completed. Then, after consideration of the evidence furnished by the examination of the jury, in connection with the affidavits presented, the court denied the motion for change of venue.

The matter of granting of a change of venue in a criminal action is largely resting in the sound discretion of the trial court, and, unless such discretion is abused, the ruling will not be disturbed on appeal.

The evidence, considered as an entirety, is conflicting. Embodied in this showing appear copies of all newspaper articles published in the newspapers of Morrill county pertaining to this prosecution. None are of an inflammatory character. They purport to give the substance of what witnesses said, the official action taken by proper authorities, and include the result of the preliminary examination. No opinion as to the credibility of interested parties is expressed, nor is the defendant condemned as guilty of the charge made. These articles could hardly be deemed the source of possible prejudice. In fact, without exception, they are rather to be commended as examples of proper policy and tone on part of the press. And when, in connection with the affidavits presented by the respective parties, we consider the evidence elicited upon the examination of the jurors, no doubt can remain but what the action of the court in denying the change of venue was not only within its discretion, but was proper in view of the evidence before it. *Simmons v. State*, 111 Neb. 644;

Baker v. State, 112 Neb. 654; *Goldsberry v. State,* 66 Neb. 312.

The next assignment of error upon which the defendant relies is the failure of the district court to sustain his motion requiring an election on part of the state.

The information upon which the defendant was convicted, in apt language, charged that, "on or about the twenty-fifth day of November, A. D. 1926," in a county and state certain, the defendant did "unlawfully, violently, wilfully, knowingly, and feloniously, carnally know and abuse" the complaining witness, then of the age of less than 15 years.

The opening statements of the county attorney to the jury, after they had been impaneled to try the issues of this case, were in substance that, at the time referred to in the information, during a continuous transaction, three acts of sexual intercourse occurred between the prosecutrix and the defendant. The defendant, at the close of the statement, thereupon presented a motion to require the state to elect upon which of the three sexual acts it would "stand" for conviction. This motion was, by the district court, overruled. Whereupon the state introduced evidence which, if believed, tended to establish: That the prosecutrix was 14 years of age; that the accused was more than 21 years of age; that on the date charged in the information, pursuant to previous arrangement, acting in concert, for the purpose of accomplishing a predetermined, criminal purpose, the defendant, aided and assisted by one Hill, secured the physical control and possession of the prosecutrix, which thereafter was continuously maintained and exercised by him for a period of not to exceed two hours; that during this time, for the purpose mentioned, the prosecutrix was kept and carried about Morrill county, Nebraska, in an automobile, and finally taken to the home of the defendant; that, en route, the prosecutrix was twice compelled to submit to sexual intercourse with the defendant, and once with Hill; that upon arrival at defendant's home, prosecutrix was forcibly

removed from the automobile, taken into the house, where the sexual act was repeated by the accused, and also by Hill.

The jury, as triers of fact, who heard this evidence and saw the witnesses, were the sole judges of its truth. In connection with surrounding facts and circumstances appearing in the record, if believed, it established one indivisible, criminal transaction, initiated and carried out by the accused in person, all of which took place within a short period of time on a single night; and during which everything said and done was in furtherance of one continuous, criminal purpose not completed and entirely consummated on part of the accused until after his last sexual relations with prosecutrix at his home.

At the close of the state's evidence, the accused again presented his motion requiring the state to elect upon which of the sexual acts it would rely, which motion was, by the district court, overruled.

It would seem there can be no question but what the denial of defendant's motion to require the state to elect, when first made at the close of the opening statement of the state to the jury, was proper. *Blair v. State,* 72 Neb. 501.

A different question was presented when defendant's motion to require an election was renewed at the close of the state's evidence in chief. It must be conceded that rape is not a continuing offense, and where the testimony of the prosecuting witness discloses a number of acts of sexual intercourse between the defendant and prosecutrix, evidence of these acts of intercourse are admissible; but, as a general rule, the state should be then required to elect upon motion upon which sexual act it will rely.

However, an apparent exception to the general rule appears to be well established both in reason and in authority. It seems that, where the relations of the parties are continuous, and so close in point of time, and so connected with, and related to, each other, and to the surrounding facts and circumstances contemporaneous therewith, as

to constitute substantially one indivisible, criminal transaction, no election will be required. The present case clearly falls within the exception.

It follows, therefore, that in the action of the trial court in denying the motion of defendant to require an election on part of the state at the close of the evidence, on part of the prosecution, no error was committed. *State v. Alberts*, 199 Ia. 815; *People v. Turner*, 260 Ill. 84; *State v. Mueller*, 38 Minn. 497; Underhill, Criminal Evidence (3d ed.) 194, sec. 152.

We have carefully examined the contentions presented by the defendant, (a) that the evidence is insufficient to sustain the verdict; (b) that there is no sufficient corroboration of the prosecutrix; (c) that the court erred in giving certain instructions on the subject of the necessity of corroboration, and in refusing the instructions tendered by defendant on that subject; and (d) that the sentence of five years in the state reformatory for men at Lincoln, Nebraska, imposed by the court, is excessive.

We are unable to agree with any of them. Without quoting from the record *in extenso*, it may be said that it contains ample evidence, if believed, to sustain the conviction; that the jury were convinced of its truth; that the corroboration of the prosecutrix appearing in the record meets the requirements imposed by the rule now and long prevailing in this jurisdiction, which is: "In a prosecution for rape, it is not essential to a conviction that the prosecutrix should be corroborated by the testimony of other witnesses as to the particular act constituting the offense. It is sufficient if she be corroborated as to material facts and circumstances which tend to support her testimony, and from which, together with her testimony as to the principal fact, the inference of guilt may be drawn." *Fager v. State*, 22 Neb. 332. See, also, *Hammond v. State*, 39 Neb. 252; *Darwin v. State*, 107 Neb. 177; *Miller v. State*, 112 Neb. 243; *Aller v. State*, 114 Neb. 59; *Lewis v. State*, 115 Neb. 659.

The instruction on this subject by the court, complained

of, was ample and substantially correct, and the refusal to give instructions tendered by defendant was, therefore, not erroneous. In view of the testimony in the record, the plea now made that the sentence of five years, imposed by the district judge who heard and saw the witnesses, is excessive is neither appealing nor convincing.

The judgment and sentence of the district court is right, and is, therefore,

AFFIRMED.

Note—See 22 R. C. L. 1226.

THOMAS SALISBURY V. STATE OF NEBRASKA.

FILED DECEMBER 9. 1927. No. 25971.

Homicide. Evidence examined, and *held* insufficient to sustain the verdict.

ERROR to the district court for Pierce county: ANSON A. WELCH, JUDGE. *Reversed.*

Hugh J. Boyle and *William L. Dowling,* for plaintiff in error.

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

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

EBERLY, J.

The defendant below, plaintiff in error here, was convicted on an information which, eliminating formal parts and surplusage, charged in apt language that on a certain public highway in Pierce county, Nebraska, on the 26th day of January, 1927, said defendant did operate a motor vehicle outside of any city or village at a "rate of speed greater than was reasonable and proper, having regard to the traffic and use of said highway at the place aforesaid, and having regard for the safety of the public, and did then and there so drive, propel and operate said automobile at a rate of speed so as to endanger the life and

limb of persons using and traveling said highway at the place aforesaid," and by reason thereof did unlawfully kill one Carl Eisenblatter.

This information is properly laid under the provisions of the motor vehicle act of Nebraska, sections 8364-8405, Comp. St. 1922. It further appears from the facts in the record that section 9546, Comp. St. 1922, has no application whatever to the offense which the proof may have tended to establish. The instructions of the district court, in general, were properly given on this theory. *Wallace v. State*, 91 Neb. 158.

The death of Carl Eisenblatter was, indeed, regrettable. That the automobile driven by the defendant caused his death stands admitted. The state concedes that the unfortunate occurrence was unintended on part of the accused, but insists that the death of Eisenblatter was due to the voluntary operation of this automobile by the accused at an unlawful speed as hereinbefore defined. The record fairly reflects the following facts: Salisbury is and was a nonresident of Nebraska. With his wife he had, prior to the 26th of January in question, been visiting at the home of friends in Pierce county, Nebraska. He owned and drove a Willys-Knight roadster. Because of needed repairs, he left his automobile at a shop in Norfolk, Nebraska, on the day of the accident. For his accommodation he was loaned a "Hudson speedster" at this shop for his use, while the repairs were being made on his own car. Neither with this particular car nor with the Hudsons, as a class, had he had any previous experience. From Norfolk, immediately after receiving this "car," he drove to the Zimmer home in Pierce county where his wife was visiting. About 6 o'clock that evening, in the automobile in question, he left the Zimmer home for the home of one Mr. Carsten. With him in the front seat of the automobile sat Mr. Zimmer; Mrs. Zimmer and his wife occupied the rear seat. A portion of the road traveled by the parties was north over the state highway No. 81, commonly known as the Meridian highway. At a place

on this road where it is practically level and straight, and with a well-maintained, smooth roadway, 20 feet wide in the clear, the accident occurred for which the defendant is now being prosecuted. Eisenblatter, then driving south on the same road, was approaching the scene of the accident with a four-horse team hitched abreast, attached to a wagon on which was loaded about 6,000 pounds of sand. He was walking on the near side of the wagon. Hitched as the left horse of the four was a stallion whose habits of shying and surging are established by the evidence beyond dispute. There is no evidence in the record that defendant was previously acquainted with either horses or driver. In the meanwhile the defendant had discovered, after starting on the trip, that one of the spark plugs on his car was "missing." He accordingly, from time to time, opened the cutout, disengaged the clutch, and sought by stepping on the accelerator and increasing the spark to clear the plug. There is no evidence in the record that this procedure was in any manner negligent or improper. At first the success of this effort was indifferent. But it appears that almost immediately before the accident the "missing" plug cleared up and suddenly began functioning. The undisputed testimony of defendant's witnesses is, that just prior to arriving at the place of the accident the speed of the car, which at no time was excessive or fast or of a racing nature, had been markedly reduced; that, when the defendant had finally succeeded in clearing the "missing" plug, he thereupon replaced the clutch and, at the same time, lifted his foot from the accelerator. The latter failed to respond. It seems that it had been caught and held so that the gas remained on. This, so far as the evidence discloses, was the first intimation that defendant had that the car he was driving was in any manner defective. But all plugs of the engine were now "hitting," and the result of the power of the engine, thus involuntarily applied, was that the car lunged forward, out of control, with instantly increasing velocity, and the suddenness of the increase of speed was so great

that the occupants of the car were unbalanced and thrown backward in their seats. Defendant grabbed at the "sticking" accelerator in a vain attempt to correct the defect and to thereby regain control of the car. Contemporaneous with this movement he discovered the approaching four-horse team then just passing from the bridge to the north of him between 40 and 50 feet distant. There is no evidence that at this time and, indeed, during the entire transaction, the defendant's automobile was in a position other than its proper place on the right (east) side of the highway in the direction it was proceeding. The evidence of the state tends to establish that Eisenblatter's wagon and horses, just previous to the collision, were as far to the west side of the highway as they could be driven. There is no evidence in the record from which it might be inferred that Eisenblatter at any time requested the approaching vehicle to be brought "to an immediate stop" by "putting up the hand" or otherwise.

It appears that the four horses abreast spanned approximately 10½ feet. The roadway was 20 feet wide in the clear, improved, and well maintained.

In view of the physical facts uncontroverted in the record, it seems there is no question but what there was then free space between the horses and east road boundary to afford the approaching auto sufficient room to pass. The danger inherent in the situation was, therefore, due to the propensity of the animals to scare and shy.

According to the evidence of defendant's witnesses, which is not expressly contradicted, as the surging automobile came within some 20 feet of the horses, it was first discovered by the occupants of the automobile that the latter were frightened. At about 12 feet, still nearer, the stallion (the east horse of the team of four), in its fright, suddenly lunged away from its team mates to the eastward and reared upon its haunches almost in the direct course of the approaching automobile. The witnesses describe him as appearing to be raised above the engine. At this the defendant spun his steering wheel to the eastward,

and his automobile, responding thereto, struck and severely indented the steel railing forming part of the approach. The impact between the "car," "stallion," and the steel railing was evidently almost instantaneous, though exact order cannot be ascertained by the record. It seems that darkness, possibly terror, rendered a more complete account impossible. The first disinterested witness to reach the scene found the stallion dead lying about 15 feet due north of the wagon on the west side of the road. The deceased was lying immediately north of his wagon, between it and the dead horse, with his body in a north and south position, mortally wounded. The left front wheel of the wagon was crushed; two of the horses had broken away and disappeared. A third, the one hitched next to the stallion, was standing with blood marks upon him, and one hoof torn off. The automobile had stopped about 10 to 12 feet from where it struck the steel railing, with its rear wheels in line with the rear wheels of the wagon. It was within a foot or two of the east side of the road. Both front wheels of the automobile were wholly destroyed. The radiator and the left lamp had been badly crushed in, and the left fender had been bent back by the force of the impact. The right fender appeared but little injured, and the right lamp was intact and remained lighted until turned off after the accident. The engine was running, the accelerator still "stuck," but the clutch was in neutral.

The defendant now challenges the sufficiency of the evidence contained in the record, and insists that the district court erred in giving and refusing to give certain instructions. In considering these contentions, it must be kept in mind (a) that, as a general rule, direct testimony is not essential to warrant a jury in finding that an automobile was operated at an excessive speed. Evidence of the force of the impact of the collision may, by itself, or in connection with other circumstances, be of sufficient weight to warrant a jury in finding negligence as to speed; (b) if evidence in the case, either direct or circumstantial, or any material part thereof, is fairly susceptible of two

constructions, one in favor of the state, and the other in favor of the defendant, the doubt must be resolved in behalf of the innocence of the accused, as every intendment or inference under the evidence, considered in its entirety, must be construed in his favor. *Bourne v. State, ante,* p. 141.

The state, in view of the conceded fact that the accelerator stuck just before the accident occurred, offers little, or no, convincing, direct evidence on the subject of the speed of defendant's car. The sole, direct evidence on the subject is from a single witness who testified that, at and prior to the accident, he was in his field about 40 rods north of the bridge on this highway, and approximately 2 rods from the road; that he heard a car coming from the south, and it sounded as though the cutout was open, and the car running fast; that he heard the crash of the accident which occurred just south of the bridge above referred to; that he looked south towards the source of the sound and he saw one automobile light still burning; that he went down the road to the wreck and found the car. At the time he started for the scene of the accident, the engine of the car, which had not stopped running, was still making considerable noise, but later was shut off by some one, and that the light went out before he arrived at the place of the wreck. This witness also said that he first heard this automobile coming "somewhere around Ulrich's place," which he "judges was better than a half mile" south of the scene of the accident, and that it was between a minute and a minute and a half from the time he first heard the coming automobile until he heard the crash of the collision. Witness, if correct, was, at the time he first heard the approaching automobile, more than 3,400 feet north of the approaching car. Disregarding the time required for the transmission of sound to him (approximately 1,100 feet a second), and assuming his judgment to be accurate and correct, it discloses that the average speed of defendant's car, after this witness first heard its approach, was not in excess of 20 or 30 miles an hour.

It would seem, indeed, that if this be considered to be as an unvarying speed, and over a portion of a straight, well-improved, 20-foot highway, then otherwise unoccupied and not in use, and especially in view of the fact that violation of the provision of our statute governing the speed of an automobile in approaching a bridge, or passing another vehicle, is not a part of the charge, it would hardly be subject to just criticism, let alone be made the basis of a criminal complaint.

Unfortunately, this witness' testimony does not attempt to state that the speed was uniform. His facts, if correct, indicate simply the average speed, or the time occupied by the automobile in covering the distance of approximately a half mile. In view of this fact, we must remember that a driver is quite able to control and change the speed of an automobile at different points in the distance he may be traveling. Therefore, the facts testified to by this witness would afford little or no basis for determining the speed of this car at the time immediately prior to the collision or at the time of impact. *People v. Barnes*, 182 Mich. 179.

But, at least, it must be conceded that there is no evidence of criminal negligence or of any improper operation of the car until it arrived at the approach of the bridge where the accident occurred. As to what occurred thereafter, a careful consideration of the record, in the light of the presumptions to which the defendant is entitled, compels the conclusion which may be thus summarized: That due to the sudden development of the defects of the accelerator of the strange automobile which first became apparent at a point not exceeding 50 feet from the team approaching on the highway from the north, while the accused was proceeding therein at a lawful speed, in a proper manner, on and over a portion of the public road over which he was lawfully entitled to travel and occupy for such purpose, the speed of the car was momentarily out of control, or not controlled by the defendant; that at this instant the stallion driven by deceased, due to fright and to habit, which must have been known to deceased, also

became out of control, or, at least, was not controlled by the latter; that the lack of exercised control of the automobile's speed on part of the accused, and the lack of exercised control over the stallion's bolting on part of deceased, jointly and equally constitute the proximate cause of the unfortunate results which followed. The record furnishes no proof that, in the absence of either factor last mentioned, the accident would have occurred.

If, therefore, criminality exists in this case, it must be wholly due to a lack of success on part of the accused in his efforts to regain and to exercise proper control of the defective automobile between the time of the discovery of the approaching team and the impact of the collision that followed. If we take as the basis of our investigation 44 feet a second as the speed rate of 30 miles an hour, and 30 feet a second as the speed rate of 20 miles an hour, the true narrative of the facts in this record must be told in a story of "split seconds." To summarize: From the concurrent discovery of the approach of the four-horse team, and the development of the defect in the accelerator, with the thereafter sudden, constant, and progressive increase of velocity of the automobile to instant of impact, probably less than a second intervened—not time for more than a single heart-throb; from discovery of fright among horses, less than a half second; from the surge of the white stallion in front of the oncoming automobile to instant of impact would be measured by fifths of a second.

Based upon these facts, the defendant was convicted, not for what he did, but rather for what he failed to do—release the clutch, cut off the spark, apply the brakes, stop the automobile, and thus prevent an impending collision between, for the instant at least, a bolting unmanageable horse, and a bolting, uncontrollable car.

Under the peculiar facts of this record, this horse and this car present many characteristics in common.

As to the horse, it seems this court is committed to the rule that the driver of a horse which suddenly becomes unmanageable, bolts, and escapes from control is not, be-

cause of these facts, alone, civilly or criminally liable for the results which follow, or the damages which ensue. *Brooks v. Kauffman*, 93 Neb. 682. Such, indeed, is the modern form of the general rule: *Rowe v. Such*, 134 Cal. 573; *Creamer v. McIlvain*, 89 Md. 343, 6 Am. Neg. Rep. 547, 45 L. R. A. 531, 73 Am. St. Rep. 186; *McGahie v. McClennen*, 86 App. Div. (N. Y.) 263; *Gray v. Tompkins*, 15 N. Y. Supp. 953; *Coller v. Knox*, 222 Pa. St. 362, 23 L. R. A. n. s. 171; *O'Brien v. Miller*, 60 Conn. 214, 25 Am. St. Rep. 320; *Button v. Frink*, 51 Conn. 342, 50 Am. Rep. 24; *Cunningham v. Belknap & Co.*, 22 Ky. Law Rep. 1580; *Blue Grass Traction Co. v. Ingles*, 140 Ky. 488.

In *Olney v. Omaha & C. B. Street R. Co.*, 78 Neb. 767, a somewhat different phase of the question before us was then before this tribunal, and was determined in a manner not adverse to plaintiff in error herein.

Brooks v. Kauffman, supra, was a civil action to recover damages occasioned by a runaway team colliding with a vehicle preceding it. It was contended that "if the defendant had been driving carefully he might have driven his team into an irrigation ditch," and thus avoided the collision. This court answered the contention by saying that, under the circumstances of that case, there could have been no time immediately preceding the accident for the defendant to balance probabilities in his mind, and to determine his course, and that actionable negligence was, therefore, not evidenced by his failure to do "what he might have done." The time available to the defendant in that case to balance probabilities was, at least, a hundred per cent. greater than in this.

It would seem, therefore, that the operator of an automobile which, solely because of mechanical defects, theretofore unknown, becomes suddenly out of control is plainly within the reason of the rule which is applied in this state to uncontrollable teams.

It follows that the law under which this complaint is filed does not require a finding for the state, if the defendant could have stopped the car, without limiting his efforts

in stopping to the duty of reasonable care, in view of all the circumstances which surrounded and made up the transaction, and particularly in view of the limitations as to time; and that the accused is not liable, under the terms of the statute, for what he could not reasonably prevent or avoid.

We have not forgotten the fact that the physical evidences of the wreck, under some circumstances, might afford ample evidence for the conviction. However, in view of the surrounding facts and circumstances in this case, nothing in the way of proof appears from it to establish the guilt of the defendant before us.

We conclude, therefore, that the evidence adduced in this case is insufficient to sustain the conviction, and the judgment and sentence of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

N. M. SOMMERVILLE, APPELLANT, V. BOARD OF COUNTY COMMISSIONERS OF DOUGLAS COUNTY ET AL., APPELLEES.*

FILED DECEMBER 9, 1927. No. 25643.

1. **Constitutional Law.** A party invoking the provisions of a statute is not in a position to raise the question of its constitutionality.
2. **Taxation: APPEAL.** Taxpayers' appeals from rulings of board of equalization must be preceded by ten days' notice of appeal as provided by section 866, Comp. St. 1922.

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

Brown & Dibble, for appellant.

W. W. Slabaugh, Henry J. Beal, James E. Adams, Gaines, Van Orsdel & Gaines and *Blackburn & King, contra.*

Edwin F. Myers, amicus curiæ.

---

* Note—Rehearing denied. See opinion, 117 Neb. ——.

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON and EBERLY, JJ., and RAIT, District Judges.

RAIT, District Judge.

The appellant, as a taxpayer, made complaint to the board of equalization of Douglas county respecting the assessment of appellee life insurance companies. His complaint was dismissed, and he attempted an appeal to the district court, where demurrers to his petition were sustained, and, following these rulings, the matter is brought to this court.

Appellant's complaint is as follows:

"The Honorable Board of Equalization of Douglas county, Nebraska.

"Omaha, Nebraska, June 9, 1925.

"Sirs:— The undersigned, a citizen-taxpayer of Nebraska, hereby respectfully informs your honorable body, that the following named domestic corporations, located in Omaha, Douglas county, Nebraska, to wit, the Bankers Reserve Life, Equity Life, North American Nat'l Life, Northwestern Life, Omaha Life Ins. Co., and Prairie Life, did not list (with the assessor) for assessment (at actual value) and taxation (at 25 per cent. the tangible rate) their capital stock (corporation shares) as required by sections 5808, 5810, 5811, 5813, 5818, 5820, and 5884, Comp. St. 1922, for the years 1922, 1923, and 1924, as per section 5888, Comp. St. 1922. Therefore your informant prays that you proceed against said negligent domestic corporations according to provisions made and provided in sections 5888, 5915, 5937, 5938, 5942, 5944, 5963, 5972 (fifth) 5973, and 5974, for the aforementioned years— 1922, 1923, and 1924.

"Also, further, inasmuch as the 1925 legislature did not repeal any sections of the intangible law, only amending so as to change the rate from 25 per cent. of the tangible rate to a flat 5, or 2½ mill levy on each dollar of actual valuation (½ or ¼ of 1 per cent.) your informant prays, that for the year 1925 the capital stock (personal intangible property) of the aforenamed domestic corporations be

assessed and taxed as 'directed by law' (sections 5820, 5884, and 5890, Comp. St. 1922) and provided in the Constitution (art. VIII, secs. 1, 2, and 4).

"For this, your informant—petitioner, the undersigned, does and ever will pray.

"N. M. Sommerville,
"Lincoln, Nebraska."

In plaintiff's brief it is said:

"In deciding the constitutional question here raised, this court must determine whether the tax provided by section 5896 is a *property tax* or a tax upon *insurance interests or business.* If a property tax, then said section is clearly in violation of the uniformity clause of the Constitution above quoted. The authorities above cited so hold, and a different rule cannot be established without overruling said cases. If a tax on insurance interests or business, then the intangible property of the defendant insurance companies is by said section released from the burden of taxation, in violation of the Constitution.

"Under either view of the case, the section in question is unconstitutional, and the court erred in sustaining the demurrers and in not requiring the defendant companies to list their intangible property and capital stock for taxation for the years complained of.

"In conclusion, said section is unconstitutional because: (a) It exempts domestic life insurance companies from payment of taxes upon intangible property. (b) It is unconstitutional and void for want of uniformity. (c) It exempts domestic life insurance companies from the payment of taxes upon intangible property for the support of county and city municipalities and for the support of the public schools."

In this situation the court is asked to declare unconstitutional section 5896, Comp. St. 1922, so as to compel compliance with section 5884. Section 5896 provides that domestic life insurance companies shall pay 4 mills upon the gross premiums collected in this state, "in lieu of all other taxes upon intangible property," to be paid to the state;

and section 5884, provides that intangible property shall be assessed at 25 per cent. of the mill rate levied upon tangible property, to be paid to the county where the owner resides, and to be "in lieu of all other taxes upon such intangible property."

Section 1, art. VIII of the Constitution, provides:

"The necessary revenue of the state and its governmental subdivisions shall be raised by taxation in such manner as the legislature may direct; but taxes shall be levied by valuation uniformly and proportionately upon all tangible property and franchises, and taxes uniform as to class may be levied by valuation upon all other property."

It will be noted from the above that the legislature is empowered to tax tangible property by valuation, uniformly and proportionately, and to tax intangible property by valuation, uniformly, and without proportionate rates. This has been attempted by the legislature in sections 5896 and 5884. These sections, with others, while dealing with different classes, are comprised in the same subject-matter, the intangible tax law, as authorized by the Constitution. The requirement as to uniformity and valuation as provided in the Constitution runs through the entire intangible tax law, and the identical objections raised by the plaintiff against the constitutionality of section 5896 may be urged with as much force against section 5884.

The court is, then, asked to declare unconstitutional section 5896, so that section 5884 may be enforced. In these circumstances the relief asked for by this appellant may not be granted, as the relief and the burden are alike subject to the same objections. He asks the enforcement of the intangible tax laws and at the same time complains of them. In Black, Interpretation of Laws, sec. 99, it is said:

"In the construction of a statute, in order to determine the true intention of the legislature, the particular clauses and phrases should not be studied as detached and isolated expressions, but the whole and every part of the statute must be considered in fixing the meaning of any of its parts. * * *

"There are two principal reasons for this rule. In the first place, the force and significance of particular expressions will largely depend upon the connection in which they are found and their relation to the general subject-matter of the law. The legislature must be understood to have expressed its whole mind on the special object to which the legislative act is directed; but the vehicle for the expression of that meaning is the statute, considered as one entire and continuous act, and not as an agglomeration of unrelated clauses. Each clause or provision will be illuminated by those which are cognate to it and by the general tenor of the whole statute, and thus obscurities and ambiguities may often be cleared up by the most direct and natural means. In the second place, effect must be given, if it is possible, to every word and clause of the statute, so that nothing shall be left devoid of meaning or destitute of force. * * * To this end, each provision of the statute should be read in the light of the whole. For the general meaning of the legislature, as gathered from the entire act, may often prevail over that construction which would appear to be the most natural and obvious on the face of a particular clause. It is by this means that contradictions and repugnancies between different parts of the statute may be avoided. The rule stated is therefore one of primary importance, and it is well established upon the authorities."

The intangible property tax law, although containing several sections, is nevertheless a legislative unit which must conform to the Constitution and contain the elements of valuation and uniformity and be free from the element of exemption.

The section sought to be enforced requires the same consideration as the section sought to be stricken. Objections to one section may equally be applicable to the other. If the vulnerability of one is established, the other may also be afflicted, so that if the law is to be questioned it should be done by a party who at the same time does not invoke it.

"A party invoking the provisions of a statute is not in

a position to raise the question of its constitutionality." *LaBorde v. Farmers State Bank, ante,* p. 33.

Attention is called to the fact that plaintiff did not give notice of appeal within ten days as provided by section 866, Comp. St. 1922. This is a jurisdictional requirement, and a failure to comply with the statute defeats the appeal. Taxpayers' appeals are usually impressed with a public interest, and earlier notice of an intent to contest the decisions of the boards of equalization in these cases is required, presumably for the purpose of affording the boards an opportunity to rectify their action. The right to appeal is a statutory one, and the record must conform to the statute where the requirements are mandatory.

AFFIRMED.

HENRY MYERS V. STATE OF NEBRASKA.

FILED DECEMBER 9, 1927. NO. 25816.

1. **Evidence** examined, and *held* to sustain the verdict.
2. **Information: INTOXICATING LIQUORS.** An information which charges merely an unlawful and felonious sale of intoxicating liquor, as a second offense, is referable to section 3238, Comp. St. 1922.
3. **Intoxicating Liquors: BOOTLEGGING.** In order to charge the crime of bootlegging under section 3239, Comp. St. 1922, as amended by chapter 106, Laws 1925, it is necessary to allege in the information, in addition to the sale of liquor, some element of that crime, such as carrying or transporting the liquor, etc.
4. **Information.** Merely charging as "felonious" an act denounced by the statute as a misdemeanor will not supply the place of an allegation of an essential element of a crime denounced as a felony, and thus convert the information into a charge of the graver offense.
5. **Criminal Law: REMAND FOR SENTENCE.** Where the only error in the record is the imposition of the wrong penalty, the judgment will be reversed and the cause remanded, with instructions to sentence defendant according to law.

ERROR to the district court for Hall county: EDWIN P. CLEMENTS, JUDGE. *Reversed, with directions.*

Edward F. Hannon, for plaintiff in error.

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

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

REDICK, District Judge.

Plaintiff in error was charged in three counts with unlawfully and feloniously selling, unlawfully transporting, and unlawfully having in possession intoxicating liquors. The second count was dismissed, and he was convicted on the first and third. The sale was charged as a second offense. He was sentenced under chapter 106, Laws, 1925, to pay a fine of $500 and be confined in the state penitentiary for not less than six months nor more than two years. He brings these proceedings, assigning error as follows: (1) Overruling his motion for a directed verdict; (2) verdict is not supported by the evidence; (3) in giving instruction No. 12; (4) in passing sentence upon the defendant.

1. The first and second assignments may be considered together. There was positive evidence that defendant actively assisted one Krull, who pleaded guilty, in producing and delivering the liquor to the purchaser, and while he denied all participation in the transaction it was a question for the jury. As to third count, it is argued defendant was merely the agent of the other party connected with the sale, and, having no title to the liquor, did not have possession, but merely the custody thereof. The evidence of the state, however, was to the effect that defendant participated in the profits of the transaction, part of the identical currency paid for the liquor being found upon his person. He attempts to explain this by saying he received it from the other party, Krull, in part payment of a debt. Whether defendant had such ownership in the liquor as to charge him as having the possession thereof within the meaning of the statute was also for the jury. Upon a careful examination of the record, we are convinced that the jury were justified in their finding that

defendant unlawfully sold and had in his possession the liquor in question.

2. The instruction complained of was given upon the return of the jury into court after deliberating five hours, and is as follows:

"You have requested that I give you a further instruction on the law of this case, indicating that you are uncertain whether or not one party who it is claimed was concerned in the sale of the liquor was or was not the agent of the other.

"You are instructed that, where two persons engage in a common enterprise to do an unlawful act, each taking part therein and each receiving a part of the profits derived from such unlawful act. both of such persons are principals and one is equally guilty with the other."

The criticism of this instruction is that it assumes that defendant was engaged in a common enterprise with Krull and received a part of the profit derived from the sale of the liquor. It is not claimed that the instruction is not correct as an abstract proposition of law, and had the language been "*If* two persons are," instead of "*where* two persons are," the instruction would have been beyond chance of criticism. However, we do not think the same will bear the construction contended for. It purports on its face to be an abstract statement, and the word "where" is broadly used in the sense of "in the case or in the instance in which," as it may be according to Webster. In several of the prior instructions the jury had been told that the facts of sale or possession must be proved by the state beyond a reasonable doubt, and we are of opinion that the jury could not have been misled by the language criticised.

3. Defendant was sentenced under section 3239, Comp. St. 1922, as amended by chapter 106, Laws 1925. The original section reads as follows:

"It shall be unlawful for any person to, in any manner, knowingly carry, transport or deliver any intoxicating liquor to or for any person to be kept, stored, sold, fur-

nished, given, traded or otherwise disposed of in violation of law."

As amended: "Any person, who shall by himself, or through his agent, carry or transport, for the purpose of sale, sell, or give away, trade, deliver or otherwise dispose of, any intoxicating liquor," etc. And provided a penalty for the second and each subsequent offense a fine of not less than $500 nor more than $5,000 and imprisonment in the penitentiary not less than six months nor more than two years, and declared the second offense to be a felony.

By section 3238, Comp. St. 1922, the sale of intoxicating liquor was declared a misdemeanor, and, by section 3288, the penalty for a second offense was imprisonment in the county jail not less than 60 days nor more than 90 days, and the third offense was declared a felony and punishable as such.

The question for determination is whether the complaint in this case charges an offense under section 3238 or section 3239, Comp. St. 1922, as amended. The latter is known as the section providing penalties for "bootlegging," and in *Knothe v. State*, 115 Neb. 119, we held that an information under this section was required to charge, in addition to the sale, some element of the crime of bootlegging, such as carrying or transporting liquor. As noted above, the first count in this case merely charged that the defendant did "unlawfully and feloniously sell intoxicating liquor;" but it is the contention of the state that the use of the word "feloniously," in charging a second offense, clearly tied the information to section 3239, as a second offense under section 3238 was only a misdemeanor, and that by the use of that term any other element of the crime of bootlegging was sufficiently charged. We cannot agree to this proposition. We think the term "feloniously" cannot be made use of to supply a constituent element of the crime charged; it is merely descriptive or a characterization of the criminal act which must be set forth in the information substantially as denounced by the statute. That

the information must allege directly, and not by inference, each material element of the crime is so well understood that no citation of authorities is needed. One of these elements of the crime of bootlegging is carrying or transporting the liquor, which is not alleged and cannot be inferred from the term "felonious." Moreover, in *Drawbridge v. State,* 115 Neb. 535, we held that an information charging that the defendant "wilfully, knowingly, unlawfully and *feloniously* did sell intoxicating liquor to one Jack Moyer" charges an offense under section 3238, and that it was error to apply thereto the provisions of chapter 106, Laws 1925.

We therefore conclude that the record is without error, except as to the penalty imposed; and the judgment of the district court is reversed and the cause remanded, with directions to impose a sentence as provided by section 3288, Comp. St. 1922.

REVERSED.

NEBRASKA WESLEYAN UNIVERSITY, APPELLANT, V. WILLIAM THOMPSON ET AL., APPELLEES.

FILED DECEMBER 9, 1927. No. 24976.

Mortgages: ESTOPPEL. Evidence examined, and *held*: (1) That the evidence is insufficient to sustain the decree of the district court; (2) that defendants are estopped from claiming a forgiveness of the debt.

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

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

Clark Jeary, contra.

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

REDICK, District Judge.

This case was heard before the commission, and reargument ordered before the court.

Action to foreclose a mortgage on real estate. March 4, 1919, William Thompson and Mary I. Thompson, husband and wife, executed and delivered the note and mortgage in question to Martin Burns to secure remainder of purchase money of lot described therein. March 1, 1922, when it became due, an extension agreement with interest coupons attached, for three years, was duly executed, interest payable March 1 and September 1, each year. Martin Burns died testate July 5, 1922, and willed 7-20 of his estate to plaintiff. Pursuant to order of county court, June 19, 1923, the mortgage and June 27, 1923, the extension agreement were assigned to plaintiff, which took them at their face value as part of the residuary estate under the will. When suit was commenced the original note and mortgage were lost and suit brought accordingly. Upon the trial the mortgage, abstract and insurance policy were produced by defendants. The note is still lost. Defendants admit the execution of the mortgage, note and extension, but allege that immediately after the execution of the extension agreement the mortgagee, Martin Burns, orally forgave the debt and delivered the note and mortgage to defendants, reserving only the interest thereon during his life, which presents the only contested question. Plaintiff replied denying the gift and setting up an estoppel *in pais*. Decree for defendants establishing the gift, quieting their title as against the mortgage, and plaintiff appeals.

Grounds urged for reversal are: (1) Error in permitting Mary I. Thompson to testify concerning a conversation and transaction with Martin Burns, since deceased; (2) error in holding defendants not estopped; (3) evidence insufficient to support decree.

We need not discuss the first assignment in view of our conclusion upon the other two.

The burden is upon defendants to prove the fact of the gift; and in this class of cases the evidence must be clear and convincing, especially, as appears, when such claim is not made until after death of the donor and after suit brought. 28 C. J. 676, sec. 82, 680, sec. 85.

William Thompson being clearly incompetent under section 8836, Comp. St. 1922, to testify as to the transaction with Martin Burns, since deceased, the only witness as to the gift was Mary. Her evidence in substance is that after the execution of the extension agreement, and as she and her husband were about to depart, Burns called them back, and as she was sitting in a chair at the foot and her husband on the side of the bed in which Burns was sitting up (being bedridden), no one else being present, Burns said, "I have no children and no relatives, and I want to do something for you," and handed him the papers. He said, "I am giving those to you, and I want the interest as long as I live, and when I am through the principal is yours. * * * Don't show them to any one or give them to no one."

The circumstances relied upon as sustaining the gift are: The possession by defendant Thompson of the mortgage, abstract and insurance policy (the note was not produced nor its absence accounted for, though the answer alleged its delivery with the other papers and possession in defendants); the failure to show any opportunity for defendants to obtain possession of the documents except as claimed; the close friendship between donor and defendants and sympathy of donor for William Thompson, who was nearly blind and had been so for some years; the nonexistence of close relatives of the donor, who might naturally be recipients of his bounty.

As affording contrary inferences, the following facts appear: The business of the Thompson family was conducted by Mary and two sons, George and Verne, on account of William's failing sight, and their conduct with relation to the transaction is binding upon William; the interest falling due September 1, 1922, two months after Burn's death, was paid by George with a check signed by and from the bank account of Mary; George says he paid by his own check on his account at the University Place Bank; the bank records show no such check, but do show one signed Mrs. William Thompson and charged to her

account for $63, the amount of the interest coupon upon the date of the payment; interest due March 1, 1923, was paid by Verne, who says he was reimbursed by his father and mother; the family bank account was kept in the name of Mary. Witness Ripley, representative of Lincoln Trust Company, executor of the will, prior to the transfer to plaintiff, had several conversations with Verne (being referred to him by both William and Mary as attending to the business), looking toward the execution of a new note and mortgage in lieu of that which was lost, and not one of them suggested that there was any defense to the debt, nor that William had possession of the mortgage. April 3, 1923, the trust company wrote William inclosing new note and mortgage for signature, and April 16 inclosed canceled coupon due March 1, paid the 8th, and inquiring about new note, and May 5 asking about new note, saying the extension agreement alone could not be handled. No response was made to these letters.

Speaking of a conversation with Ripley, Mary testified: "I was over at my son's when he came. It was when he had the coupon, after he sent several letters and wanted us to make a new mortgage and brought the coupon, and he said, 'I am going to hand this to Wesleyan,' and I said, 'Well, we have always paid our debts, and if you hold that we will pay it—if we owe it we will pay it,' and that was all I said."

George W. Isham, treasurer of the endowment fund of plaintiff, testified that when he demanded payment of interest due September 1, 1923, Verne Thompson said they did not have the money, but would pay it when they sold some crops near McCook. Verne admitted seeing Isham, and at first denied telling him anything except passing the time of day, but finally said he did not remember—said he first learned of the gift in March, 1923—made no mention of it to Isham.

G. A. Knight, a disinterested witness, who drew the extension agreement testified that at that time none of the papers connected with this claim could be found in the tin

box where Burns kept his papers, nor elsewhere, though search was made, and that he had to call the register of deeds' office to get the date and place of record of the mortgage; while Mary testified that the papers were there all the time. Mary testified that she did not know the interest had been paid September, 1922, though it had been paid by a check signed by her on her account; denied ever drawing such a check or having destroyed it, because she did not have any to destroy; denied all knowledge of the payment in March, 1923. Her answers to questions on cross-examination were for the most part evasive and contradictory. The only excuse offered for failure to divulge the fact of the gift was that Burns told them not to; but, surely, after Burns' death the reason, if any, for caution had disappeared. The possession by defendants of the mortgage, abstract and insurance policy is unexplained, except by the testimony of Mary, and that of William, who says he got it when extension agreement was signed. The note was not given them, and they both say they never saw an $1,800 note. Knight says the note and mortgage were not there and he had to telephone to the register of deeds, as above stated. William says Knight asked for and got all the papers and left them on the table close by the bed. This was stricken out by the court.

While the fact of possession is important, we do not think it a circumstance entitled to much weight in view of the evasive character of the testimony of defendants. Furthermore, the note itself, to which the mortgage was a mere incident, was not delivered to defendants, so that the weight of any presumption arising from mere possession is very much weakened, if not quite demolished. An interesting discussion of the presumption of ownership arising from mere possession, in a very similar case, is found in *Atchley v. Rimmer*, 148 Tenn. 303. As to the close friendship between Burns and William, the only evidence is from the latter, who said they were intimate friends, but no facts are presented tending to support this conclusion. We think the evidence lacks that clear and convinc-

ing quality necessary to establish a forgiveness of the debt. The silence of defendants and their agents upon that subject, when, if their claim was true, it would be the most natural thing for them to speak, continued until after suit brought; the payment of two interest coupons, six months apart, after the death of Burns, without protest as to their liability; the fact that Mary contradicts the bank records on a most material point, and her evidence is evasive and contradictory in itself and at variance with the testimony of every witness for plaintiff, whether interested or not, all lead us to the conclusion that there was no forgiveness of the debt as claimed.

It further appears from the evidence that, in order to close the estate, the executor persuaded plaintiff to accept the extension agreement as cash, telling Isham of the several conversations with defendants and their family in which no denial of the debt was made, and that plaintiff accepted the instrument relying upon the information so obtained as part of its legacy under the will. The estate has been closed and distribution made to the other legatees. We think a clear case of estoppel is made out. Defendants cite *Onn Lumber & Shingle Co. v. Powell Lumber Co.*, 94 Neb. 267, to the effect that it must appear that the declarations or acts on which the estoppel is based were made with the express intention to deceive, or with such carelessness as to amount to a constructive fraud. The evidence fully complies with at least the last condition. Defendants were informed that the agreement was to be turned over to plaintiff, and must have known that the latter would be deceived unless informed of defendants' claim, and must have contemplated that their acts would be communicated to any one dealing with the paper. The fact that plaintiff might recoup its loss from the other legatees in case the gift is established cannot be considered upon that question, nor prevent the operation of the estoppel.

The decree of the district court is not sustained by sufficient evidence, and defendants are estopped from claiming

a forgiveness of the debt. The decree is therefore reversed and the cause remanded, with directions to enter a decree of foreclosure as prayed.

REVERSED.

GEORGE R. JOHNSON, APPELLEE, V. SOLOMON SAMUELSON ET AL., APPELLANTS.

FILED DECEMBER 9, 1927. No. 24771.

1. **Appeal:** HARMLESS ERROR. Where an instruction, though erroneous, is not prejudicially so and cannot by any course of logical reasoning be deemed to have resulted in disadvantage to the complaining party, it should not be allowed to work a reversal.
2. **Evidence** examined, and *held* that testimony of plaintiff as to anticipated marriage, etc., was properly received.
3. **Appeal:** CONFLICT OF EVIDENCE. A verdict upon conflicting evidence will not be set aside by this court, where it appears that the evidence of the prevailing party was sufficient to support such verdict.

APPEAL from the district court for Madison county: ANSON A. WELCH, JUDGE. *Affirmed.*

A. M. Morrissey, C. C. Flansburg, H. Halderson and *William L. Dowling,* for appellants.

William McDonnell, North, Pollock & Wade and *Sullivan, Wright & Thummel, contra.*

Heard before ROSE, DAY, GOOD and THOMPSON, JJ., RAIT and SHEPHERD, District Judges.

SHEPHERD, District Judge.

The first trial of this case resulted in a verdict of $13,098 in favor of Johnson, plaintiff, and against Samuelson and Olson, defendants; and the second resulted in a verdict for $11,033. The first was set aside by the trial court because of surprise. The second, duly rendered upon retrial, was followed by the judgment from which the defendants Samuelson and Olson appeal to this court.

Following an order of affirmance without opinion, a rehearing was granted upon application duly made and the case was reargued. The case is a damage case in which Johnson sued Samuelson and Olson for alleged false representations by which he was induced to buy their clothing stock and business in Newman Grove.

An erroneous instruction as to the measure of damages was given by the trial court; the true rule being that damages in cases of fraudulent representation are to be measured by the difference between the value and the represented value, and the court incorrectly instructing that the measure was the difference between the price paid and the actual value of the goods.

The error was not, however, prejudicial to the defendants, and therefore cannot be suffered to work a reversal. This was made plain in appellee's original brief, and was so amplified by brief and argument upon rehearing that no doubt whatever as to the proposition remains in the mind of the court. Where the instruction, though erroneous, is not prejudicially so and cannot by any course of logical reasoning be deemed to have resulted in disadvantage to the complaining party, it should not be allowed to work a reversal. *Rocha v. Payne*, 108 Neb. 246; *McCarthy v. Village of Ravenna*, 99 Neb. 674; *Fitzgerald v. Meyer*, 37 Neb. 50; *City of South Omaha v. Fennell*, 4 Neb. (Unof.) 427.

Moreover, the figures submitted by the appellee in his brief on reargument have not been well answered by the appellants, and are sufficient to convince the court that the error of the trial judge was actually in their favor. An instruction in a party's favor can be no basis for reversing a judgment against him. *Chicago, K. & N. R. Co. v. Wiebe*, 25 Neb. 542; *Stough v. Stefani*, 19 Neb. 468; *Butler v. Greene*, 49 Neb. 280; *Darr v. Donovan*, 73 Neb. 424.

Complaint is made because the court permitted testimony on the part of the plaintiff to the effect that he was led into the purchase of defendants' business by a tentative arrangement whereby plaintiff was to become Samuelson's son-in-law. Though the story of this had been

stricken from the pleadings, it was permitted to be detailed upon the stand. It was not error, for as tending to show reliance upon the representations of the defendants it was perfectly competent. Expecting to become his son-in-law, the somewhat green youngster in business would ordinarily rely the more readily and the more completely upon Samuelson's representations. Considered from this point of view, the testimony was permissible, though the order striking the story from the petition was right as not permitting the pleading of evidence.

Appellants contend that Johnson, who seems to have been about the poorest of witnesses, but who was nevertheless his own witness as to value, and the only one produced by him, was at the time incompetent to testify on that head. They insist that he plainly disqualified himself, though the owner of the stock, by saying, in answer to an interjection by the court, that he guessed he did not know, and by his answers in other instances. If these were the only showings of the record, it would have been the duty of the court to direct against him, for undoubtedly the rule that he who owns may testify as to value does not apply when it is shown beyond question that he is actually disqualified. It appears, however, that though Johnson had little or no knowledge at the time he purchased he remained steadily in the store for more than a year, keeping up the stock and incidentally learning what it contained and what the present and past value of the merchandise was. It seems clear to the court from the examination of his testimony that, while he was very ignorant at the time of his purchase, he became qualified as to values in the succeeding two years. There was enough evidence on his part (it is cited in the briefs of the appellees, but is so lengthy that it cannot be here reproduced) to justify the court in permitting the case to go to the jury. This being so, to have set aside the verdict would have been to substitute the court's judgment for the judgment of the jury on a question of fact. When it is determined that plaintiff's said testimony was sufficient to raise the question of fact, the

case is not different from the hundreds of others in which the court has declared that, where the evidence of a party tends to prove his cause of action, the fact that it is scanty, or such as would not under all of the circumstances have been convincing to the court, is no reason for setting aside the verdict of the jury. A verdict upon conflicting evidence will not be set aside by the supreme court, where it appears that the evidence of the prevailing party was sufficient to sustain it.

The trial court was not willing to grant a new trial upon the ground of misconduct of the parties and the attorneys. The attorneys and the parties, as well as the witnesses, were under the eye of the judge who conducted the proceedings in the district court, and upon a full examination of the record this court cannot say that he was in error in refusing to grant a new trial upon the ground mentioned.

The verdict of the jury was upon sufficient evidence and we think that the record is free from reversible error. The judgment of the district court is therefore.

AFFIRMED.

IDLEWILD FARM COMPANY, APPELLANT, V. ELKHORN RIVER DRAINAGE DISTRICT, APPELLEE.

FILED DECEMBER 9, 1927. No. 26069.

1. Drains: DIVERSION OF WATERS: DUTY OF ADJOINING LANDOWNERS. Supposing that the diversion of a river to a new channel has been effected by construction which is both authorized and nonnegligent, under all the facts in this case, the duty to maintain the river in its new course devolves, not upon the drainage district which did the work, but upon the owner of the adjoining lands, unless the plans and specifications of the project specifically provide for such maintenance by the said district.

2. ———: ———: ———. Though the construction may have been negligent, the adjoining landowner who has estopped himself by direction and participation in connection therewith must

be bound in the matter of maintenance as if the said construction were nonnegligent.

3. ———: DENIAL OF DAMAGES. *Held*, in this case, that the appellant may recover neither for construction nor maintenance in connection with the cut-off in question; and that the case was properly dismissed by the district court.

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

Abbott & Dunlap, for appellant.

Courtright, Sidner, Lee & Gunderson and *J. C. Cook*, *contra.*

Heard before GOSS, C. J., ROSE, GOOD, THOMPSON and EBERLY, JJ., RAIT and SHEPHERD, District Judges.

SHEPHERD, District Judge.

The first judgment of the district court awarding damages in a large sum for the negligent construction and maintenance of a cut-off on the Elkhorn river—called cut-off E—was reversed and remanded; it being held by this court that the plaintiff could not recover for construction because the same was according to its demand and direction. Upon the coming down of the mandate, plaintiff filed a second amended petition demanding damages for negligent maintenance only.

This petition was in due course attacked by motion, amended upon application of the plaintiff, and assailed by a motion to dismiss in the nature of a demurrer. Upon submission of the latter, the court first entered an order reciting that said demurrer ought to be and would be sustained at the end of ten days unless application were in the meantime made to the supreme court for an amplification of its ruling upon reversal. And afterward, upon the expiration of the said ten days, the trial court dismissed the case on the ground that the petition failed to state a cause of action, and because the plaintiff, by not applying to again amend, had refused to plead further and had elected to stand upon the said petition.

Whether the petition, now declaring for negligent maintenance alone, states a cause of action depends in some degree upon whether the law and facts of the case put maintenance in the same catagory with construction. The general application of plaintiff's cases is not to be doubted. A demurrer admits the existence of all facts well pleaded; ordinarily recovery may be had whenever negligent construction and maintenance result in damage; a case reversed and remanded may commonly be prosecuted on the cause of action remaining if the same be separable from what has been taken away by the court of review. But the question before us is: If the rule announced by this court removed negligent construction as a ground of recovery, did it not perforce do likewise for negligent maintenance, bearing in mind the findings of the supreme court and the facts set forth in the petition?

The findings in the case are epitomized in two early paragraphs of the first opinion (114 Neb. 134), viz.: "The substance of plaintiff's contention is that the proximate cause of the alleged damage to its lands, by erosion, flooding and the like, was defendant's negligent installation of the drainage and construction works complained of," and that such installation was negligently performed.

"The record is very voluminous and it is impractical to reproduce much of the evidence. It fairly appears, however, from the evidence of many practically uncontradicted witnesses that Schneider not only favored the installation of all of the materially important construction works, of which the Idlewild now complains, but in fact it appears therefrom that the work was done at and because of Schneider's apparently urgent request and as and where he wished to have it installed. It appears, too, that plaintiff, aside from the defendant district, by Schneider, its president, alone made substantial contributions to the expense of such change of installation."

Schneider was president of the appealing Idlewild corporation.

From these findings of fact the court held that the Idle-

wild company was estopped to recover damages for said construction. The holding does not in the least go contra to the doctrine of *Hopper v. Elkhorn Valley Drainage District*, 108 Neb. 550, to the effect that recovery may be had by the party injured through the negligent construction and maintenance of a ditch or cut-off; it proceeds wholly upon the doctrine of estoppel.

It is practically certain that the injury and damage in this case arose from negligent construction. The amended petition upon which the case was originally tried set forth that the cut-off was constructed at right angles to the course of the river, and that the result of such construction was to throw the current against the defendant's land in such wise as to inevitably erode it. It was not a matter of negligent maintenance; the damage inhered in the construction. And, for that matter, the plea of the said petition was that the drainage district abandoned the work immediately upon its completion. It would seem therefore that the company's case fails *in toto* when it fails upon the ground of negligent construction. The estoppel carries through. The proximate cause of the damage was defendant's installation of the construction works complained of. We think that our former decision concludes the appellant in the matter of his present contention.

But, without regard to this, the trial court's ruling must still be sustained. If the company could recover at all on the ground of negligent maintenance, it would be because the drainage district was under a duty to maintain and yet did nothing whatever after the construction was complete. It is committed to this contention by its pleading that upon the completion of the work the district abandoned it and left it to the river and to the adjoining landowner. The second amended petition, subsequently further amended by interlineation, does not allege any active maintenance on the part of the district. It could not be further amended by setting forth any promise on the part of the district in regard to maintenance, for this would be in contract instead of in tort, and opposed to the com-

pany's former pleading. But the specifications did not provide for maintenance in this case and the district was under no duty to maintain. The general rule, as we deduce it from the authorities and from our statutes, is that where the law authorizes the diversion of a river, and where such diversion has been effected by a construction which is nonnegligent, the duty devolves upon the owner of the abutting lands to maintain the river in its new course, and not upon the drainage district which did the work, unless the plans and specifications of the project specifically provide for such maintenance by said district. *Hofeldt v. Elkhorn Valley Drainage District*, 115 Neb. 539; Comp. St. 1922, sec. 1741; *Flesner v. Steinbruck*, 89 Neb. 129; *Aldritt v. Fleischauer*, 74 Neb. 66; *Arthur v. Glover*, 82 Neb. 528; *Steiner v. Steiner*, 97 Neb. 449; *Idlewild Farm Co. v. Elkhorn River Drainage District*, 114 Neb. 134.

The contention of the Idlewild company is that the drainage district was negligent in not removing stumps, trees and debris which had accumulated in the cut-off at the point of diversion. But since the company estopped itself to complain of negligent construction it cannot escape being bound by the rule which obtains in the case of good and nonnegligent construction. The duty to maintain devolved upon the company itself. The statute above referred to so indicates and the better reasoning supports the view. Any other doctrine would make the drainage district an insurer of the course of the stream.

Besides assigning the sustaining of the demurrer as error, appellant complains because the court refused to give it time and opportunity to further amend. The chronology of the case hardly supports any such contention. But it is obvious, as above shown, that no amending that would have been proper could have changed the situation.

Our examination of the record satisfies us that the trial court was not in error, and that its judgment sustaining the demurrer and dismissing the case should be affirmed.

AFFIRMED.

L. A. STUART, APPELLEE, V. DAVID W. BLISS ET AL., APPELLANTS: FRED BRAUN, APPELLEE.

FILED DECEMBER 24, 1927. No. 25303.

1. Mortgages: FORECLOSURE: DECREE. "In a suit to foreclose a mortgage on real estate, the execution of the contract, the breach thereof, the identity of the real estate described therein, and the amount remaining due thereon are material and necessary issues to be determined by the decree." *Union Central Life Ins. Co. v. Saathoff*, 115 Neb. 385.
2. ———: ———: REVIEW. "In such a suit, the findings of fact contained in the decree on issues properly pleaded are not subject to review on objections to a deficiency judgment." *Union Central Life Ins. Co. v. Saathoff*, 115 Neb. 385.
3. ———: ———: APPLICATION FOR DEFICIENCY JUDGMENT: DEFENSES. "A decree of foreclosure of a real estate mortgage showing personal liability of defendant for any deficiency that may remain after sale of the mortgaged premises precludes such defendant on an application for a deficiency judgment from presenting any defense which he could or should have interposed prior to the announcement of the decree." *Union Central Life Ins. Co. v. Saathoff*, 115 Neb. 385.
4. Record examined, and *held* not to warrant a refusal to enter deficiency judgment, and to require a reversal.

APPEAL from the district court for Holt county: ROBERT R. DICKSON, JUDGE. *Reversed, with directions.*

George M. Harrington and *Fay H. Pollock*, for appellants.

Lewis C. Chapman and *Donald Gallagher, contra.*

H. M. Uttley, amicus curiæ.

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

GOSS, C. J.

This is an appeal by David W. Bliss and Gustave A. Schlueter from a final order of the trial court refusing them a judgment against Fred Braun for a deficiency remaining due them on the findings and decree of foreclos-

ure of a real estate mortgage after the distribution of the proceeds of the sale.

The record brought before us begins with the answer and cross-petition of Bliss and Schlueter filed in the main suit on July 16, 1923, in which they set up a second mortgage in suit against defendants other than Braun, plead a written contract for a valuable consideration between those other defendants and Braun in which Braun assumed and agreed to pay this mortgage, allege his personal liability, and pray that Braun be adjudged to pay any deficiency after application of the proceeds of the sale.

The decree was entered September 8, 1923. It indicates jurisdiction of the parties and of the subject-matter, shows that Braun and other defendants did not plead but were defaulted, finds, among other things, that the facts set forth in the cross-petition as against the defaulting defendants are true, finds that the entire amount of the debt is due Bliss and Schlueter, finds that Braun in writing assumed the payment of the debt and mortgage in question, and orders the property sold and the proceeds applied in satisfaction of the sums found due. At the judicial sale July 21, 1924, plaintiff bid in the real estate at approximately the first lien, interest and costs. On the same day Braun filed a motion setting up that he never assumed and agreed to pay the second mortgage, had no notice that the cross-petitioners would demand a finding that he was personally liable, and asked that he be given notice of and be allowed to defend against any claim for a deficiency judgment. On March 13, 1925, Bliss and Schlueter filed their motion for a deficiency judgment against Braun, on June 23, 1925, he filed his objections to the motion, on November 27, 1925, the court, over the objections of Bliss and Schlueter that the record and decree concluded Braun on that point, took evidence on behalf of Braun, and on the same day entered findings and judgment denying the deficiency judgment and dismissing the application therefor. Bliss and Schlueter filed a motion for a new trial, which was overruled, and they appealed. By their motion for

new trial and by their assignment of errors they properly preserved their objections and exceptions.

The inquiry is, was Braun concluded by the decree?

After the instant case was appealed, we had before us the recent case of *Union Central Life Ins. Co. v. Saathoff*, 115 Neb. 385. In that case, as in this, there was no specific finding or order in the decree to the effect that on the distribution of the proceeds of the sale there would be a liability of the particular defendants for a deficiency remaining unpaid on the amount found due in the decree. So that the case is a precedent for this. We there held as follows:

"In a suit to foreclose a mortgage on real estate, the execution of the contract, the breach thereof, the identity of the real estate described therein, and the amount remaining due thereon are material and necessary issues to be determined by the decree."

"In such a suit, the findings of fact contained in the decree on issues properly pleaded are not subject to review on objections to a deficiency judgment."

"A decree of foreclosure of a real estate mortgage showing personal liability of defendant for any deficiency that may remain after sale of the mortgaged premises precludes such defendant on an application for a deficiency judgment from presenting any defense which he could or should have interposed prior to the announcement of the decree."

We cited in support of the above propositions: *Kloke v. Gardels*, 52 Neb. 117; *Smith v. Allen*, 72 Neb. 170; *Parratt v. Hartsuff*, 75 Neb. 706. Other cases bearing on the same propositions are: *Cooper v. Foss*, 15 Neb. 515; *Rockwell v. Blair Savings Bank*, 31 Neb. 128; *Reynolds v. Dietz*, 39 Neb. 180.

Braun had notice from the allegations and prayer of the cross-petition that Bliss and Schlueter were not only asking the court to fasten personal liability on him but anticipating an insufficient sale value of the mortgaged property were seeking a deficiency judgment against him in that particular action, as authorized by section 9209, Comp. St.

1922. If he had a defense, then was the time and there the place to make it. If he did not choose to defend, he must accept the penalty of a foreclosure of his right to defend. The reason for the rule is to make an end to litigation. The trial court having once passed on the issues of fact as presented under the pleadings may not require a party to the suit over his objections to relitigate those issues.

The judgment of the trial court is reversed and the cause remanded, with directions to enter deficiency judgment against the defendant Fred Braun and in favor of the defendants David W. Bliss and Gustave A. Schlueter for the amount of his liability shown by the decree, with interest and costs.

REVERSED.

E. G. COLLING V. STATE OF NEBRASKA.

FILED DECEMBER 24, 1927. NO. 25804.

1. **Criminal Law: "FLEEING FROM JUSTICE."** The phrase "fleeing from justice," as used in section 9931, Comp. St. 1922, implies a departure by a person from his usual place of abode, or from the place where he has committed an offense, with the intent to avoid detection or prosecution for a public offense.

2. ———: ———. One cannot be said to be "fleeing from justice," within the meaning of that phrase, as used in section 9931, Comp. St. 1922, where it appears that he abandoned his wife and thereafter neglected to support her, but remained in the vicinity for a period of more than seven months, during which time no prosecution for the offense was commenced or threatened, and where it appears that while absent from the state he corresponded with a member of the wife's household, so that his whereabouts was at all times known.

3. **Parent and Child: "ABANDONMENT."** To constitute an abandonment of a child by its father, within the meaning of section 9584, Comp. St. 1922, there must be an intention to wholly abandon the child and to sever, so far as possible, the parental relation, and to throw off all obligations arising therefrom.

ERROR to the district court for Adams county: LEWIS H. BLACKLEDGE, JUDGE. *Reversed.*

J. E. Willits, for plaintiff in error.

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

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

GOOD, J.

Plaintiff in error, hereinafter referred to as defendant, was prosecuted upon an information charging him with wilfully and without just cause abandoning and neglecting and refusing to support his wife and two minor children, aged 13 and 17 years. A trial resulted in a conviction and a judgment, sentencing him to imprisonment for six months at hard labor in the county jail. To review the record of his conviction he prosecutes error to this court.

Defendant urges that the offense of which he was convicted was barred by the statute of limitations, and for that reason the verdict is not supported by the evidence. The information charges the offense to have been committed on or about the 6th day of August, 1923. The evidence shows beyond question that defendant left his home, wife and two children on the 3d day of August, 1923, and never thereafter reentered his home; that at about the time he left he threw $2 upon the table and informed his wife that it was all the money he would ever voluntarily give her. He never thereafter contributed to the support of his wife. He took his personal belongings and one chair and left the home. Once thereafter he called at the home and, standing on the porch, talked to his wife, offering to give her a one-third interest in, or a third of the value of, certain real estate, owned by him in the state of Kansas, upon the condition that a divorce should be obtained by one or the other of the parties. The home was in Hastings, Nebraska, and after defendant departed therefrom he re-

mained in and about Hastings for a period of seven or eight months. He then went to the state of Kansas and from there to Missouri, where he obtained a divorce from his wife, service of process being obtained by publication. After the divorce was granted he returned to Nebraska. Thereafter he was arrested, and on his preliminary hearing was held to appear in the district court. A transcript of the proceedings of the preliminary hearing was filed in the district court on May 14, 1926, but the information upon which he was prosecuted was not filed until the 27th day of August, 1926. It will thus be seen that a period of more than three years had elapsed between the time of the abandonment and the filing of the information.

Section 9931, Comp. St. 1922, in part provides: "No person or persons shall be prosecuted for any felony (treason, murder, arson and forgery excepted), unless the indictment for the same shall be found by a grand jury, within three years next after the offense shall have been done or committed. * * * Provided, nothing herein contained shall extend to any person fleeing from justice."

In *Boughn v. State,* 44 Neb. 889, it was held that under the section of the statute above quoted an indictment must be found or information filed within the time fixed, and that it is not sufficient that the prosecution be instituted by complaint or arrest or preliminary examination within such period. This ruling was adhered to in *State v. Robertson,* 55 Neb. 41.

So far as the charge against defendant relative to abandonment and nonsupport of his wife is concerned, it is apparent that the prosecution is barred by the statute of limitations, unless, as contended by the state, defendant, during the time he was out of the state, was a fugitive from justice, so that the case is within the proviso of section 9931, Comp. St. 1922. The term "fugitive from justice," as used in statutes pertaining to extradition, is not synonymous in meaning with the term "fleeing from justice," as used in the statute of limitations. Ordinarily, in statutes relating to extradition the term "fugitive from

justice" has reference to one who has committed an offense in one state or jurisdiction and is afterwards found in another. Generally, the motive that induced his going from the state or jurisdiction, where the offense was committed, to another is immaterial. The mere fact that he has gone from the jurisdiction, where the offense was committed, into another is held sufficient to make him a "fugitive from justice," within the meaning of the extradition statute. The term "fleeing from justice," as used in the statute of limitations, has a somewhat different significance. It means to leave one's usual place of abode, or to leave the jurisdiction, where an offense has been committed, with intent to avoid detection or prosecution for some public offense.

Judge Dillon, in writing the opinion in *United States v. O'Brian*, 27 Fed. Cas. 212, No. 15908, where the question under consideration was the statute of limitations, has this to say concerning the term "fleeing from justice:" "It means to leave one's home or residence or known place of abode, with intent to avoid detection or punishment for some public offense against the United States." See, also, 26 C. J. 741.

In the instant case the record shows that for more than seven months after the commission of the offense defendant remained in and about Hastings, where he was seen daily. At the time he departed from the state no prosecution had been instituted, nor, so far as the record discloses, had any been threatened. There is nothing to indicate that defendant had any reason to anticipate or believe that any criminal proceeding was to be instituted against him. When he left the state he did not conceal the place to which he had gone. At intervals he wrote letters to his older daughter, who remained in the home of his wife, so that his place of abode was at all times known. If a prosecution had been instituted against him, he could have been extradited and returned for trial. He was not arrested until after his return to Nebraska. The facts disclosed by the record negative the suggestion that defendant was flee-

ing from justice when he departed from the state of Nebraska, and are insufficient to bring the case within the proviso of the statute.

With reference to the prosecution, so far as it relates to abandonment of and failure to support the minor child, the evidence indicates that the abandonment occurred at the same time as the abandonment of the wife, but a different rule would obtain as to the child. Departing from the home where the child was would not necessarily be an abandonment of the child. To constitute an abandonment of a child, there must be an intention to wholly abandon the child and entirely sever, so far as possible, the parental relation, and to throw off all obligations arising therefrom. 29 Cyc. 1677. It is possible that upon a subsequent trial evidence may be adduced to show that defendant exercised parental care and control over the younger daughter for some time after he departed from the home on the 3d of August. It may be that there was not a complete abandonment of the child until a period which would be within three years preceding the filing of the information. The mere failure to support the child would not constitute the offense and start the statute of limitations to running. This court has held that, to constitute the offense under the provisions of section 9584, Comp. St. 1922, there must be both an abandonment and neglect to support and both without just cause. *Altis v. State*, 107 Neb. 540.

The conclusion arrived at makes it necessary that the judgment of the district court be reversed and the prosecution dismissed, so far as it relates to the abandonment of and failure to support the wife. But, so far as it pertains to the abandonment of and failure to support the younger child, the cause is remanded for further proceedings.

Since there may be another trial, it may not be amiss to say that we have considered the other assignments of error and particularly those relating to the instructions of the court, and find them without merit.

REVERSED.

Note—On presumption of guilt from flight, see 39 L. R. A. (n.s.) 58; 25 A.L.R. 887; 8 R.C.L. 192; 5 R.C.L. Supp. 451.

As to who are fugitives from justice, see 51 L.R.A. (n.s.) 668; 13 A.L.R. 415; 11 R.C.L. 731; 4 R.C.L. Supp. 717; 6 R.C.L. Supp. 671.

NORRIS DUNLAP V. STATE OF NEBRASKA.

FILED DECEMBER 24, 1927. No. 25838.

1. Evidence examined and found sufficient to warrant its submission to the jury.
2. Witnesses: IMPEACHMENT. In the trial of an action, it is error for the court to permit counsel, in order to affect the credibility of a witness, to inquire of him whether he previously had been convicted of an offense below the grade of a felony.
3. Intoxicating Liquors: UNLAWFUL SALE: STATUTE GOVERNING. An information accusing the defendant of the unlawful sale of intoxicating liquor charges him with the commission of a misdemeanor, and is governed by the provisions of section 3238 and 3288, Comp. St. 1922, and not by those of section 3239 thereof, as amended by chapter 106, Laws 1925.

ERROR to the district court for Dixon county: MARK J. RYAN, JUDGE. *Reversed.*

McCarthy & McCarthy, for plaintiff in error.

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

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

THOMPSON, J.

The defendant, plaintiff in error herein, was convicted in the district court for Dixon county, Nebraska, of the unlawful sale of intoxicating liquor, and sentenced to pay

a fine of $100 and to imprisonment in the county jail for a period of sixty days, and to pay the costs of prosecution. To reverse this judgment he relies on the following claimed errors: That the judgment is without evidence to support it; errors of law occurring at the trial; and that the court erred in sentencing the defendant to both fine and imprisonment. We will consider the alleged errors in the order of their presentation.

The record reflects sufficient evidence to warrant the trial court in submitting the case to the jury for its determination, and such verdict and judgment would not be disturbed save for the reasons hereinafter set forth.

As to the claimed errors occurring at the trial: Section 9923, Comp. St. 1922, provides: "The term 'felony' signifies such an offense as may be punished with death or imprisonment in the penitentiary. Any other offense is denominated a 'misdemeanor.'"

The defendant was a witness in his own behalf, and testified generally in regard to the facts involved. On his cross-examination the prosecuting attorney was, over objections of defendant's attorney properly interposed, permitted to ask, and defendant was required to answer, if he had ever pleaded guilty to the unlawful possession of intoxicating liquor (a misdemeanor) in Dixon county, Nebraska. The sole purpose such question and answer could serve was to weaken the defendant's credibility as a witness, and thus minimize the weight of his testimony. To permit such question to be asked and answered was error, and by such error the defendant was denied a fair and impartial trial. Section 338 of the Code of Civil Procedure, being section 8848, Comp. St. 1922, provides: "A witness may be interrogated as to his previous conviction for a felony. But no other proof of such conviction is competent except the record thereof." We held in *Brown v. State*, 111 Neb. 486: "This section applies to any witness in a case and is for the purpose of affecting his credibility." In *Elliott v. State*, 34 Neb. 48, we stated, the question quoted (the same as herein) "must have been prej-

udicial to the accused. Where a defendant in a criminal case offers himself as a witness on his own behalf, he is subject to the same rules of cross-examination as other witnesses, and it is the duty of the court to keep the cross-examination within the law." In interpreting such section 8848 in *Young Men's Christian Association v. Rawlings*, 60 Neb. 377, we said: "It allows the admission of a witness that he had been convicted of a felony, or the record of such conviction, to be received as evidence. Said section clearly excludes the idea that the conviction of an offense below the grade of a felony is admissible to affect the credibility of a witness. Argument cannot make it plainer. The defendant not having been convicted of a felony, the testimony offered was properly excluded." If it was properly excluded in that case, it was improperly admitted in the instant case. We are further sustained in this conclusion by our holdings in *Ford v. State*, 106 Neb. 439, and *Daggett v. State*, 114 Neb. 238. The law is that in the trial of an action it is error for the court to permit counsel, in order to affect the credibility of a witness, to inquire of him whether he previously had been convicted of an offense below the grade of a felony.

This renders it unnecessary to consider the third ground for a reversal, except to state that the offense charged herein is a misdemeanor, governed by the provisions of sections 3238 and 3288, Comp. St. 1922, and upon conviction thereunder a sentence of a fine or imprisonment can be imposed; and not by the provisions of section 3239, Comp. St. 1922, as amended by chapter 106, Laws 1925, which provides for both fine and imprisonment. *State v. Smith*, 114 Neb. 653; *Knothe v. State*, 115 Neb. 119; *State v. Dineen*, 115 Neb. 174; *Drawbridge v. State*, 115 Neb. 535; *Coxbill v. State*, 115 Neb. 634; *Myers v. State, ante*, p. 287. Therefore, the trial court erred in sentencing defendant to both fine and imprisonment. The judgment is reversed and cause remanded for further proceedings.

REVERSED.

ROSE, J. dissenting.

I do not concur in the conclusion that defendant is entitled to a new trial because he was asked and was required to answer whether he had ever pleaded guilty to the charge of unlawful possession of intoxicating liquor. In the present case he was accused of unlawfully selling intoxicating liquor, a similar offense. The evidence proves his guilt and the jury so found. The conviction is set aside for the reason that he was asked and required to answer whether he had ever pleaded guilty to the charge of unlawful possession of intoxicating liquor. A reason for reversing the conviction is stated in the opinion as follows:

"The sole purpose such question and answer could serve was to weaken the defendant's credibility as a witness, and thus minimize the weight of his testimony."

Defendant frankly answered the question in the affirmative, admitting he had on a former occasion pleaded guilty to the charge of unlawfully selling intoxicating liquor. As I view the question and the answer he was not thus discredited as a witness. The question and answer indicate that defendant did not previously testify falsely to escape conviction and punishment under a similar accusation. If the sole purpose of the question was to weaken his credibility, the former plea of guilty is the basis of a proper inference that he is not a witness who would testify falsely to escape punishment. In my judgment direct evidence of guilt, not the collateral question and answer, influenced the jury. It seems to me it was to prevent a reversal for an error like this that the legislature enacted the statute forbidding the reversal of a conviction for the admission of improper evidence not resulting in a miscarriage of justice. Comp. St. 1922, sec. 10186. The opinion itself contains a ruling that the competent evidence, except for the question criticised, was sufficient to justify a verdict of guilty. The competent evidence and the finding of the jury should control the issue of fact and prevent the technical error from overshadowing the truth.

The legislative enactment that "A witness may be inter-

rogated as to his previous conviction for a felony" created a rule of evidence for the courts. Comp. St. 1922, sec. 8848. This rule does not make the statute forbidding the reversal of a conviction for harmless error inoperative when the statutory question as to a felony is propounded to a witness charged with a misdemeanor. As I view the record the conviction should not be set aside for the reason given.

SALYERS AUTO COMPANY, APPELLEE, V. FRED DEVORE, APPELLANT.

FILED DECEMBER 24, 1927. No. 25090.

1. **Courts: JURISDICTION: NONRESIDENTS.** Under the facts in this case, it is solely in virtue of the state's jurisdiction over the property of the nonresident situated within its limits that its tribunals can inquire into that nonresident's obligations to its own citizens, and the inquiry can then be carried on only to the extent necessary to control the disposition of such property. If, however, the nonresident has no property in this state, there is nothing upon which its tribunals can adjudicate.
2. **Attachment: SITUS OF DEBTS.** Notwithstanding the general rule, which is well settled, that the situs of debts and obligations is at the domicile of the creditor, our attachment laws rightfully, for the purpose of attachment proceedings directed against nonresident defendants, fix the situs of "debts owing" to such defendants within this state at the domicile of said debtor, if within the state, or where such debtor may, within this state, be legally served with appropriate process.
3. ———: **VENUE.** In the absence of both personal appearance of, and personal service of summons upon, a nonresident within this state, an action, and proceeding ancillary thereto, may be sustained against him, only if brought in a county of this state in which at the commencement of the suit, and also at the time of the service of the attachment (including garnishment in aid thereof), "there may be property of, or debts owing to, said defendant."
4. **Garnishment.** The facts in the present case disclose without dispute that at the time of the commencement of the original suit, as well as at the time of service of the attachment issuing therein upon the garnishee herein, such garnishee did not

have in his possession any property of the defendant and was not then indebted to said defendant, in any amount, and that his future liability to such defendant, dependent wholly on the collection of money from third persons, was contingent and was not subject to levy of attachment or garnishment.

5. ———. Under the undisputed facts of this case, the garnishee's liability must be determined as of date of the service of the order of attachment, and cannot be affected by transactions occuring thereafter.

6. ———: CONTRACT FOR PERSONAL SERVICES. In absence of fraud and collusion, no garnishable debt can arise from a contract for personal services where, pursuant to terms of the employment, the employee is paid in advance. This rule extends not only to amounts paid as compensation, but also to payments made in advance to cover necessary expenses thereafter to be incurred by the employee in performing the contract of employment.

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

Slama & Donata, for appellant.

Wayne E. Sawtell and *Grover C. Rinehart, contra.*

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

EBERLY, J.

On December 1, 1923, Salyers Auto Company, plaintiff, brought this action in the district court for Douglas county, Nebraska, against Fred DeVore. The action was based on an order of court dated April 7, 1923, directing DeVore, as garnishee in an action entitled Salyers Auto Company v. J. R. Walker, to pay into court $1,916.83, the same to be held by the clerk until further order.

DeVore failed to comply with the order and, in conformity to our practice, plaintiff brought the present action. A jury was waived and trial had to the court, resulting in a finding that the plaintiff was entitled to recover from the defendant, DeVore, $1,510.22, with interest thereon

at 7 per cent. from April 7, 1923, to June 27, 1925, amounting to the sum of $1,743.67, for which the plaintiff was awarded judgment. From this judgment defendant has appealed.

It appears that on February 17, 1921, the assignors of plaintiff obtained a judgment in the district court for Mills county, Iowa, against J. R. Walker for $1,575, drawing interest at the rate of 8 per cent. from date of judgment. On June 19, 1922, plaintiff, as the owner of this judgment, commenced an action thereon in the district court for Douglas county, Nebraska, against J. R. Walker, and caused an attachment to be issued in said action, and in aid thereof garnishment was served on DeVore. Walker was a nonresident of the state, and service was had upon him by publication only in the manner provided by our statute. He made no personal appearance in this action above named, nor did he, in any manner, personally appear in the present proceeding.

The garnishment notice was served on DeVore June 24, 1922, and directed him to appear in court on July 11, 1922, to answer the summons in garnishment. On July 8, 1922, the garnishee filed a written answer which disclosed that he was not indebted in any sum to Walker. Apparently this answer was not satisfactory, as the record shows that the garnishee appeared personally in court on July 11, 1922, and was examined under oath by counsel for plaintiff. The record also shows that further hearing of the examination of the garnishee was continued until April 7, 1923, at which time the garnishee was further examined, resulting in an order of court directing the garnishee to pay to the clerk of the court $1,916.83, the same to be held by the clerk until order of the court.

The record shows that DeVore was conducting a stock newspaper largely devoted to the advertising of dealers of Duroc hogs. Walker was employed by him to solicit advertising and incidentally subscriptions upon a commission basis. The arrangement was verbal, but Walker was to receive as his compensation 33 1-3 per cent. on all

moneys collected for advertising procured by him. There was this further arrangement, that DeVore was to advance to Walker $100 a week to cover his traveling expenses, the same to be charged to Walker's account.

The issue in the present case involves a balancing of accounts between Walker and DeVore to determine the status of their respective accounts. The record shows that at the time of his employment, about March 10, 1922, Walker was indebted to DeVore on account of previous transactions in the sum of $2,788.35. Between that date and June 24, 1922, the date of the garnishment, DeVore had advanced and paid items on Walker's account in the sum of $1,269.09, so that the charges against Walker on June 24 amounted to $4,057.44. The record does not show clearly the amount of collections made up to that date upon which Walker would be entitled to receive commissions under his contract. It does show, however, that on that date there had not been collected, on contracts procured by Walker, an amount sufficient to cancel the indebtedness of Walker to DeVore on June 24, 1922. The record shows that, on the date of garnishment, Walker had procured a large number of advertising contracts which, if "run" by the paper and collected by DeVore, would, on a balancing of their respective accounts, show that DeVore was indebted to Walker in a considerable sum.

On April 7, 1923, when the garnishee made his final answer in court, the record shows with reasonable certainty there had been collected up to that date on contracts procured by Walker, up to June 24, 1922, $17,454.26 of which he, under the terms of his contract, was entitled to receive $5,818.09. If a balance were struck upon the figures thus far given, DeVore would be owing Walker on April 7, 1923, $1,760.43, not including interest.

The record further shows that after the summons in garnishment was served on DeVore, June 24, he continued to advance to Walker $100 a week, as required by the terms of his contract, up to April 7, 1923, the date of his final answer, so that the books showed on the last-named date noth-

ing was due Walker on contracts procured by him up to June 24, 1922.

The case thus arises out of an attempt on part of the courts of this sovereignty to subject the property of a nonresident to the demands of our own citizens. While the right to do so is undoubted in a proper case, yet, because of the inherent nature of such proceedings, certain difficulties pertain to and adhere therein.

While the procedure in our courts, inclusive of the method of obtaining jurisdiction over the nonresident parties by substituted service, is, and properly may be, regulated by our legislature, yet such power is subject to a federal limitation that courts of a state cannot so acquire jurisdiction over nonresidents for the mere purpose of a personal adjudication against them; indeed, not for any purpose except to adjudicate either with reference to the property within this state, or with reference to the status of some of its citizens. Our statutes on this subject of acquiring jurisdiction over nonresidents must be read in the light of the interstate limitation resting upon us by reason of the frame of government of the nation, of which our state is a part. *Moyer v. Koontz,* 103 Wis. 22.

Indeed, the controlling principle, as announced by the supreme court of the United States, is: "The state, through its tribunals, may subject property situated within its limits owned by nonresidents to the payment of the demand of its own citizens against them; and the exercise of this jurisdiction in no respect infringes upon the sovereignty of the state where the owners are domiciled. Every state owes protection to its own citizens; and, when nonresidents deal with them, it is a legitimate and just exercise of authority to hold and appropriate any property owned by such nonresidents to satisfy the claims of its citizens. It is in virtue of the state's jurisdiction over the property of the nonresident situated within its limits that its tribunals can inquire into that nonresident's obligations to its own citizens, and the inquiry can then be carried only to the extent necessary to control the disposition of the prop-

erty. If the nonresident have no property in the state, there is nothing upon which the tribunals can adjudicate." *Pennoyer v. Neff*, 95 U. S. 714.

So is it also true that— "The general rule is well settled that the situs of debts and obligations is at the domicile of the creditor. But the attachment laws of many states recognize the right of a creditor of a nonresident to attach a debt or credit owing or due to him by a person within the jurisdiction where the attachment issues, and to this extent the principle has been sanctioned that the laws of a state, for the purposes of attachment proceedings, may fix the situs of a debt at the domicile of the debtor." 2 R. C. L. 806, sec. 5.

The statutory provisions of this state governing and controlling the proceedings now before us for review, to be construed "in the light of the interstate limitations resting upon us," embrace the following enactments: Comp. St. 1922, secs. 8562, 8583, 8676-8728.

Two distinct classes of actions are contemplated by these provisions: (1) The ordinary civil action commenced by filing of petition, and the issuance of a proper writ thereafter personally served upon the defendant within the jurisdiction of this state in the manner provided by law. (2) A civil action commenced by filing of petition not followed by personal service, but where the jurisdiction rests solely upon the fact of property seized, and where the exercise of judicial powers is limited to the proper disposition of such property then in the hands of the court.

Sections 8676-8728, Comp. St. 1922, embrace provisions general in their nature and ordinarily, except where context thereof, or the provisions of statutes in *pari materia*, indicate the contrary, regulate, provide for, and govern the application of this ancillary remedy whenever the same is invoked.

In this connection it is to be noted that section 8702, Comp. St. 1922, provides: "If the garnishee appear and answer, and it is discovered in his examination that, *at or after* the service of the order of attachment and notice

upon him, he was possessed of any property of the defendant or was indebted to him, the court may order the delivery of such property and the payment of the amount owing by the garnishee into the court."

The only provision of the Code for notice by publication in these actions is section 8583, Comp. St. 1922, which is in the following language: "Service may be made by publication in either of the following cases: * * * Third. In actions brought against a nonresident of this state, * * * having in this state property or debts owing to them, sought to be taken by any of the provisional remedies, or to be appropriated in any way."

Section 8562, Comp. St. 1922, provides: "An action * * * against a nonresident of this state * * * may be brought in any county in which there may be property of, or debts owing to said defendant, or where said defendant may be found."

The section last quoted was before this court in *Lamb v. Finch*, 87 Neb. 565. On May 25, 1908, the plaintiffs therein filed their petition and præcipe for summons in the district court for Perkins county, Nebraska, which was issued on May 25, and on May 28 personally served on defendant Finch in Perkins county. However, the proof appearing uncontradicted that on May 25, the date of the commencement of this action, Finch was a resident of Colorado, and was not within Perkins county nor the state of Nebraska, this service was quashed as not in compliance with section 8562, Comp. St. 1922.

Can it be contended, in view of the language as thus construed that, had Finch in that case been accompanied by a shipment of personal property made to a resident of Perkins county as his agent, who had been served with garnishment on the day Finch was served with summons, and prior to its arrival or receipt in Perkins county, but at a time when the property in question was still without the boundaries of the state, this court would have denied jurisdiction as to Finch's person, but sustained it as to Finch's property? It would seem, in view of the language appear-

ing in section 8562, *supra*, particularly when construed in the light of our interstate limitation, that its requirements as to the necessity of person and as to the necessity of property "being within the county at the time of the institution of the action" are identical and mandatory.

It would also seem beyond controversy, in view of the language of section 8562, *supra*, as interpreted by this court and the interstate limitation resting upon us as expressed by the supreme court of the United States in the words, "If the nonresident have no property in the state, there is nothing upon which the tribunals can adjudicate," that jurisdiction of this court would be limited in cases of attachment based solely on the ground of nonresidence to what was actually levied upon at the time for service of process. *Pennoyer v. Neff, supra.*

The record discloses without dispute that there was nothing due and owing from DeVore to Walker on June 24, 1922.

True, DeVore had contracts for publications which, when made, and if, and only when, paid for by third persons, would entitle Walker to further compensation. But at the commencement of this action against Walker, at the time of the service of process therein, as well as at the time of the hearing on July 11, 1923, these were simply contingencies, and nothing was then owing thereon from DeVore to Walker.

It thus appears that such contingent claims were not the subject of attachment or garnishment.

"Indebtedness dependent upon collection of money from a third person is contingent, and cannot be reached by garnishment until after the money has been collected." 28 C. J. 134. See, also, *Foster v. Singer*, 69 Wis. 392; *Norton v. Soule*, 75 Me. 385; *Black v. Zacharie & Co.*, 3 How. (U.S.) *483; *Dennison v. Soper*, 33 Ia. 183.

Indeed, in the limitations expressed in section 8562, *supra*, in effect restricting the right to bring suit against a nonresident to counties "in which there may be * * * debts owing to said defendant," and in section 8583, *supra*,

providing for publication of notice of actions based on attachment proceedings against nonresidents only for cases where and when nonresidents have "debts owing to them" in this state, and in view of the interstate limitation necessarily imposed, our several enactments on this subject fairly express a legislative intent that the liability of the garnishee of a nonresident debtor in a case involving facts similar to the instant case is limited to that for which the nonresident may be sued in our courts, viz., "debts owing to such defendant" on the date of the commencement of the action against such nonresident. No other action of this character is provided for or permitted. The fact of "debts owing to the defendant" must therefore be determined by the status of the funds in the hands of the defendant's garnishee or the then condition of their mutual accounts at the time of the service of process upon such garnishee upon which the jurisdiction of the court in such cases is made to depend.

This construction does not ignore nor do violence to the words contained in section 8702, *supra*, "at or after the service of the order of attachment." The words last quoted are a part of the general provisions of our statutes of attachment. The language of sections 8562, 8583, Comp. St. 1922, are specific provisions relating to a specific subject-matter, viz., "attachment against nonresidents." As specific provisions, in view of the question presented by the facts of this record, they control, and the limitations they express and necessarily imply will prevail. *McCann v. McLennan*, 2 Neb. 286; *Albertson v. State*, 9 Neb. 429; *Richardson County v. Miles*, 14 Neb. 311; *Merrick v. Kennedy*, 46 Neb. 264; *State v. City of Kearney*, 49 Neb. 325; *State v. Cornell*, 53 Neb. 556; *State v. Cornell*, 54 Neb. 72; *State v. Several Parcels of Land*, 79 Neb. 638; *State v. Seavey*, 22 Neb. 454; *State v. Nolan*, 71 Neb. 136.

In view of the obvious fact that the construction here made conforms our practice to the interstate limitations resting upon us, and to the doctrine of *Pennoyer v. Neff*, *supra*, it would seem to be mandatory. The conclusion would

therefore follow that the judgment appealed from is not sustained by the admitted facts of the transaction.

But, even if this deduction be an error, it would not follow that the evidence in the record sustains the judgment. As already stated herein, on April 7, 1923, when the final hearing of the garnishee was had and an order entered in the district court for Douglas county, Nebraska, which DeVore declined to perform, upon which the present suit was instituted against him, the record in the present case shows with reasonable certainty that there had been collected up to that date on contracts procured by Walker up to June 24, 1922, $17,454.26, of which he, under the terms of his contract, was entitled to receive $5,818.09, less advances made to him by DeVore.

If a balance be struck upon the figures thus far given, and denying credit to DeVore for advances made by him to Walker subsequent to June 24, 1922 (the date of the service of the notice of garnishment), DeVore would then be owing Walker on April 7, 1923, $1,760.43, not including interest. The record also discloses that DeVore continued, as required by his contract, his advances of "expense money" to Walker after service of notice of garnishment upon him, so that, if he be credited with this amount thus paid, nothing was due from DeVore to Walker on April 7, 1923.

In this connection there is no issue of fraud or collusion presented by the pleadings in the instant case. This contract of employment with Walker was for continuous service with compensation on a contingent basis, and imposed the obligation on DeVore to make certain "advances" for expenses, etc., so that Walker could be kept at work pending the time when the collection of the contracts of advertising secured by him had been completed. Upon the happening of that event, from his 33 1-3 per cent. were to be deducted such advances as had been made to him, and he was entitled only to any balance that might result.

The amount of the advances made after June 24, 1922, are thus within the contract of the parties, and are reason-

able and customary in the business in which the parties were employed. The continuance of these payments, it must be admitted, was essential to the continuance of the business in which Walker was employed and in which DeVore was engaged.

In a case involving similar facts, the supreme court of Alabama sustained the right of the garnishee to continue the payments required by his contract, and to receive credit for the payments thus made, and laid down the following rule: "It is sufficient to note that the mere agreement to work on an advance pay, or drawing account, basis, is not fraudulent. Garnishment is a process to reach the estate of the debtor. Third persons owe no duty to his creditors to aid in the accumulation of an estate. If they engage one's services upon a contract calling for pay in advance, the employee becomes debtor to the employer. So long as they live within such contract, and no cause of action in assumpsit accrues to the debtor, his creditor can stand on no higher ground. The high legal and moral duty of the debtor to pay does not give the creditor a property right in the debtor's services, and employers are not required to contract on the basis of any such right." *Simpson Coal & Transfer Co. v. Hood,* 215 Ala. 175. See, also, as sustaining the principle involved in this case, *Alexander v. Pollock & Co.,* 72 Ala. 137; 28 C. J. 172, 173; *Callaghan v. Pocasset Mfg. Co.,* 119 Mass. 173; *Worthington v. Jones,* 23 Vt. 546; *Bambrick v. Bambrick Bros. Construction Co.,* 152 Mo. App. 69; *Eller v. National Motor Vehicle Co.,* 181 Ia. 679; *Bump v. Augustine,* 163 Ia. 307.

In view of the doctrine above announced, it would follow that even if DeVore's liability were dependent on the facts as they existed April 7, 1923, he would be entitled to credit for all advances made under the contract of employment up to that date, notwithstanding the garnishment, with the result that on the day last named there would be nothing due Walker, and therefore nothing to support the judgment entered against DeVore.

It follows, therefore, that in the entry of judgment in this case against DeVore the district court erred. The judgment of the district court is, therefore, reversed and the action dismissed.

REVERSED AND DISMISSED.

Note—See Garnishment 12 R.C.L. 850, 28 C. J. 130 n. 2, 134 n. 31, 172 n. 91.

SAMUEL E. BAILEY, APPELLEE, V. DAISY M. L. RANDALL ET AL., APPELLANTS.

FILED DECEMBER 24, 1927. No. 25869.

Parent and Child: CUSTODY OF CHILD. While, in controversies for the custody of an infant of tender years, the court will consider the best interests of the child, and will make such order for its custody as will be for its welfare without reference to the wishes of the parties, yet the sole surviving parent has a right by nature and by law to the custody of his child, which right should never be denied unless substantial reasons for such denial affirmatively appear.

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

George I. Craven and *W. M. Elmen,* for appellants.

Patrick O'Connor, contra.

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

EBERLY, J.

This is a habeas corpus proceeding brought by Samuel E. Bailey against Daisy M. L. Randall, Oscar Randall, and Ilma Ada Agur, to secure and settle the custody and control of a minor, Gretchen Rae Bailey. Of this child the plaintiff is the father, and to it the defendants sustained the relation of uncle and aunt. The question presented by the record is essentially a question of fact.

The evidence, without serious conflict, establishes the following: Edna C. Bailey, the wife of the plaintiff, taking

her daughter with her, departed from his home in the latter part of 1922, and thereafter lived apart from him. In 1923, it seems, a reconciliation was sought between these parties. Nothing came of it, and in May, 1925, a divorce action was instituted by the wife in the district court for Lancaster county, Nebraska, which, so far as revealed by the record before us, never was completed or determined. After leaving in 1922, Mrs. Edna C. Bailey and her daughter, the latter under the mother's control and in her custody, lived apart from the plaintiff until 1926. In March of that year Edna C. Bailey was adjudged insane and committed to the hospital for the insane, and since that date has been continuously confined in that institution.

It therefore appears that, at the time of the commencement of this proceeding, the mother was wholly incompetent to exercise control or retain custody of Gretchen Rae Bailey, her nine-year-old daughter. It must also be conceded that, during the time that intervened after the mother left the domicile of the plaintiff herein, plaintiff made no attempt to deprive the mother of the custody or control of his daughter.

It must be admitted, however, that, from the record before us, the inference might be drawn that the whereabouts of the child was, in a measure, kept from her father. But it shows beyond dispute, as soon as the father learned of the incompetency of the mother he, at once, became active in attempting to locate and secure the possession of his daughter.

When we leave these admitted facts and seek to determine the character of the father and petitioner; what duties to the wife and child during the separation he was culpable in not performing in view of the situation that obtained; the extent to which he contributed to the support of his wife and child; the character of the home now furnished by the father for his child and the nature of the influences surrounding the same; in short, what the best interests of this child demand, under the existing circum-

stances, we find ourselves confronted by a record of oral evidence, conflicting in its nature, which was submitted to the district court on the trial before that tribunal.

The trial judge saw these witnesses, heard their testimony, observed their demeanor. It must be admitted that his opportunities for correctly determining the disputed questions of fact were far superior to those who must be, in their investigations, confined to the printed page.

No question of law is here involved. And after a careful reading of the record, and due consideration of the evidence, arguments and briefs of the parties, we are unable to say that the district judge has not, in finding for the petitioner, given due consideration of the interest of the child. And taking the evidence as to the excellent character of the defendants as true, and according due consideration to their praiseworthy conduct in the case before us, still we are unable to say that the order finally entered does not promote the best interests of the subject of this litigation. We must concede that the determination as made by the trial judge of the issues of fact before him finds due support in the record before us.

It must be conceded that the unquestioned rule applicable to this case is that, while, in controversies for the custody of an infant of tender years, the court will consider the best interests of the child, and will make such order for its custody as will be for its welfare without reference to the wishes of the parties, yet the sole surviving parent has a right by nature and by law to the custody of his child, which right should never be denied unless substantial reasons for such denial affirmatively appear.

It follows, therefore, that the judgment of the district court must be deemed by us to be right, and the same is

AFFIRMED.

HORACE HENEFIN, APPELLEE, V. LIVE STOCK NATIONAL BANK OF SIOUX CITY, IOWA, APPELLANT.

FILED DECEMBER 24, 1927. No. 24795.

1. **Banks and Banking:** DEPOSIT OF CHECK. Where the payee of a check drawn upon a bank at a distant place indorses it and deposits it with his local bank and receives credit therefor as cash, and is permitted to draw upon the same, there being no different understanding, the ownership of the check passes to the bank and the relationship of debtor and creditor is established between the bank and payee.
2. ———: ———. In such case, the correspondent bank to whom the indorsee transmits it for collection or credit does not become the agent of the payee and thus become liable to him for negligence in making collection.
3. ———: DEPOSIT OF CHECK FOR COLLECTION. Where a bank receives a check for collection only, it incurs no liability for negligence of the bank through which it seeks to make collection, provided it exercises ordinary care in selecting a proper agent; in which case, the person selected becomes the agent of the payee of the check.
4. ———: ———: NEGLIGENCE: BURDEN OF PROOF. In an action for negligence in the routing and presentment of a check indorsed to a bank for collection, the burden is upon the plaintiff to show that the negligence proved was the proximate cause of his loss.
5. **Assignments.** Ordinarily, an assignee of a chose in action acquires no greater right than was possessed by his assignor, but simply stands in the shoes of the latter.
6. **Opinion Disapproved.** *Western Wheeled Scraper Co. v. Sadilek*, 50 Neb. 105, disapproved in so far as it assumes to hold that a bank receiving a check or bill for collection only is liable for negligence of the agents it selects to make the collection, where no claim is made that they are improper agents.

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

Charles H. Kelsey and *E. A. Burgess*, for appellant.

M. F. Harrington and *C. B. Scott, contra.*

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

REDICK, District Judge.

Case heard before the commission, and opinion of affirmance rendered and adopted by the court. A motion for rehearing was filed and allowed, and hearing had before the court, and is now before us for final disposition.

The facts are not in serious dispute. Plaintiff, appellee, on March 24, 1923, indorsed and deposited with the Nebraska State Bank of O'Neill a check payable to his order for $1,353.16, drawn by his son Edward Henefin upon the First National Bank of Gregory, South Dakota, where the drawer had sufficient funds on deposit to meet the check. The same was received and credited in the open account of plaintiff, and on the same day $500 or $600 was withdrawn by checks of plaintiff. On the same day the O'Neill bank indorsed the check for collection to its correspondent in Sioux City, Iowa (defendant and appellant), which received it March 26 and forwarded it by mail to Northwestern National Bank of Minneapolis, Minnesota, which received it March 27, and on same day delivered it to Federal Reserve Bank of Minneapolis, which forwarded it direct to First National Bank of Gregory with other items for collection aggregating $1,780.95. It was presented for payment on the 29th to the Gregory bank and was paid with other items by the latter by its draft upon and in favor of the Federal Reserve Bank. The check in question was marked paid, charged to his account and later surrendered to the drawer. This draft was not paid. The Gregory bank failed March 29. On March 26 and 27 the Gregory bank was overdrawn at the Federal Reserve Bank to the amount of $2,962.43 and on the 29th $4,303.21. On March 27, 28, and 29, the Gregory bank had actual money in its vaults about $1,400, enough to pay plaintiff's check, but not sufficient to pay all checks outstanding and presented, in excess of $2,200. The amount of the check in question was charged back by defendant to the O'Neill

bank, which acquiesced in that charge and claimed reimbursement from plaintiff. Thereupon plaintiff reimbursed the O'Neill bank and took an assignment of all its rights and claim against defendant. Plaintiff brings this action for damages claimed to have resulted from negligence of defendant in forwarding and presenting the check. There was a trial to the court and finding and judgment for plaintiff for amount of check and interest. Defendant appeals.

The negligence complained of consists of the routing of the check by way of Minneapolis, instead of sending it direct to defendant's correspondent at Gregory, the Commercial State Bank; and the forwarding by Federal Reserve Bank to drawee bank direct. And plaintiff claims that, had defendant used ordinary care, the check would have been presented and paid before the Gregory bank failed. On the other hand, defendant contends that it acted in the usual and customary manner in the handling of such matters and with ordinary care and is not liable; furthermore, that if the check had been presented on the 27th or 28th, the earliest time it could have been presented, it would have been paid by draft with the same result, and the delay in presentment caused no loss.

Plaintiff grounds his right to recover on two propositions: (1) That defendant was negligent in the circuitous routing of the check, and (2) that the Federal Reserve Bank, the agent selected by defendant, was negligent in sending the draft direct to the drawee bank instead of some other bank at Gregory. Plaintiff takes the position (1) that he was the owner of the check in question and its proceeds, and that defendant was his agent for collection; plaintiff had no dealings direct with defendant, but only through the O'Neill bank acting, as is claimed, as his agent, who selected defendant as collection agent; and (2) that defendant is liable to the O'Neill bank, his assignor.

If plaintiff was owner of the check and the O'Neill bank received it only for collection, then the Sioux City bank and its successors in the collection chain were agents of plaintiff and respectively liable to him for their negligence

causing loss. *First Nat. Bank v. Sprague,* 34 Neb. 318. That case discusses the Massachusetts rule and the New York rule in such cases, and adopts the former to the effect that the bank of deposit for collection is only liable for negligence if it fails to select a proper correspondent, but, having done that, is not responsible for the negligence of the correspondent bank, which is considered the agent of the owner. The New York rule held the bank of deposit liable for its own negligence and also that of all other banks in the chain of collection. It is suggested by plaintiff that the Massachusetts rule has been abrogated in this state by the later case of *Bedell v. Harbine Bank,* 62 Neb. 339. In that case the Harbine bank received the check for collection and, in consequence of a circuitous routing, presentment was not made for three days, when it could reasonably have been made in one, amount of check being thereby lost. The suit was by the bank against the payee as indorser, and it was held that the indorser was discharged by the delay, citing *Western Wheeled Scraper Co. v. Sadilek,* 50 Neb. 105, and *First Nat. Bank v. Miller,* 37 Neb. 500. The first of these cases was by the payee against the drawer of the check, who was held released by negligence of the bank selected by the payee as its agent for collection; and the second by the bank of deposit against the indorser, who was held released by negligence of indorsee bank in presenting the check for payment. Both support the conclusion in the *Bedell* case that the indorser was discharged by the delay in presenting the check, but do not discuss the Massachusetts rule. If the present case was by the O'Neill bank against plaintiff on his indorsement, the three cases would be applicable, and would require the discharge of the indorser; but they are not in point in this case, which is for damages for negligence. True, it was said in the *Bedell* case, page 343: "The defendant in error (the Harbine bank) would * * * have been inexcusably negligent in sending the check for collection through the agency of the St. Joseph bank, thus consuming three days' time in doing what might have been

done in one day, and would be also responsible for the negligence of the latter bank in sending the check directly to the drawee either to make payment or give the requisite notice of dishonor." And: "The Harbine bank is responsible for the consequences, not only of the delay occasioned by sending the check to the St. Joseph bank, but for any default or negligence committed by the latter" —and this proposition was repeated in the syllabus; but in none of the three cases was the rule under discussion involved. We are therefore constrained to hold as *dictum* the statements quoted as to the responsibility of the bank of deposit for the negligence of its agents, and that *First Nat. Bank v. Sprague,* 34 Neb. 318, is still the law of this state. Moreover, that case was distinguished (not overruled) in the *Harbine* case, and was cited with approval in the later case of *Crilly v. Ruyle,* 87 Neb. 367.

The Massachusetts rule, however, is only applicable to cases where the bank receives the check for collection, not to those in which it becomes the owner of the check and makes the collection on its own account. It is therefore important to discover the precise relation of the bank to the check, whether owner or merely collecting agent. The petition alleges that he "indorsed said check and delivered the same to the Nebraska State Bank of O'Neill, Nebraska, and he deposited said sum of money in said bank to his credit in an open account and said Nebraska State Bank gave him credit for the amount of said check," and plaintiff testified that he sold the check to the bank, that he did not deposit it for collection—"nothing said about collection." The cashier of the bank testified that the account was credited with the amount of the check, and the same sent to defendant bank for *credit,* not for collection, and the assignment recites that by the indorsement and credit the bank "itself became the owner of the said check." It therefore appears that the bank became the owner of the check and by the deposit the relation of debtor and creditor was established between the bank and plaintiff. We conclude from what has been said that plaintiff has

not brought his case within the Massachusetts rule; that defendant was not his agent, and is not responsible in this action to plaintiff under his first proposition.

It remains to determine whether plaintiff may recover as assignee of the O'Neill bank, in which capacity he merely stands in the place of the bank.

The material facts are that the O'Neill bank was the owner of the check and deposited it with defendant for credit March 26, 1923, and received acknowledgment thereof in the usual form in which such transactions had been handled for some years, containing the following:

"All items are credited subject to final payment as follows: All items received by this bank for collection or credit are taken at the depositor's risk. This bank will not be liable for neglect or failure of the channels or parties to whom, or through whom, such items have been sent; nor for loss in transit; nor will it be liable for returns thereon until such returns have been cashed. Should any bank convert the proceeds or remit therefor in checks or drafts, which are dishonored, the amount for which credit has been given will be charged back and the item or items returned to the depositor. Unless instructions to the contrary are given, this bank reserves the right, at its discretion, to send any items direct to the bank on which drawn. When so sent, none of the above conditions are waived or suspended, and the customer in depositing in this bank agrees to be bound by the above rules and regulations.

"Please check this transcript promptly and preserve it for reference, as we furnish no other statement. Any errors or omissions should be reported immediately and unless so reported this statement will be considered correct."

The subsequent handling of the check has been detailed above.

Plaintiff contends that defendant was negligent in routing the check by way of Minneapolis and thus delaying presentment 24 hours, as it would have been presented for

payment on the 28th if it had been sent direct to Gregory from Sioux City; also that Federal Reserve Bank was negligent in sending the check direct to the drawee bank.

Defendant insists that routing through the Federal Reserve Bank, where Gregory bank kept its reserve, was the customary and regular course and in accordance with banking regulations.

The effect of the dealings between the O'Neill bank and defendant under the acknowledgment above quoted is that defendant received the check for collection, and outside the question of routing, no question is made but that the two Minneapolis banks were proper agents to make the collection. It follows that the Sioux City bank is not liable to the O'Neill bank, nor its assignee, for the negligence, if any, of those two banks. *First Nat. Bank v. Sprague*, 34 Neb. 318.

Whether or not there was negligence of defendant in routing the check as it did is extremely doubtful in view of the regulations of the Federal Reserve Board and the universal custom in that regard; we do not deem it necessary to decide this question. Assuming the negligence charged, plaintiff has failed to show that such negligence was the proximate cause of the loss; this he is required to do in this kind of action. *State Bank v. Carroll*, 81 Neb. 484. In this respect the case differs from those which seek to charge an indorser, in which class of cases the discharge follows an unreasonable delay irrespective of any loss to the indorser. *First Nat. Bank v. Miller*, 37 Neb. 500. It appears, it is true, that there was in the Gregory bank on March 27, 28, *and 29*, $1,400 from which this check *might* have been paid, but this is far from proving that it would have been paid if it had been presented on the 27th or 28th; the situation was the same on the 29th as upon the previous days. Furthermore, on those days there were checks presented for payment in an amount in excess of $2,200, and it cannot be maintained that the check in question had any priority over the others presented at the same time. On the 27th checks for $429.06 were presented by

the Federal Reserve Bank, and if paid in cash would have reduced the balance to about $1,000, but these checks were covered by the draft of the 29th for $2,210.01 which included the check in question. It further appears without dispute that for over three months prior to this transaction the other banks of Gregory would not accept the drafts of the First National except for collection; also that for nine years it had been the custom with the Gregory banks to settle clearing balances in excess of $20 or $25 by draft, and that if the check in question had been presented by one of the other Gregory banks a draft would have been accepted in payment. Thus, it appears that there is no evidence upon which to base a finding that the check would have been paid in cash had it been presented on the 27th or 28th. In this situation a finding that the delay of 24 hours was the proximate cause of the loss is not warranted and the action of plaintiff as assignee must fail.

It is further contended that appellant was negligent in selecting the Federal Reserve Bank, knowing that the latter would send the check direct to the drawee bank which, prior to enactment of chapter 29, Laws 1925, of this state, was held to be an act of negligence (*Western Wheeled Scraper Co. v. Sadilek*, 50 Neb. 105); but by the terms of its deposit with defendant the O'Neill bank expressly consented to that procedure and its assignee is bound thereby. It also agreed that the check might be charged back if any bank remit therefor by draft which was dishonored. Surely, in the face of this contract, the O'Neill bank could not recover from defendant and its assignee has no greater right. It appears to us that plaintiff has mistaken his legal rights, and could have successfully defended an action by the O'Neill bank to charge him as indorser of the check in question.

It follows that the order adopting the opinion of the commission and such opinion must be set aside, and the judgment of the district court reversed.

REVERSED.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM. 1928.

L. O. KEEDICK, APPELLANT, V. EDWARD J. BROGAN, APPELLEE AND CROSS-APPELLANT: FEDERAL LAND BANK OF OMAHA, APPELLEE.

FILED JANUARY 24, 1928. No. 25351.

1. **Contracts**: VALIDITY. Where one is so intoxicated as to be so far deprived of his reason and understanding as to render him incapable of knowing the character and consequences of his act, he is defined to be excessively intoxicated.
2. ———: RESCISSION. "To avoid a contract on the ground of excessive intoxication, one must rescind the contract within a reasonable time after recovering his senses." *Case Threshing Machine Co. v. Meyers*, 78 Neb. 685.
3. ———: ———: MENTAL CAPACITY: BURDEN OF PROOF. Where it is sought to cancel an instrument for the want of mental capacity of the grantor to make it, the burden of proof is on the one who alleges the mental incapacity. *Brugman v. Brugman*, 93 Neb. 408.
4. **Deeds**: EXECUTION: MENTAL CAPACITY. In determining the mental capacity of the grantor to execute an instrument, if it clearly appears that when the instrument was executed the grantor had the capacity to understand what he was doing, knew the nature and extent of the property dealt with and what he proposed to do with it, and had the capacity to decide intelligently whether or not he intended to make the conveyance, it cannot be said that he was incompetent to execute the instrument. *Brugman v. Brugman*, 93 Neb. 408.
5. **Mortgages**: VALIDITY. Evidence examined and *held* insufficient to show mental incapacity of the grantor at the time of the transaction and to require a reversal of part of the judgment

on that point, and further *held* to show that the fraud, if any, practiced on the maker while intoxicated was later waived.

APPEAL from the district court for Dodge county: FREDERICK W. BUTTON, JUDGE. *Affirmed in part, and reversed in part, and remanded, with directions.*

Courtright, Sidner, Lee & Gunderson, and *McIntosh & Martin,* for appellant.

Dolezal, Spear & Mapes, J. J. Gleeson and *J. C. Cook,* for cross-appellant.

E. F. Dougherty, J. L. Cutright and *E. J. Robins, contra.*

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

GOSS, C. J.

This is a suit by plaintiff to foreclose a real estate mortgage. Federal Land Bank of Omaha intervened to foreclose its mortgage. From a decree adverse to plaintiff, he appeals.

Neither the appellant nor Edward J. Brogan, the defendant, now appellee, questions, in brief or in oral argument, the decree in favor of the Federal Land Bank, in which the court found that the bank obtained its mortgage in good faith without notice or knowledge of any mental infirmity or incapacity of Brogan and that the sum of $8,000 was actually paid by the intervener to him.

Edward J. Brogan was the owner of 120 acres of land, free from incumbrance, in Dodge county. When he made application for the loan from the Federal Land Bank July 19, 1921, he recited that he was 45 years old, a widower for three years, and lived on the land with his five boys, ranging from 8 to 21, and with his two girls, ranging from 3 to 16 years of age. In 1917 he had bought 160 acres near Julesburg in eastern Colorado. This was only partly paid for. In the summer of 1920 he was induced by the Bentley Land Company, which had offices in Sidney, Ne-

braska, and in Burlington, Colorado, to go to Colorado to look at land with a view of buying more. His 20-year-old son, James, accompanied him. On August 24, 1920, he signed two contracts of purchase of land, one for 160 acres and one for 320 acres. He paid no money, but for the quarter section he agreed to pay $90 an acre or $14,400 in payments described; and for the half section he agreed to pay $77.50 an acre or $24,800, of which $600 in Liberty bonds were to be forwarded to Bentley Land Company at once and the remainder in payments described. He then returned to his home at North Bend, taking with him the duplicate copies of his contracts. J. A. Bentley, the president of the land company, testified he told Brogan he did not own the quarter section and did not know whether he could deliver it but had it listed and perhaps could. On August 28 the company wrote Brogan a letter, returning the two notes given by him on the quarter section contract, saying they were unable to deliver it at the price and that they had marked the contract as canceled. The letter stated that they had not yet received the Liberty bonds. Brogan took the letter and contract to his attorney and on August 30 the attorney wrote the company that Brogan would not consent to the cancelation and forwarded the Liberty bonds to the company to apply on the contract for the half section. After some further fruitless correspondence, Brogan employed a Fremont lawyer and brought suit for damages against the company at Sidney for breach of contract; but on March 1, 1921, the matter was compromised by the parties entering into a contract by which the company sold Brogan a different quarter section at $82.50 an acre or $13,200 and he agreed to give a first mortgage on his Dodge county farm for $6,600 and a like mortgage on the Colorado land. The damage suit was dismissed and the mortgage on the Dodge county farm was executed April 20, 1921, and recorded. During the next year the record shows that Brogan was seeking an advantageous sale of his home farm or a large loan to relieve himself of financial pressure. April 24, 1922, he mortgaged

this land to the Federal Land Bank for $8,000 as a first lien and gave a new mortgage, acknowledged June 29, 1922, as a second lien, to J. A. Bentley for $13,297, subject to the Federal Land Bank mortgage. On June 20, 1922, Bentley assigned this mortgage and the note secured thereby to plaintiff. On June 7, 1923, the county court of Dodge county made an order appointing Brogan's sister, Catherine Langdon, his guardian, on the ground of mental weakness, but for some reason the letters of guardianship were not issued to her until November 28, 1924. As such guardian she appeared for him in this suit.

The answer of the guardian alleged the incompetency of Edward J. Brogan during all the transactions referred to; alleged that Bentley procured his intoxication and overreached Brogan in the matter of the sale of the Colorado lands; that Keedick is a brother-in-law of Bentley and had knowledge of the premises and aided Bentley to contrive to defraud Brogan, and that plaintiff is not an innocent purchaser.

According to the record, the trial began December 21, 1926 (probably intended for 1925) and ended January 23, 1926. In the decree the court found that at and before the times in issue Brogan was mentally weak and incompetent to enter into the transactions with Bentley, and that Bentley and his land company caused him to be intoxicated and by undue influence induced him to enter into the contracts and to execute the note and mortgage sued on, and that ever since the time of the transactions Brogan has been incompetent to ratify the transactions or to waive the fraud practiced upon him, and that plaintiff is not an innocent purchaser. The decree found that the Federal Land Bank mortgage was obtained in good faith for value and that the $8,000 was actually paid to Brogan.

The question of intoxication at the time of the inception of the dealings between Bentley Land Company and Brogan does not seem to be very controlling or important in view of these facts which we find from the record to be facts: Brogan had been a farmer all his life; he was not

unfamiliar with Colorado land, having owned land there since 1917; shortly after his return from the trip in question he refused to yield to Bentley's written request to cancel one of the contracts, and was advised therein, and his correspondence was conducted, by a lawyer whose letters indicate that he must have received his data from a then sober man; later another lawyer brought suit in Sidney for damages for breach of the same contract, obtained for Brogan a satisfactory adjustment of controversies, and it may well be said that, if it was then apparent to sober and reasonable men that the repudiation of the Colorado transactions should be sought on account of intoxication of Brogan, it would have been done then and there; there are in the record several letters written in his own hand as well as details of other acts by him strongly corroborating knowledge of what he had done, at a time it is now claimed he was intoxicated; and at least in 1920 and 1922 he went out in person and with others harvested the grain grown on the Colorado land. These facts are definitely indicative of ratification as against the plea of intoxication. Where one is so intoxicated as to be so far deprived of his reason and understanding as to render him incapable of understanding the character and consequences of his act, he is defined to be excessively intoxicated. "To avoid a contract on the ground of excessive intoxication, one must rescind the contract within a reasonable time after recovering his senses." *Case Threshing Machine Co. v. Myers,* 78 Neb. 685; *Johnson v. Harmon,* 94 U. S. 371. We think the court erred in holding that the dealings between Bentley and Brogan should be voided by reason of intoxication. Brogan failed to prove the necessary facts by a preponderance of the evidence and he ratified and failed to rescind the contracts when sober.

As to the defense of incompetency, this must be considered in the light of the following well-established rules of law. Where it is sought to cancel an instrument for the want of mental capacity of the grantor to make the instrument, the burden of proof is on the one who alleges the

mental incapacity. *Brugman v. Brugman*, 93 Neb. 408, *Clark v. Holmes*, 109 Neb. 213. In determining the mental capacity of the grantor to execute an instrument, unless it appears that when the instrument was executed the grantor lacked the capacity to understand what he was doing, did not know the nature and extent of the property dealt with and what he proposed to do with it and lacked the capacity to decide intelligently whether or not he desired to make the conveyance, it cannot be said that he was incompetent to execute the instrument. *Brugman v. Brugman, supra; Clark v. Holmes, supra; Schley v. Horan*, 82 Neb. 704; *West v. West*, 84 Neb. 169.

Guided by those well-recognized principles, we have read the voluminous record and have studied the briefs to see where the truth lies in pursuance of our duty to try the case *de novo*. We have sought to find in the evidence the sure foundations for the decree of the trial court finding that Brogan was mentally incompetent at the time of the transactions. The court filed a memorandum opinion in which he said that the fact that Brogan was a mere child mentally became evident from the time he gave his testimony. From this brief mention he proceeds to the subject of his intoxication. While we do not have the opportunity to see the witness as did the trial court, yet it should be noted that his mental capacity is to be tested as of the date the transactions occurred and by what he said and did then, rather than years afterwards on the trial. It would have aided us in our investigation of this particular branch of the subject if the court or counsel for appellee in their brief had specifically pointed out such convincing evidences of mental incapacity as would support the memorandum opinion and the decree and sustain the burden of proof. We have perused the evidence of their witnesses showing him to be an improvident farmer and that he overbought machinery and supplies, that he mumbles to himself, talks in his sleep, gets up in the night and walks around, does little farm work except in the garden, sometimes for days would not talk to his family, slept out in

the car for a time, had sunstroke twice and the flu once, and would ask the boys, when having insurance written, the number of rooms in the house and the number of animals (no disclosure as to whether he was then intoxicated). One witness, described as one of the leading alienists of the state, testified to two examinations and tests of Brogan, beginning about nine months prior to the trial, and assigned Brogan "the mental age of a child of eight years and eight months." This witness, in answer to a hypothetical question, objected to because not reflecting the testimony, expressed the opinion that Brogan was incompetent and had been so for ten years. On cross-examination this expert frankly admitted that he knew he was testing Brogan as to his competency in connection with the land transaction in controversy and that he assumed Brogan knew it because he asked him about it; admitted that it would make some difference if it was proved that he wrote coherent letters and furnished coherent, detailed information as to his financial affairs to another; admitted that his condition indicated that he was progressively worse mentally, and conceded that his opinion, expressed on direct examination, was influenced by the history of alcoholism. Another witness, who is a general physician, likewise expressed the opinion, in answer to the hypothetical question and from examinations of him, that he was incompetent.

Aside from the so-called expert opinions, the other witnesses in ultimate effect indicated qualities in Brogan either that inhere in many sane men, or that are found in improvident men, or characteristics disclosed by men who are affected temporarily by the influences of liquor. Several of these witnesses are the children of Brogan, who were not disinterested witnesses. The value of their testimony is diminished, if not discredited, by the fact that on April 11, 1921, they petitioned the county court of Dodge county to appoint Edward J. Brogan their guardian to care for their property in Nebraska and Colorado; and on the same day he was, on their petition, found to be "a

suitable person to act as such guardian," was appointed, gave bond and received his letters of guardianship. The letters written by Brogan were coherent, and the testimony of the agent for the Surety National Farm Loan Association of Dodge, through whom Brogan arranged the $8,000 loan held by the Federal Land Bank and who dealt with and for Brogan in getting the Bentley claims rearranged, shows that Brogan was perfectly competent and rather clever for a man of his opportunities. Tested by the principles usually applied, we are of the opinion that the representative of Brogan has not sustained the burden of proving Brogan incompetent, and that the court erred in that respect as it did in the finding as to his intoxication.

It follows that it is immaterial whether plaintiff is an innocent purchaser, that he is entitled to a lien for the amount of his mortgage debt, and that the lien of the Federal Land Bank is further and more fully confirmed, on all legal and equitable grounds, than it was by the court's decree and on the grounds upon which he allowed it.

The judgment of the district court is affirmed as to the Federal Land Bank's first lien, and is reversed and remanded as to plaintiff, with directions to enter a decree for the plaintiff giving him a lien subject only to that of Federal Land Bank.

AFFIRMED IN PART, AND REVERSED IN PART.

Note—See Contracts, 54 L.R.A. 440; 2 L.R.A. (n.s.) 666; 25 L.R.A. (n.s.) 596; L.R.A. 1915B, 1121—6 R.C.L. 595; 2 R.C.L. Supp. 160; 6 R.C.L. Supp. 399—13 C. J. 757, n. 27.

VAN E. PETERSON, RECEIVER FARMERS STATE BANK, BARTLEY, APPELLANT, V. BERNARD SCHABERG, APPELLEE.

FILED JANUARY 24, 1928. No. 26168.

1. Fraud: FALSE REPRESENTATIONS. To maintain an action for damages for false representation, the plaintiff, in substance, must allege and must prove by a preponderance of the evidence

the following elements: (1) What representation was made; (2) that it was false; (3) that the defendant knew it was false, or else made it without knowledge as a positive statement of known fact; (4) that the plaintiff believed the representation to be true; (5) that the plaintiff relied on and acted upon the representation; (6) that the plaintiff was thereby injured; and (7) the amount of the damages.

2. ———: INSTRUCTIONS. An instruction to a jury in an action for damages for false representation, which states in substance or in language naturally understood by a jury to mean that the defendant is not responsible for a misstatement of fact if he made it in good faith, is erroneous.

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

Perry & Van Pelt, for appellant.

Claude S. Wilson and *Albert S. Johnston, contra.*

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

GOSS, C. J.

This is an action for damages for alleged deceit. It is based on alleged false representations as to notes on which the Farmers State Bank of Bartley loaned and lost. The suit was commenced in Lancaster county by the bank while it was a going concern and was prosecuted by the receiver who was appointed by the district court for Red Willow county, where the bank was located. From a verdict and judgment for defendant, the receiver appealed.

Bernard Schaberg, the defendant, during the period involved, was president of the said Farmers State Bank, of the First National Bank of Pilger, and of the First National Bank of University Place, but lived in University Place. He had formerly lived in Pilger.

The petition alleges that the defendant as president of the bank supervised and assisted generally in the conduct of the business of the bank; that between April 23, 1919, and November 15, 1921, he mailed to the bank and direct-

ed the cashier to discount and credit to the First National Bank of University Place certain notes of several parties named, aggregating $19,800, and that they were so discounted; that renewals were made from time to time, and that the last renewals made at various dates between April 21, 1922, and January 2, 1923, crediting payments made thereon, left unpaid the several notes of Howell Rees, L. D. Ohman, Walter M. Rees, S. J. Pester, Carl Spoering, R. E. Rees, and Wm. J. Rees, amounting to a total of $22,279.03; that the defendant, when the notes were accepted, represented by letters to the bank that the makers of the notes, with the exception of Pester (who lived at University Place), were wealthy farmers living near Pilger, and that they, including Pester, were in good financial circumstances, and that each and all of said notes were perfectly good and first class paper; that the letters were submitted by the cashier to the directors, and that like oral representations were made to the directors at or about the times the renewal notes were accepted; that the bank and its directors relied on the representations and on defendant as the bank's president to guard its interests and so accepted the notes and renewals; that the representations were untrue, the notes were not perfectly good, or first class paper, the makers were owing other creditors large sums of money they were unable to pay at the time the representations were made, all of which was unknown to the bank until about January 21, 1923; that after diligent effort plaintiff has been unable to collect on said notes, has been damaged by reason of the defendant's acts in the sum named and prays judgment therefor.

The defendant admits in his answer that the credits were given for the original notes as directed by the defendant, and alleges that in making the loans he acted in good faith and in the exercise of his best judgment; that any statements either oral or written made by him were but good faith expressions of genuine opinion as to the financial standing of the makers and were so considered by the officers and directors of the bank, to whom he disclosed all

the information he had; that the renewals were made by other officers of the bank, in transactions in which he took no part, and were made upon thorough investigation by such other officers, who relied upon their own judgment in making the renewals.

For reversal, the appellant relies on errors of the court in giving and refusing instructions, and in permitting the defendant to testify that at the time he sent the notes to the Bartley bank he believed them good.

At the outset, it is well to chart the elements necessary in such an action before damages can be recovered: First, the plaintiff should allege and prove what representation was made; second, that it was false; third, that the defendant knew it was false, or else he made it without knowledge as a positive statement of known fact; fourth, that the plaintiff believed the representation to be true; fifth, that the plaintiff relied on and acted upon the representation; sixth, that the plaintiff was thereby injured; seventh, the amount of the damages. *Stetson v. Riggs,* 37 Neb. 797; *Foley v. Holtry,* 43 Neb. 133; *Scovel v. Isham,* 113 Neb. 238. In explanation of the third element, as stated above, containing the alternatives charging either that the defendant knew the representation to be false or else made it without knowledge as a positive statement of a known fact, it is important to note the opinion in the *Foley* case above where Judge Irvine, after reciting the five elements from the *Stetson* case above, says: "To these requirements the courts formerly added another, to wit, that defendant must have known that the representations were false. A more accurate statement in view of the later decisions would be that the defendant must either know that the representations were false, or else they must be made without knowledge as positive statements of known facts. The rule as thus formulated practically charges the defendant with notice of the truth in all cases where he makes positive representations of existing facts." For a generation we have been committed to this rule, and in the *Scovel* case above it was specified as the third element to be al-

leged and proved. In final effect, the third element above stated is merely an amplification of the second. If the pleadings allege and the proofs show that one made an actionable false representation, it would follow that he either knew it was false or else he made it without knowing that it was false but as a positive statement of a known fact, and thus, for the purposes of an action, made a false statement. So, while in a case like this, it is not indispensable to state one or the other propositions of this third element in terms in the pleading or in the instructions to the jury, yet we think it a good practice to do so. It helps to clarify the case for the jury.

Appellant assigns, among others, error in the second paragraph of the court's charge to the jury. We quote it in full:

"Instruction No. 2. Law of the Case.

"In order to recover, the plaintiff must prove by a preponderance of the evidence that the aforesaid representations were made; that they were false; that the Bartley bank relied upon them and took or renewed the notes in reliance thereon and was damaged thereby.

"The defendant, while president of the Bartley bank, owed the said bank the duty of good faith and the obligation to disclose all the facts within his knowledge in respect to the financial responsibility of the makers of the notes rediscounted and renewed by the Bartley bank. The defendant, as the president of the Bartley bank, was bound only to use reasonable skill, care, and diligence in the discharge of his duties as president, and is not liable for honest mistakes made by him in inducing the bank to accept or renew notes. He is not a guarantor of the payment of the notes in question. He cannot, however, foist uncollectable notes upon his bank by misrepresentation concerning them and avoid personal liability for so doing. The fact that the bank actually suffered a loss is not, of itself, sufficient to justify you in finding that the defendant did not use reasonable skill, care and diligence in placing these notes in the bank and that he acted fraudulently

in so placing them. The point to be considered is the financial condition of the makers of the notes at the time the representations were made. You can only determine the defendant's good faith by a consideration of all the facts and circumstances in respect to the taking or receiving of the notes in question.

"If the defendant acted in good faith he is not responsible for the loss upon the notes, if he did not act in good faith he is responsible.

"He is not responsible for an honest expression of opinion; he is for a deliberate misstatement of fact."

The headnote of this instruction is criticized because to the lay mind it would indicate that the other instructions which had other headings were not the law of the case. We think it doubtful whether it would have that effect. The other paragraphs were more appropriately labeled with headings to indicate the subjects discussed in them. However, we do not commend the practice of using headnotes with charges to the jury. It requires unusual skill and watchfulness to make them inclusive of all subjects treated of, and we can imagine a case where it might mislead a jury.

The text of this instruction, however, contains the crux of the differences between the parties as shown by various assignments of error and by the arguments of counsel. The appellee's brief says: "Instruction No. 2 given by the court goes to the very heart of this case. We think, in the light of the authorities, that it states the law correctly. In the final analysis, this instruction tells the jury that the good faith, or lack of good faith, on the part of the defendant, in his capacity as president of the bank, is the real issue in this case."

In the front of the particular instruction the court correctly stated the element of falsity of the representations as a fact necessary to be proved by a preponderance of the evidence, but in the next to the last sentence he stated that if the defendant acted in good faith he is not responsible for the loss upon the notes; and in the last sentence

of the instruction he stated that the defendant is liable for a "deliberate" misstatement of fact. Under the law, while good faith may have a tendency to soften the results as to an opinion which is nevertheless erroneous, yet it does not mitigate the effect of a misstatement of a fact acted upon to the actor's injury. Whether the misstatement of that fact be deliberate or spontaneous makes no difference. Thus, the instruction was prejudicially erroneous. In addition to the cases in our court heretofore cited as bearing on this point, we call attention to *Phillips v. Jones*, 12 Neb. 213; *Moore v. Scott*, 47 Neb. 346; *Willard v. Key*, 83 Neb. 850. See, also, 12 R. C. L. 347; 26 C. J. 1109, sec. 39.

Errors are assigned based on the refusal of the court to give certain instructions requested by plaintiff on his theory of the law heretofore discussed. It would take too much time and space to discuss these in detail, as appellant has requested in his brief. Some of them were correctly stated and some were overdrawn, but the propositions of which they treated were properly charged by the court. Most of them centered around the main element already disposed of. On a retrial these questions are not likely to arise.

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

REVERSED.

IN RE ESTATE OF JAMES A. WALLER. FRIDA WALLER, APPELLEE, V. CHARLES T. DICKINSON, ADMINISTRATOR, APPELLANT.

FILED JANUARY 24, 1928. No. 24823.

1. **Husband and Wife: ANTENUPTIAL AGREEMENTS.** Good faith is a cardinal governing principle in an antenuptial agreement.

2. ———: ———: **GOOD FAITH.** A surviving illiterate wife asserted her right to a widow's lawful share in her deceased husband's estate, notwithstanding the terms of an antenuptial agreement which gave her less than such widow's share. Her

husband's estate was of the agreed value of $22,000. Under the written agreement she was to receive $1,000 in full satisfaction, and waive any and all rights to participate further in any part of the estate. *Held*, that the agreement was inequitable and unjust, and *held*, that the widow was entitled to a widow's share in the estate as provided by law, but that she must remit therefrom the sum already paid on the antenuptial agreement.

3. Appeal: TRIAL DE NOVO. When an action in equity is appealed, it is the duty of this court to try the issues *de novo* and to reach an independent conclusion without reference to the findings of the district court. Rev. St. 1913, sec. 8198 (now section 9150, Comp. St. 1922). But, when the evidence on material issues so conflicts that it cannot be reconciled, "this court will consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite. *Shafer v. Beatrice State Bank*, 99 Neb. 317.

APPEAL from the district court for Douglas county: ABRAHAM L. SUTTON, JUDGE. *Affirmed as modified.*

Charles T. Dickinson, pro se.

J. J. Friedman, contra.

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

DEAN, J.

James A. Waller and Frida Durkran, both over 60, were married June 1, 1922, and from thence for about a year they lived together in Omaha. Both of the parties had been married before and both had children by the former marriage. December 31, 1923, Mrs. Waller obtained a decree of divorce on the ground of extreme cruelty, and under the decree of divorce the defendant paid $1,000 to her as alimony and all the costs and $150 as counsel fees. All payments were made within the time designated in the decree. The court decreed, however, that the alimony, when paid, "shall be in lieu of all dower or other right which the plaintiff has or claims to have in the defendant's

property." February 12, 1924, or less than two months after the decree of divorce was rendered, James Waller died. The plaintiff now contends that she is entitled to a widow's share of the Waller estate which, as shown by a stipulation, is of the approximate value of $22,000.

By his former marriage Waller had only two children, namely, Mrs. Bell Miller, 42, and Mr. James E. Waller, 40, both residents of Anton, Colorado. Charles T. Dickinson, as administrator, contends that the above-named daughter and son of Waller are the decedent's sole heirs at law and are entitled to all of the Waller estate, and that Mrs. Waller, the plaintiff, is entitled to no part of the estate except that which she had already recovered in the divorce suit. The county court found against the administrator and he prosecuted an appeal to the district court.

On appeal the judgment of the county court was affirmed, and under a decree dated March 19, 1925, the plaintiff was allowed to participate in the distribution of the estate in the following amounts namely, $100 a month for support for one year from the date of Waller's death, and $500 in lieu of homestead, and $200 in lieu of personal property. The court also found that the plaintiff "was entitled to her distributive share in the property of the deceased as his widow." From the decree of the district court, the defendant administrator has prosecuted an appeal to this court.

The record discloses an antenuptial contract which was executed by the parties. From this instrument it is made to appear that, if Waller's wife survived him, she should be paid from his estate $1,000 within six months after his death in full of all rights of dower, distributive share or other interest in and to his estate.

The defendant, Charles T. Dickinson, designated as the "administrator with the will annexed" of the Waller estate, directs attention to the fact that the antenuptial agreement in express terms also provides that, if either party should obtain a divorce or if the plaintiff should refuse to live with him as his wife, the provision therein made for

the payment of $1,000 to her shall be null and void, and that Waller's estate shall be thereby relieved from such payment or any part thereof. The administrator admits the marriage, but pleads the fact that the divorce was granted December 31, 1923, and insists that the decree became final the 30th day of June, 1924, and that the applicant is not, therefore, the widow of the decedent.

Clearly the argument of counsel is not sound in respect of the finality of the decree. Under the facts and the law, the decree could not become final until the expiration of six months after the rendition of the decree of divorce. Section 1555, Comp. St. 1922, so far as applicable to the facts before us, among other provisions, contains this: "A decree of divorce shall not become final or operative until six months after trial and decision." In the present case Mr. Waller died less than two months after the divorce decree was rendered. Under our decisions in like cases, the plaintiff, by reason of the death of Waller within six months after the divorce, became restored to all her marital and property rights in Waller's estate, and from the fact that the decree of divorce never became final she is the surviving widow of the decedent.

True, the plaintiff signed the antenuptial agreement, but the court found that it was procured by fraud and the evidence supports the finding. The antenuptial agreement consists of more than two full pages of legal cap, and was written in English. Plaintiff, then a recent arrival from Germany, could neither read nor write nor understand the English language and did not know what her lawful marriage rights were at the time. She testified that counsel for Mr. Waller read the contract to her, but that she understood no part of what he read nor what they were talking about. The language of the agreement is somewhat involved and intricate and to a layman it would perhaps be in part meaningless. When interrogated in respect of the time when she was told about the contents of the contract, plaintiff answered: "After they went out of Mr.

Dickinson's office and went to Brandeis. Q. Was that after the contract was signed? A. Yes, sir."

The antenuptial agreement appears to be unfair and unjust in its provisions as they affect the marital rights of Mrs. Waller. The weight of the evidence sustains this view. In cases in this class the rule is that it is the court's bounden duty to carefully examine the contract and see that no injustice is done to either party. And more especially should this beneficent rule be applied for the protection of the ignorant, the aged and infirm, or one of tender years, or a person having an imperfect understanding or no understanding at all of the language in which the instrument is drawn.

The administrator argues that, when the plaintiff accepted the final instalment of the $1,000 under the antenuptial agreement, she was thereby estopped from prosecuting her claim to participate in the estate of Waller as his widow. But it appears that before Waller died he had paid but one instalment of alimony, and that the plaintiff was in Chicago, living with some relatives, when the second instalment was paid to her, and she did not then know that he was dead, nor did she find out that he was dead until some time after the final instalment had been paid. When she learned of Waller's death she applied to the county court of Douglas county to have her status recognized as Waller's widow, and tendered back the $1,000 alimony as a credit on her distributive share of the estate, and made application to have such statutory allowances as the law provides for a surviving spouse. And the trial court rightfully recognized and established her rights in the premises.

The question in respect of the rights of the respective parties, and upon whom rests the burden of proof under the terms of an antenuptial agreement, under section 1555, Comp. St. 1922, is well settled in this jurisdiction; and, under the decisions, the burden is on the party seeking to establish the agreement. In the present case the Waller

estate relies upon the agreement for its defense against liability; hence, the burden rested on the defendant estate.

In *Holmberg v. Holmberg*, 106 Neb. 717, we said: "Where a divorce was granted and one of the parties died before the expiration of six months thereafter, such divorce decree never became effective, and as to such divorce the action abated." And in the body of the *Holmberg* opinion this language is used: "Section 1606, Rev. St. 1913 (now section 1555, Comp. St. 1922) provides that the decree of divorce shall not become operative for six months after trial and decision, except for purpose of review or appeal, and if no such proceedings have been instituted the district court may at any time within six months vacate or modify its decree. The cause of action for divorce not surviving, it abated at the death of the husband."

In *In re Estate of Enyart*, 100 Neb. 337, this rule was adopted by the court: "Where the provision made for the intended wife by an antenuptial contract is grossly disproportionate to the interest in the prospective husband's estate which the intended wife would acquire by operation of law in case a marriage took place, the burden rests upon those claiming the validity of the contract to show that a full and fair disclosure was made to her before she signed it of the extent and value of the property, or that she was aware to all intents and purposes of the nature, character and value of the estate which she was relinquishing if the marriage took place."

That good faith is the cardinal principle in an antenuptial contract is the apt observation of a writer on this subject. He goes on to say that, if the provision made in the contract for the prospective wife is unreasonably disproportionate to the husband's financial worth, the presumption of designed concealment is raised, and the burden of disproving the charge rests upon the husband. 21 Cyc. 1251; *Warner's Estate*, 207 Pa. St. 580; *Russell v. Russell*, 60 N. J. Eq. 282.

It plainly appears to us that Waller wickedly availed himself of the ignorance of his intended wife, and of her

lack of understanding of the English language, and her lack of information in respect of the office of the antenuptial agreement, and thereby perpetrated a grossly outrageous fraud that no court, under the established facts, will perpetuate by its decree. The money which Waller wrongfully induced the trustful plaintiff to accept under the agreement is a mere bagatelle in respect of property rights, as compared with the property rights which would have been hers, as his widow, under the marriage laws of this state, but for the antenuptial agreement in suit.

It may be noted that the agreement in suit was evidently prepared by Waller for a former intended wife with whom he had apparently been negotiating for a marriage. The name of the former intended appears as the second party to the contract eight or ten times in the space allotted for the prospect that he formerly had in mind. In the same agreement, which was signed by the plaintiff, and upon which the defendant estate bases its claim, the name of Mrs. Frida Durkran, the plaintiff here, was signed in every space above the erased name of the former intended. From this it fairly appears that Waller was no novice in his search for a helpmeet.

In respect of the $1,000 that came into the hands of plaintiff from the Waller estate, the plaintiff expresses a willingness, in order to do equity, that the $1,000 may be charged against her share of the estate to which the court's decree finds she is entitled. But we do not think the plaintiff should be made to suffer on the ground that she accepted the second instalment of the $1,000 under the facts herein pointed out, in view of her offer to tender the $1,000 alimony back to the estate on the condition above noted.

In view of the always significant fact that the trial court saw and heard the witnesses and observed their demeanor upon the witness-stand and had a better opportunity to pass upon the weight of the evidence, it is not for us to say that the court erred in its judgment. *Greusel v. Payne*, 107 Neb. 84, and cases there cited.

Finding no reversible error, the judgment of the district

court is modified and affirmed, and remanded, with directions that the sum of $1,000 heretofore paid to plaintiff be deducted from her share of the estate.

AFFIRMED AS MODIFIED.

ALEXANDER H. GORDON, APPELLANT, V. FRANCIS W. LOWRY, COUNTY CLERK, ET AL., APPELLEES.

FILED JANUARY 24, 1928. No. 25992.

1. **Trial.** It cannot be controverted that in a proper case, a court has jurisdiction to determine relevant questions of disputed fact and to apply the law thereto when the fact is so determined.
2. **Constitutional Law:** JUDICIAL FUNCTIONS. The judicial function is to apply the law in controverted cases and this involves the investigation of evidence as a basis for that determination.
3. ———: LEGISLATIVE FUNCTIONS. The legislature is not clothed with authority to infringe upon the exclusive province of the judiciary in the matter of the investigation of facts which have to do with the determination of controverted facts in litigation.
4. ———: JUDICIAL AND LEGISLATIVE FUNCTIONS. An inquiry in respect of the relevancy of material facts in litigation devolves upon the judicial department of the government, and not upon the legislative department.
5. **Evidence:** POPULATION. The population of a governmental subdivision of the state is not conclusively determined by the reports of the United States census.
6. **Constitutional Law.** Chapter 91, Laws 1925, is a legislative act which purports to usurp judicial power. It follows that the act is unconstitutional and therefore void.

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

Miller & Randall and *Barlow Nye,* for appellant.

N. P. McDonald, contra.

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

DEAN, J.

This suit was brought to enjoin the issuance, or delivery, of a salary warrant to a county officer. The prayer of plaintiff is in the usual form for general and equitable relief. Plaintiff demurred to the defendants' answer. The demurrer was overruled. The plaintiff electing to stand on his demurrer and refusing to plead further, on motion of the defendants for judgment on the pleadings, the court found for the defendants and plaintiff's action was thereupon dismissed with the costs taxed against the plaintiff.

Following is the plaintiff's contention as pleaded in his petition: That any sum paid to county attorney Reed, as salary, in excess of $125 a month is unlawful on the ground that the county had a population of less than 24,000 inhabitants during all of the time material to this controversy.

In support of his argument, the plaintiff in his brief cites chapter 91, Laws 1925. The act follows:

"If, during the periods elapsing between censuses taken under supervision of the federal government, there arises any question as to the present population of any civil subdivision of the state of Nebraska, the population stated in the last federal census for such civil subdivision shall govern and control."

We do not think the above cited statute is controlling for the reasons following: First, it constitutes an intrusion into the functions of the judicial department of the state government; and second, it infringes upon and is in conflict with section 1, art. II, of the Constitution of Nebraska, which reads:

"The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons being one of these departments, shall exercise any power properly belonging to either of the others except as hereinafter expressly directed or permitted."

And the question in respect of the population of the state, or of the population of any of its subdivisions, is purely a

question of fact to be determined by the court the same as other fact questions.

For their answer, among other allegations, the defendants pleaded that, for all times material to this suit, Buffalo county had a board of seven supervisors; that an investigation was had by the board, in respect of the population of Buffalo county, to the end that the salaries of county officers and deputies, and county employees as well, might be determined; that under such investigation the supervisors adjudged and determined that the county, on November 21, 1924, had a population of 25,000 and upward, and that its determination was not appealed from. It is also pleaded that the county board, pursuant to the enumeration made by the board, fixed the salary of the incumbent county attorney at $1,800 per annum payable $150 a month.

The defendants argue that Buffalo county, at all times material to this suit, had a population of 25,000 inhabitants, and that the county attorney's salary, therefore, comes within the meaning of section 2372, Comp. St. 1922, which, *inter alia*, provides that, "in counties having a population of twenty-four thousand and less than thirty thousand" inhabitants, county attorneys shall be allowed by the county board for their services a yearly salary "not exceeding eighteen hundred dollars."

For the reasons, and under the authority, herein pointed out, we do not think the argument of plaintiff can be sustained. It cannot, of course, be controverted that, in a proper case, a court has jurisdiction to determine relevant questions of disputed fact and to apply the law thereto when the fact is so determined.

In 2 Wigmore, Evidence (2d ed.) sec. 1353, this is said:

"The judicial function under the Constitution is to apply the law in controverted cases; to apply the law necessarily involves the determination of the facts; to determine the facts necessarily involves the investigation of evidence as a basis for that determination. To forbid investigation is to forbid the exercise of an indestructible judicial

function. To make a rule of conclusive evidence, compulsory upon the judiciary, is to attempt an infringement upon their exclusive province." In support of the text, Dean Wigmore cites the following: "Nisbet, J., in *Birdsong v. Brooks*, 7 Ga. 88, 92, holding a statutory recital not conclusive: 'The legislature has no power to legislate the truth of facts. Whether facts upon which rights depend are true or false is an inquiry for the courts to make, under legal forms. It belongs to the judicial department of the government.'"

In *State v. Davis*, 66 Neb. 333, it was held that the United States census reports are not conclusive evidence in respect of the population of a county. And in *O'Connell v. Sioux County*, 94 Neb. 826, we held, in an analogous case: "The latest general census of the federal government does not necessarily control. The salary of the county attorney for any year depends upon the number of inhabitants of the county during that year, and that fact is to be determined, as are other facts in litigation, by the best competent evidence that can be adduced under the circumstances. *State v. Long*, 17 Neb. 502; *Kokes v. State*, 55 Neb. 691; *State v. Davis*, 66 Neb. 333."

Defendants' counsel also points out that the plaintiff's demurrer admits the material facts, and that he is therefore bound by the decision of the board of supervisors the same as he would be bound by a decision of a court. 34 C. J. 1028, sec. 1459; 2 Wigmore, Evidence (2d ed.) sec. 1355.

A recognized authority points out that "any act by which the legislature attempts to exercise authority properly within the scope of the judicial power is unconstitutional and void." 12 C. J. 807, sec. 239.

In view of the facts and the law applicable thereto, we conclude that the judgment of the learned district court is right, and it is therefore, in all things,

AFFIRMED.

Note—See Constitutional Law, 12 C. J. 807 n. 84, 823 n. 27, 824 n. 30, 32—6 R.C.L. 158 et seq.

HENRY A. BARNTS V. STATE OF NEBRASKA.

FILED JANUARY 24, 1928. No. 25733.

1. **Bigamy**: INDICTMENT: PLEADING EXCEPTIONS. "In an indictment for bigamy, an averment that the former husband or wife had not been 'continually and wilfully absent for the space of five years together and unheard from, next before the time of' the last alleged marriage, is not necessary. Such fact, if it exist, is matter of defense to be proved by the accused." *Stanglein v. State*, 17 Ohio St. 453.
2. **Information**: PLEADING EXCEPTIONS. "An information need not negative the exceptions of a statute, which are not descriptive of the offense." *Sofield v. State*, 61 Neb. 600.
3. **Criminal Law**: INDORSEMENT OF WITNESSES ON INFORMATION. Under section 10087, Comp. St. 1922, the court may in the proper exercise of its judicial discretion permit the names of additional witnesses to be indorsed on the information after the trial has begun.
4. ———: REVIEW. Record examined, and *held* that there was no abuse of judicial discretion in allowing the name of the sheriff as a witness to be indorsed on the information during the progress of the trial; further *held* that the record shows no reversible error.

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

A. E. Langdon, for plaintiff in error.

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

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

DAY, J.

Plaintiff in error, hereinafter called defendant, was convicted in the district court for Sarpy county of bigamy and sentenced to the penitentiary for not less than two nor more than seven years. Alleging there was error upon the trial, he has brought the record of his conviction to this court for review.

The information is based on section 9760, Comp. St. 1922, which provides: "If any married person, having a husband or wife living, shall marry any other person, every person so offending shall be imprisoned in the penitentiary not more than seven years nor less than one year. Nothing contained in this section shall be construed to extend to any person whose husband or wife shall be continually and wilfully absent for the space of five years together and unheard from, next before the time of such marriage."

A demurrer was filed based upon the theory that the information was defective in that it did not charge that the first wife had not been "continually and wilfully absent for a space of five years together and unheard from, next before the time of such marriage." The overruling of the demurrer is assigned as error. The precise question here presented was before the court in *Stanglein v. State*, 17 Ohio St. 453, wherein it was held:

"In an indictment for bigamy, an averment that the former husband or wife had not been 'continually and wilfully absent for the space of five years together and unheard from, next before the time of' the last alleged marriage, is not necessary. Such fact, if it exist, is matter of defense to be proved by the accused."

We are disposed to follow the Ohio court in its construction of the statute. Our Criminal Code and practice is largely based on that of Ohio. We think the court did not err in overruling the demurrer.

The negative portions of the statute form no part of the description of the offense. *Carpenter v. State*, 106 Neb. 742. In *Sofield v. State*, 61 Neb. 600, it is held: "An information need not negative the exceptions of a statute, which are not descriptive of the offense."

It is next urged that the court erred in permitting the county attorney, after the trial had commenced, to indorse the name of H. A. Olderog on the information as a witness for the state. It appears that subpœnas for other witnesses had been placed in the hands of H. A. Olderog as

sheriff for service, and as the witnesses could not be served the county attorney asked leave to indorse the sheriff's name on the information, which was granted. Section 10087, Comp. St. 1922, provides in substance that it is discretionary with the court to permit the names of additional witnesses on the information. In construing this statute it has been held that the district court in the proper exercise of its judicial discretion is authorized to permit the names of additional witnesses to be indorsed on the information during the progress of the trial. *Ridings v. State,* 108 Neb. 804. To the same effect, *Frey v. State,* 109 Neb. 483; *Samuels v. State,* 101 Neb. 383. Under the circumstances as disclosed at that time, we think there was no error in permitting the name of the witness to be indorsed on the information.

In considering the above assignment of error, it is proper that another assignment of error be considered with it. It appears that the regular panel of jurors was quashed, and the court, being without a jury, ordered the sheriff to summon 24 good and lawful men as jurors to report forthwith. This order of the court was complied with and the jury so summoned reported for service when the present case was called for trial. It thus appears that, after the sheriff's name was indorsed on the information as a witness, he was to testify before a jury which he had selected. It is not claimed that, at the time the sheriff selected the jury, he or any one else expected he would be a witness in the case, and for that reason there was no occasion to object to his selection of the jury. So far as the record shows in that respect, he performed his full duty impartially.

In making out the state's case, the county attorney called the sheriff as a witness, and, over the objection of the defendant to his testifying as a witness, elicited from him that he had been unable to serve subpœnas on certain witnesses whose names were indorsed on the information; and the further fact that the wife of defendant had called upon him while he was in the custody of the witness in the

Sarpy county jail. It may be questioned whether the objections made were broad enough to include the disqualifications of the witness because he had selected the jury, or to bring it within the rule announced in *Policky v. State*, 113 Neb. 858, but in any event the facts concerning which the witness testified did not contradict in any material manner the testimony of defendant, and if it were error to permit him to testify it would be without prejudice. We think the rule announced in the *Policky* case a salutary one, to which we adhere, but the record in the present case does not call for the application of the rule in that case.

Other matters of defense were presented, such as the intoxication of defendant at the time of the marriage. While there was testimony indicating that some of the members of the wedding party had been drinking, it fell far short of showing that defendant did not understand the contract he was entering into. The record shows that defendant was married to Mae E. Lewman on August 3, 1920; that he lived with her almost continuously until his marriage with Emily H. Shutt July 16, 1926, in Sarpy county; that he secured no divorce from his wife Mae and was not in a position to enter legally into a contract of marriage with Emily H. Shutt.

The testimony is amply sufficient to support the jury in their verdict of guilty. The judgment of the district court is

AFFIRMED.

FRED BORING ET AL. V. GRACE DODD, APPELLANT: BENJAMIN J. CUNNINGHAM, APPELLEE.

FILED JANUARY 24, 1928. No. 25271.

1. **Liens.** Where there is no contract out of which a lien can grow, nor any duty of one party to give to another a charge or lien on real estate, no basis for such lien exists.
2. **Judgment: JURISDICTION.** The jurisdiction of a court in a given action is subject to the qualification that the court can

render only such judgment as does not transcend, in extent or character, the law which is applicable to that class of cases.

3. ———: ———. The jurisdiction of a court to render a judgment in a particular action must be determined and tested by the pleadings and the relief sought.

4. Liens. Where a party to an action claims a lien but does not plead any facts showing a right in him to a lien, the court is powerless either to create the right or to declare a binding lien.

APPEAL from the district court for Hall county: BAYARD H. PAINE, JUDGE. *Reversed, with directions.*

A. L. Joseph, W. P. Mullen, E. P. McDermott and *Pratt, Hamer & Tye*, for appellant.

Benjamin J. Cunningham, pro se.

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

GOOD, J.

Plaintiff brought this action to partition the following described real estate: Lots 341, 342, 343, and 344, in the original town of Kearney Junction, now city of Kearney, Buffalo county, Nebraska, and lot 1, block 4, First addition to the village of Cairo, Hall county, Nebraska. Defendant Cunningham by cross-petition prayed to have included in the partition proceedings the following additional real estate: Lot 843, in the original town, now city of Kearney, Buffalo county, Nebraska; lots 544 and 545, in Kearney Junction, now city of Kearney, Buffalo county, and lots 4, 5, and 6, in block 4, First addition to the village of Cairo, Hall county, Nebraska.

The trial court decreed partition of the real estate described in plaintiff's petition, and entered this further order and decree: "And in the event the proceeds thereof are insufficient to pay the liens against the heirs above named as set forth herein, that the remainder of the property, to wit, lots four (4), five (5), and six (6), in block four (4), First addition to Cairo, lot 843, original town of Kearney,

and lots 544 and 545, in Kearney Junction, or so much thereof as is necessary to satisfy the liens and judgments hereinbefore found, be sold and the proceeds applied to the payment thereof, and for such other and further orders of distribution as are necessary." From this decree Grace Dodd has appealed.

The controversy in this case is between Grace Dodd, one of the cotenants, owners of the real estate, and Benjamin J. Cunningham, defendant, who claims a lien against the share or interest of Arthur Boring in and to all of the said real estate. His alleged lien is based upon the findings and decree of the district court in a foreclosure action that had been previously determined in the district court for Hall county. For a proper understanding of the questions involved, a somewhat extended statement of the facts seems necessary.

On February 12, 1920, Jesse Boring, the owner of a quarter section of land in Hall county and of all the property above described in both the petition of the plaintiff and the cross-petition of Cunningham, departed this life. By his will, which has been duly probated, he devised all of his real estate, in equal shares, to his seven children, but therein provided that the share going to his son Arthur should be charged with $1,800, to be paid to his children other than Arthur.

At the time of Jesse Boring's death, there existed two mortgages upon the quarter section of land in Hall county. On August 24, 1920, Arthur Boring and wife executed to his sister Grace Dodd a warranty deed for his undivided one-seventh interest in lots 544, 545, and 843, in the original town of Kearney Junction, now city of Kearney. This deed was filed for record on September 3, 1920.

On March 11, 1920, Arthur Boring and wife executed and delivered to Grace Dodd a mortgage for $200, conveying his undivided one-seventh interest in lots 341, 342, 343, and 344, in the original town of Kearney Junction, now city of Kearney, which mortgage was filed for record on July 20, 1920.

On March 31, 1920, Arthur Boring and wife executed and delivered to Benjamin J. Cunningham a mortgage for $500 on his undivided one-seventh interest in the quarter section of land in Hall county.

On July 26, 1920, Arthur Boring and wife executed a mortgage for $200 to one Nay on his undivided one-seventh interest in the quarter section of land in Hall county. This mortgage was later assigned to Cunningham.

On February 26, 1921, an action was begun by the New York Life Insurance Company, holder of the first mortgage on the quarter section of land in Hall county, for foreclosure of its mortgage. All of the children and legatees of Jesse Boring and other persons, holding liens on the whole of or on any undivided share or interest in said quarter section, were made defendants. The lien-holders filed answers and cross-petitions, and the action proceeded to a decree, in which the New York Life Insurance Company and the Cairo State Bank were given first and second liens on the entire quarter section of land, and the following additional liens were given on the undivided one-seventh interest of Arthur Boring: To the children of Jesse Boring other than Arthur; to judgment creditors of Arthur, and a fifth lien to Cunningham, based upon his mortgages on Arthur's undivided interest.

The following is a quotation from the decree in the foreclosure action: "The court further finds that the said defendant B. J. Cunningham, as assignee of Woolstenholm and Sterne, and as the owner of the mortgages and liens above set forth, has a lien upon all of the interests of the said Arthur Boring in and to the estate of Jesse Boring, deceased, the said liens on the above described premises in suit in this cause being in the order hereinbefore found, and that, in addition thereto, his said liens, including his mortgages and the amounts found due thereon, are also liens against the share and interest of the said Arthur Boring in and to all of the real estate belonging to the estate of Jesse Boring, deceased, as of the date of March 31, 1920, which covers, in addition to the interest of the said

Arthur Boring in the lands and premises involved in this suit, his interest in and to all of the real estate devised to him by the said Jesse Boring, deceased, situate in the village of Cairo, Nebraska, more particularly described as follows, to wit: Lots one (1), four (4), five (5), and six (6), all in block four (4) in the First addition to the village of Cairo, in Hall county, Nebraska, also the real estate situate in the city of Kearney, Buffalo county, Nebraska, more particularly described as follows, to wit: Lot 843 in the original town, now city of Kearney, Nebraska, also lots 544 and 545 in Kearney Junction, now city of Kearney, Nebraska, also lots 341, 342, 343, and 344, situate in the original town of Kearney, Nebraska, and that he has a right to and is hereby given a lien upon the interest and share of Arthur Boring in and to said premises for the amounts hereinbefore found due to him as of the date of March 31, 1920, and that the said liens of the said B. J. Cunningham are prior to all other liens and incumbrances recorded as of the date of March 31, 1920, or subsequent thereto."

The decree directed the quarter section sold for the payment of the liens, found due thereon, to plaintiff and cross-petitioners, respectively, in accordance with their priority, as found by the court. The land was sold and, by an order of distribution entered in that action on the 1st day of July, 1922, all the liens were paid and discharged except the liens of Cunningham, based on his two mortgages on the undivided one-seventh interest of Arthur Boring. The proceeds of the sale were sufficient to pay $128 on these liens, leaving the remainder unpaid and unsatisfied. So far as appears from the record in this case, no deficiency judgment was entered or asked by Cunningham. No one appealed from the decree or order of distribution, but all parties to that action acquiesced therein.

June 11, 1923, the present partition action was brought. Defendant Cunningham has no interest in any of the premises except as a possible lien-holder against the interest of Arthur Boring. In his answer and cross-petition in this

proceeding he sets forth in detail the facts as to his mortgages upon the interest of Arthur Boring in the quarter section and the foreclosure proceeding, including the decree, and, by virtue thereof, asserts that he has a lien upon the interest of Arthur in all of the real estate described in the petition and in his answer and cross-petition, and seeks to have the interest of Arthur Boring in and to all of this real estate subjected to the payment of the lien claimed by him.

It is apparent that the mortgage given by Arthur Boring to Cunningham upon his undivided one-seventh interest in the quarter section of land did not, of itself, create or give rise to a lien upon other real estate in which Arthur had an interest. No facts are alleged in any of the pleadings in the foreclosure action from which it could be inferred that Cunningham had or was entitled to a lien on any other property than that described in his mortgage, to wit: Arthur's undivided interest in the quarter section of land. Cunningham takes the position that the findings above set out, in and of themselves, are sufficient to create and give him a lien upon the interest of Arthur Boring in the real estate in controversy in this action, and that, since no appeal was taken from that decree, it is final and conclusive. He urges that the judgment lienors in the foreclosure proceeding had liens against Arthur's share in all of the real estate, and, since Cunningham's mortgages covered only the quarter section, that he was entitled to a marshaling of Arthur's assets, so that the judgment lienors should be required to first resort to Arthur's share in the real estate on which he had no lien.

It is unnecessary to determine what, if any, rights to marshaling of assets Cunningham may have had in the foreclosure action. It is sufficient in that respect to say that in that action the court did not make or enter any finding or decree attempting to marshal the assets of Arthur Boring. Apparently, there was an attempt to create and give to Cunningham, by reason of the unpaid balance of his mortgage foreclosure decree, a lien upon real estate which

was not covered by the mortgage and which was not involved in the foreclosure action.

Prior to the entry of decree in the foreclosure action, Arthur Boring, by warranty deed, had conveyed to his sister, Grace Dodd, his interest in three of the lots, and had given to her a mortgage for $200 on his undivided share in four other of the lots. The lien attempted to be created by the foreclosure decree even purports to make it operate as a lien as of the date of March 31, 1920. The decree was not entered until in July, 1921. It attempts to create a lien and make it effective for a period of more than a year prior to its creation. But, beyond that, it is necessary to determine the power of the court to enter such a decree, as was done in the foreclosure action, and the effect thereof.

It is a rule well settled that where there is no contract, out of which a lien can grow, nor any duty of one party to give to another a charge or lien on real estate, no basis for a lien exists. 37 C. J. 315, sec. 18. The jurisdiction of a court is subject to the qualification that the court can render only such judgment as does not transcend, in extent and character, the law which is applicable to that class of cases. *Cizek v. Cizek,* 69 Neb. 800; *In re Nielsen,* 131 U. S. 176; 15 C. J. 729, secs. 26, 27. It is a well-recognized rule that a test for determining the jurisdiction of the court is the nature of the case made by the pleadings and the relief sought. 15 C. J. 734, sec. 34.

Applying these principles to the situation at hand, it clearly appears that the court was without jurisdiction in the foreclosure action to create or declare a lien in favor of Cunningham upon property other than that described in his mortgage. The attempt so to do has no force or effect. Where the facts pleaded do not show a right to a lien in the party claiming it, the court is powerless either to create the right or to declare a binding lien. 17 R. C. L. 597, sec. 3. Since the effect of the decree in the foreclosure action was not to create a lien in favor of Cunningham, and as no other basis for a lien in his favor exists, it follows that the court erred in attempting to establish a

lien in his favor on any of the real estate involved in this action in partition.

The judgment of the district court is erroneous, in so far as it attempts to give to the defendant Cunningham a lien upon any of the real estate of Arthur Boring superior to the interests acquired by Grace Dodd, either by warranty deed or by virtue of the mortgage given by Arthur Boring. For the reason that Arthur Boring has not appealed, we do not determine the right of Cunningham to a lien upon the property interest of Arthur Boring, except in so far as it affects the rights of appellant Grace Dodd.

Judgment reversed and cause remanded, with directions to enter a decree in conformity with this opinion.

REVERSED.

Note—As to power of courts to create liens, see 17 R.C.L. 597; 3 R.C.L. Supp. 710; 4 R.C.L. 1142—37 C. J. 315 n. 70.

STATE, EX REL. FRED E. READ, APPELLEE, V. FARMERS IRRIGATION DISTRICT, APPELLANT.

FILED JANUARY 24, 1928. No. 26030.

1. **Constitutional Law.** An act of the legislature is presumed to be within constitutional limitations unless the contrary clearly appears.
2. **Statutes: IRRIGATION ACT: CONSTITUTIONALITY.** Chapter 70, Laws 1895,, entitled, "An act to provide for the organization and government of irrigation districts," etc., and chapter 162, Laws 1911, amending section 6877, Cobbey's Ann. St. 1909 (being section 29 of such 1895 act) examined, and *held* not violative of section 14, art. III of the Constitution of Nebraska, providing that no bill shall contain more than one subject, which shall be expressed in the title.
3. ———: ———: ———. Neither such original nor the amendatory act contravene the due process clause of the Constitution of the United States or that of the Constitution of Nebraska.
4. **Waters.** Section 2887, Comp. St. 1922 (section 6877, Cobbey's Ann. St. 1909, as amended) construed, and *held* that the sub-irrigated lands and the waters, included within its provisions,

are the lands and waters which are a part of the irrigation system.

5. **Mandamus**, while classed as a law action, is an extraordinary remedy, which is not awarded as a matter of right, but rests in the sound discretion of the court governed by equitable principles, and will not issue when to do so would compel the doing of a substantial wrong.

6. **Evidence** examined, and *held* not to sustain the judgment of the trial court.

APPEAL from the district court for Scotts Bluff county: ROBERT R. DICKSON, JUDGE. *Reversed, with directions.*

Raymond & Fitzgerald, for appellant.

Mothersead & York, contra.

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

THOMPSON, J.

This is an application by the relator to the district court for Scotts Bluff county for a writ of mandamus to compel the respondent to drain certain lands within its district, pursuant to section 2887, Comp. St. 1922. After issues were duly joined, trial was had, and peremptory writ issued. To reverse this judgment, respondent appeals.

The alternative writ reflects the following alleged facts, in substance: That the respondent is, and has been for more than ten years last past, an irrigation district organized and operated under the laws of the state of Nebraska; that the relator is now, and has been ever since and before the organization of respondent district, the owner of 120 acres of land in such county, which land constitutes a part of, and is subject to assessment by, respondent, and that he is entitled to all the rights and benefits resulting from the inclusion of his land within such corporation; that his land has become subirrigated, seeped, wet and boggy by reason of the lawful use of water from the respondent's irrigation canal, and from other sources,

not the fault or by the consent of the relator or his lessee; that relator made demand on the board of directors of such district that it drain his land, as provided in section 2887, Comp. St. 1922 (being section 6877, Cobbey's Ann. St. 1909, as amended), which demand the respondent refused contrary to its duties in the premises.

The answer of respondent, considered in connection with the alternative writ, presented issues which warranted the introduction and receipt of evidence from which we conclude the following pertinent facts were proved: That respondent was duly organized, for the purpose indicated by its name, in 1913, under and in accordance with chapter 26, Cobbey's Ann. St. 1909, and amendatory acts thereof, now chapter 26, art. I, Comp. St. 1922, which includes such section 2887; that relator's land is included in such irrigation district and forms a part thereof; that the condition of his land is not the result of the lawful or unlawful use of water from respondent's canal, and neither did it arise from the construction or operation by respondent of its irrigation system, but is due solely, or substantially so, to the seepage and subirrigation of water from sources north and west of relator's land, and not within the limits of the respondent district; also, from a tract of high table irrigated lands situate north and west, consisting of many thousand of acres, fringed by a border of gravel breaks just above respondent's canal, which are irrigated by a canal owned and operated by the United States government, which was in operation prior to respondent's organization and has been ever since; that relator's land is of a value not to exceed $50 per acre, or $6,000, even if drained as by relator prayed; that to drain such land would cost in excess of $15,000.

The relator insists that the section in question, as amended, imposes a duty which is mandatory upon the respondent district to drain his land of such accumulated and accumulating waters, regardless of their source, and notwithstanding the fact that the cost of drainage would far exceed any benefit derived therefrom.

Respondent further, by means of its answer and here, interposed as questions of law, that the statute relating to drainage by irrigation districts, and especially section 2887, Comp. St. 1922, is invalid and unconstitutional for the following reasons, in substance: First, it violates section 14, art. III of the Constitution of Nebraska, in this, that the act of which it is a part, as well as the title thereto, contains more than one subject; second, it violates section 3, art. I of the Constitution of Nebraska, and is in contravention of the Fourteenth amendment of the Constitution of the United States, in that it deprives respondent, and each of its constituent parts, of property without due process of law (which includes a denial of the right of appeal to the courts).

In determining these constitutional questions, it must be remembered that an act of the legislature is presumed to be within constitutional limitations unless the contrary clearly appears.

The "District Irrigation Law" became effective March 26, 1895, as chapter 70 of the laws of that year, and was carried into Cobbey's Annotated Statutes of Nebraska for the year 1909 as sections 6775 to 6924, inclusive. Section 6877 of such statutes was on the 8th day of April 1911, amended by chapter 162, Laws 1911, and is now the aforesaid section 2887, Comp. St. 1922. This section was in force at the time of respondent's organization, and, so far as material to this case, reads as follows:

"The board of directors, or other officers of the district, shall have no power to incur any debt or liability whatever, either by issuing bonds or otherwise, in excess of the express provisions of this article, and any debt or liability incurred in excess of such express provisions shall be and remain absolutely void; *provided*, any irrigation district organized under the provision of this article shall have power to and it shall be its duty to provide for the proper drainage of any and all lands embraced within its limits which are or have been subirrigated by reason of the lawful use of water from its canal by the owner or les-

see of the lands subirrigated or from any cause not the fault or by the consent of such owner or lessee, and for such purpose such district shall have all the authority herein granted for levying special assessments or otherwise providing funds necessary to properly drain such lands; entering upon lands for the purpose of making surveys; exercising the right of eminent domain; contract for the construction of necessary ditches; and further shall have the right to extend such drainage ditches outside of the limits of such district for the purpose of conducting the drainage water to other lands upon which the same may be lawfully used or to return the same to the stream from which its canal is taken."

Such "District Irrigation Law" is an independent act, comprehensive and complete within itself, general in its scope, plain as to its purpose, and is, as we construe it, an act to authorize the creation of a public corporation, manned by officers, by its members selected, clothed with public duties, for the purpose of reclaiming and rendering suitable for agricultural purposes our arid lands, and for the equitable and efficient management and operation of such corporate entity. The title of such original act is equally comprehensive, as is also the title of the amendatory act, and each is within the scope and purpose of such respective acts, and covers but one subject.

Then again, as to the amendatory act, it is one for the amendment of an existent section, is germane to the purpose of the section thereby sought to be amended, and hence the provision added is legislation that could rightfully be included in the amendatory section. Thus, we are impelled to conclude that neither the original nor the amendatory act are vulnerable to the first challenge interposed. In this we are sustained by our holdings in *Sheridan County v. Hand*, 114 Neb. 813, and *State v. Johnson, ante*, p. 249. As to the section amended forming a part of the title of the amendatory act, we are supported by *In re Estate of Austin, ante*, p. 137.

As to the challenge that the section as thus amend-

ed contravenes section 3, art. I of the Constitution of Nebraska, and the Fourteenth amendment of the Constitution of the United States, in that it deprives respondent, and each of its constituent parts, of property without due process of law, and is a denial to each thereof of the right of appeal to the courts, it is sufficient to say that these contentions have each thereof been met, and, either directly or by every reasonable inference, resolved by us against the challenge of respondent and in favor of the constitutionality of the respective acts, in *Board of Directors of Alfalfa Irrigation District v. Collins*, 46 Neb. 411, and, by analogy, in *Whedon v. Wells*, 95 Neb. 517, which holdings are by us approved.

This brings us to the proper construction of the section in question. Such section mentions only subirrigated lands; but, so far as this case is concerned, we are construing that term to include seeped lands as well. Before the amendment of 1911, the act, taken as a whole, dealt exclusively with freeholders and their lessees within the district, with lands forming an integral part of the district, and with waters used in its operation, stored or flowing through its canal or canals. These were the people, the lands, the waters, and the canals that the legislative body must have had in mind when considering the enactment of the amendment in question. To hold otherwise would be to defeat the entire purpose of the enactment, as is well illustrated by this record. The proviso, according to the ordinary rules governing such, must be strictly construed, and in the light reflected by the act or statutes of which it is made a part, not in derogation of the intent and purpose of the original, but in furtherance thereof. If, therefore, the proviso is to be so limited, it follows, as above indicated, that the only subirrigated lands, and the only waters, which it rightly refers to or includes, are lands and waters which are a part of the irrigation system. This would limit the liabilities of the district to damages of which its own waters were the proximate cause. This, indeed, does not eliminate the words "from any cause not the fault or by

the consent of such owner or lessee," but would merely, by construction, retain as part of such clause the limitation which is apparently understood, that it refers to the waters owned, controlled, and distributed by the irrigation district. In other words, by construction, the language of the amendment would read: "Provided, any irrigation district organized under the provision of this article shall have power to and it shall be its duty to provide for the proper drainage of any and all lands embraced within its limits which are or have been subirrigated; (a) by reason of the lawful use of water from its canal by the owner or lessee of the lands subirrigated; (b) by reason of any use of the water (from its canal) from any cause not the fault or by the consent of such owner or lessee." This construction necessarily follows, as the legislative intent must be determined from a consideration of the act as a whole, a rule by us universally adhered to. In *Barker v. Wheeler*, 71 Neb. 740, 745, we held: "All acts of the legislature upon the same general subject-matter must be construed as part of a single plan, and later statutes are to be considered as supplementary or complementary to the earlier enactments. In the passage of each act, the legislature must be supposed to have had in mind the existing legislation on the same subject and to have shaped its new enactment with reference thereto."

Considering the law applicable to an action of the kind under consideration, it must be remembered that mandamus, while classed as a law action, is an extraordinary remedy, which is not awarded as a matter of right, but rests in the sound discretion of the court governed by equitable principles, and will not issue when to do so would compel the doing of a substantial wrong. *In re Skinner & Eddy Corporation*, 265 U. S. 86; *Donahue v. State*, 70 Neb. 72; *Moores v. State*, 71 Neb. 522; *State v. Cowles*, 90 Neb. 839; *State v. McIlravy*, 105 Neb. 651; *State v. Board of County Commissioners*, *ante*, p. 261; 38 C. J. 543, sec. 4.

Thus, it becomes our duty to appply the above indicated equitable principles to the facts. In doing so we have taken into consideration the foregoing construction of the statute in question, the location, subsoil conditions, and physical contour of relator's and adjoining lands, together with the fact that the cost of such drainage would be great as compared with the benefit to be derived therefrom, and the further fact, that the condition of relator's land is due solely, or substantially, to sources not within the respondent district, and neither does the evidence show or tend to show that seepage from respondent's canal was sufficient to necessitate drainage of relator's land; and we conclude that the judgment of the trial court is contrary to the law applicable, and is inconsistent with justice and equity, in that it directs the doing of a substantial wrong.

The judgment is reversed and the cause remanded, with directions to dismiss the action, at the costs of relator in both the supreme and district courts.

REVERSED.

Note—See Constitutional Law, 12 C. J. 791 n. 19—Mandamus, 18 R. C. L. 137, 3 id. Supp. 788, 6 id. Supp. 1055. 38 C. J. 543 n. 39.

GUSTAVE PETER ET AL., APPELLANTS, V. JACOB FINZER, APPELLEE.

FILED JANUARY 24, 1928. No. 25196.

1. **Bills and Notes: NEGOTIABLE INSTRUMENTS ACT: CONSTRUCTION.** The negotiable instruments act (Comp. St. 1922, secs. 4612-4809) having been adopted by this state and others of the federal union for the purpose of securing uniformity and certainty in the laws throughout the country, should be so construed as to give effect to this design, words being given their natural and ordinary meaning, and the obvious meaning of the act being adhered to as closely as possible without reference to the law as previously existing in this state, unless necessary to dissolve obscurity or doubt, especially in instances where there was a difference in the law of the different states prior to such act.

2. ———: PRIMARY LIABILITY. Under the negotiable instruments act, providing: "The maker of a negotiable instrument * * * engages that he will pay it according to its tenor," and "the person 'primarily' liable on an instrument is the person who by the terms of the instrument is absolutely required to pay the same"—the defendant herein is primarily liable on the instrument in suit, and cannot, in view of this case, be deemed secondarily liable thereon.

3. ———: ———: EXTENSION OF TIME OF PAYMENT. The mere fact of the making of a lawful agreement, binding upon the holder of a negotiable instrument to extend time of payment, or to postpone the holder's right to enforce such instrument, is not, of itself, a defense in favor of a person primarily liable thereon who may not have consented to such agreement of extension.

4. ———: NEGOTIABLE ISTRUMENTS ACT: CONSTRUCTION. In construing our negotiable instruments act adopted by the legislature of this state, and also widely adopted by the legislatures of different states, for the express purpose of securing uniformity, great weight will be given to the harmonious decisions of the courts of other states.

5. *Merriam v. Miles*, 54 Neb. 566, examined, and *held* to be superseded by the provisions of the negotiable instruments act.

6. *Huber Mfg. Co. v. Silvers*, 85 Neb. 760, distinguished.

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

L. C. Chapman, F. C. Radke and *Magdelene C. Radke*, for appellants.

Dafoe & Dafoe and *Jay C. Moore, contra.*

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

EBERLY, J.

This is an action at law upon a promissory note. The defense was, that at the time the action was instituted, the defendant's actual relation to the paper sued upon was that of a surety who had been discharged by reason of a lawful extension of the time of maturity, without his con-

sent, made by the holder, to the then principal upon the obligation. Trial was had to a jury, resulting in a verdict for the defendant, from which plaintiff appeals.

The essential facts out of which this action arose, as disclosed by the record, are as follows: On March 2, 1918, defendant Finzer, for a valuable consideration, made and delivered to one Robert Sieber, as guardian for Charlotte Peter his promissory note, negotiable in form, and also to secure the payment of the same, executed and delivered to said guardian a certain real estate mortgage covering certain real estate then owned by the mortgagor. The plaintiffs in this action lawfully derive their title to the note from Sieber, the guardian. They elected to bring an action at law upon the note alone, claiming, in this action, no rights under the terms of the mortgage given to secure the same. Defendant Finzer filed an answer: (1) Admitted the execution of the note sued upon; (2) alleged the contemporaneous execution and delivery of the mortgage to secure the same; (3) that subsequently, by mesne conveyances, the mortgaged premises were conveyed by the mortgagor to Bodie, by Bodie to Jobes, and by Jobes to Cayou, and by Cayou to Rapp; that, as parts of each of the transactions above referred to, there was, for a valuable consideration, an assumption of the mortgage indebtedness by each of the grantees above set forth, and in each deed of conveyance, above referred to, appears the recital of such assumption as part of the consideration of such conveyance by the respective grantees therein named; that Sieber, as guardian, had actual knowledge of all the facts set forth, and with such knowledge, upon maturity of the note evidencing the obligation in suit, without the consent of the defendant, made certain valid agreements of extension of the time of maturity of indebtedness with certain of the grantees above named who had previously assumed and agreed to pay the same.

On the basis of the facts set forth in his answer, the defendant, in the court below, as a matter of law, contended that, where one buys land incumbered by a mortgage

debt and, as part of the consideration of purchase, assures the payment thereof, his promise creates a principal obligation which the mortgagee may enforce against him; that the maker of the note and mortgage thereafter, between the parties, sustain the relation of surety only; that a subsequent agreement by the mortgagee and payee with such subsequent grantee, without the assent of the grantor and mortgagor, extending time of payment of the debt, evidenced by the note and mortgage which has been assumed by such grantee, discharges the maker and mortgagor from all personal liability thereon. This conclusion seems fully supported by the doctrine announced by this court in *Merriam v. Miles*, 54 Neb. 566, determined in 1898.

The controlling question now presented is, to what extent, if any, has the doctrine thus announced been modified or affected by the provisions of the Nebraska negotiable instruments act adopted, effective August 1, 1905?

It may truly be said of this legislation: "It is matter of common knowledge that the negotiable instruments act was drafted for the purpose of codifying the law upon the subject of negotiable instruments and making it uniform throughout the country through adoption by the legislatures of the several states and by the congress of the United States. The design was to obliterate state lines as to the law governing instrumentalities so vital to the conduct of interstate commerce as promissory notes and bills of exchange, to remove the confusion or uncertainty which might arise from conflict of statutes or judicial decisions amongst the several states, and to make plain, certain and general the controlling rules of law. Diversity was to be moulded into uniformity. This act in substance has been adopted by many states. While it does not cover the whole field of negotiable instruments law, it is decisive as to all matters comprehended within its terms. It ought to be interpreted in such a way as to give effect to the beneficent design of the legislature in passing an act for the promotion of harmony upon an important branch of the law. Simplicity and clearness are ends especially to be sought. The

language of the act is to be construed with reference to the object to be attained. Its words are to be given their natural and common meaning, and the prevailing principles of statutory interpretation are to be employed. Care should be taken to adhere as closely as possible to the obvious meaning of the act, without resort to that which had theretofore been the law of this commonwealth, unless necessary to dissolve obscurity or doubt, especially in instances where there was a difference in the law in the different states.

"Approaching the act from this point of view, it is apparent that no relation of principal and surety is established or contemplated by any of its sections. It determines the liability of the various parties to the negotiable instrument on the basis of that which is written on the paper. The obligation of all makers, * * * is to pay to the holder for value according to the terms of the bill or note. Their obligation is primary and absolute." *Union Trust Co. v. McGinty*, 212 Mass. 205.

This court is committed to the doctrine that, so far as applicable, the provisions of our negotiable instruments act determine the mutual rights of the immediate parties to the instrument as between themselves. *Bank of Commerce & Savings v. Randell*, 107 Neb. 332.

Finzer, at its inception, was the sole maker of the instrument in suit.

"The maker of a negotiable instrument by making it engages that he will pay it according to its tenor, and admits the existence of the payee and his then capacity to indorse." Comp. St. 1922, sec. 4671.

Section 4801, Comp. St. 1922, provides: "The person 'primarily' liable on an instrument is the person who by the terms of the instrument is absolutely required to pay the same. All other parties are 'secondarily' liable."

It would seem incontestible that Finzer, by the terms of the instrument in suit, being absolutely required to pay the same, is "primarily" liable thereon. The language of section 4801, *supra*, affirmatively excludes him from the classification of "secondarily" liable.

Article VIII of our negotiable instruments law covers the subject of discharge of negotiable instruments. The first section thereof provides: "A negotiable instrument is discharged: First. By payment in due course by or on behalf of the principal debtor; Second. By payment in due course by the party accommodated where the instrument is made or accepted for accommodation; Third. By the intentional cancelation thereof by the holder; Fourth. By any other act which will discharge a simple contract for the payment of money; Fifth. When the principal debtor becomes the holder of the instrument at or after maturity in his own right." Comp. St. 1922, sec. 4729.

Applicable to those exclusively who are "secondarily" liable on negotiable instruments, the second section of article VIII provides: "A person secondarily liable on the instrument is discharged: First. By any act which discharged the instrument; Second. By the intentional cancelation of his signature by the holder; Third. By the discharge of a prior party; Fourth. By a valid tender of payment made by a prior party; Fifth. By a release of the principal debtor, unless the holder's right of recourse against the party secondarily liable is expressly reserved; Sixth. By any agreement binding upon the holder to extend the time of payment, or to postpone the holder's right to enforce the instrument, unless made with the assent of the person secondarily liable, or unless the right of recourse against such party is expressly reserved." Comp. St. 1922, sec. 4730.

It may also be said that the statute under consideration makes no provision for the proof of another and different relation than that expressly undertaken and defined by the tenor of the instrument signed. This act further provides in definite terms that the instrument, and hence one primarily liable, is discharged in one of the five ways set forth in section 4729, Comp. St. 1922, above quoted. There is no mention in this section of a discharge of a person "primarily" liable by an extension of time. But, among the ways in which a party "secondarily" liable may be dis-

charged as above set forth, in section 4730, *supra*, is "any agreement binding upon the holder to extend the time of payment, or to postpone the holder's right to enforce the instrument, unless made with the assent of the person secondarily liable," etc. Whatever interpretation might be required of section 4729, *supra*, containing an enumeration of the ways in which the instrument, and consequently the parties primarily liable thereon, might be discharged, if this provision stood alone, the inference arising from the omission of extension of time from such enumeration, and its inclusion among the ways in which parties "secondarily" liable may be discharged as above set forth in section 4730, *supra*, necessitates and renders irresistible the conclusion that the legislature did not intend that persons primarily liable should be discharged in that manner. Or, in other words, parties to a negotiable instrument primarily liable thereon may be discharged only in the manner provided by statute.

The conclusion follows that the extension of time set forth in defendant's answer did not constitute a valid defense to the action upon the note in suit, in view of the fact that the defendant was, under the terms of the statute, primarily liable thereon, and that the verdict of the jury and judgment of the district court are not supported by the evidence. This conclusion is, in principle, in full accord with the great weight of authority in other states, as will be seen by the following cases: *Cowan v. Ramsey*, 15 Ariz. 533; *Hall v. Farmers Bank*, 74 Colo. 165; *Fox v. Terre Haute Nat. Bank*, 78 Ind. App. 666; *Niotaze State Bank v. Cooper*, 99 Kan. 731; *First State Bank v. Williams*, 164 Ky. 143; *Vanderford v. Farmers & Mechanics Nat. Bank*, 105 Md. 164; *Jamesson v. Citizens Nat. Bank*, 130 Md. 75; *Hager v. Hagerstown Bank*, 138 Md. 252; *Union Trust Co. v. McGinty*, 212 Mass. 205; *Vernon Center State Bank v. Mangelsen*, 166 Minn. 472, 48 A. L. R. 710; *Richards v. Market Exchange Bank Co.*, 81 Ohio St. 348; *Cleveland Nat. Bank v. Bickel*, 59 Okla. 279; *Oklahoma State Bank v. Seaton*, 69 Okla. 99; *Smith v. Minneapolis Thresh-*

ing Machine Co., 89 Okla. 156; *Cellers v. Meachem*, 49 Or. 186; *Lumbermen's Nat. Bank v. Campbell*, 61 Or. 123; *Murphy v. Panter*, 62 Or. 522; *Farmers State Bank v. Forsstrom*, 89 Or. 97; *Graham v. Shephard*, 136 Tenn. 418; *Clem v. Chapman*, 262 S. W. (Tex. Civ. App.) 168, and 278 S. W. (Tex. Civ. App.) 1114; *Neyland v. Lanier*, 273 S. W. (Tex. Civ. App.) 1022; *Wolstenholme v. Smith*, 34 Utah, 300.

Nor does this conclusion conflict with the decision of this court in *Huber Mfg. Co. v. Silvers*, 85 Neb. 760. It appears in that case that the notes in suit bore date of June 10, 1903. Section 193, ch. 83, Laws 1905, expressly provides that its provisions "do not apply to negotiable instruments made and delivered prior to the taking effect hereof," viz., August 1, 1905 (Laws 1905, ch. 83, sec. 198.)

The conclusion follows that the doctrine announced in *Merriam v. Miles, supra*, has been, in effect, superseded by the provisions of the Nebraska negotiable instruments act above referred to, and that, in the entry of the judgment appealed from, the district court erred.

The judgment of the district court must be, and is,

REVERSED.

HENRY KNIES, APPELLANT, V. CAROLINE LANG, APPELLEE.

FILED JANUARY 24, 1928. No. 25316.

1. **Trial:** REQUEST FOR DIRECTED VERDICT. Where both parties to a law action then being tried to a jury ask for a directed verdict, the action of the court in granting one request has the same force and effect as would a verdict of the jury. Neither party can thereafter predicate error on the court's failure to submit the case to the jury.
2. **Negligence:** BURDEN OF PROOF. Negligence as a cause of action or a defense must be proved by the party alleging it, and the burden of proof does not shift during the trial.
3. ———: DUTY OF OWNER OF BUILDING. Ordinarily the full duty of an owner of a building extends no further than to use reasonable care and prudence in keeping his building safe

for persons rightfully entering it or passing by it. He is not an insurer of the safety and security of his building.

4. Evidence examined, and *held* to not present a case demanding consideration of the doctrine *res ipsa loquitur*, and to sustain the judgment of the trial court.

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

Grant G. Martin and *Bartos, Bartos & Placek*, for appellant.

Rinaker, Kidd & Delehant, contra.

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

EBERLY, J.

This is an action for damages caused by personal injuries alleged to have been suffered by the plaintiff, and of which it is charged that negligence of the defendant was the proximate cause. Among the facts disclosed by the pleadings and evidence are: That the defendant, at the time plaintiff's injuries were sustained, was the owner of a three-story brick building, having a round bay window on the side adjacent to a public street, extending from the second story to the roof; that the sections of this bay window were and are connected by castings or frames; that on April 28, 1925, during a high wind, as plaintiff was passing by, a board was blown from this bay window of which it formed a part, and in descending fell upon the plaintiff, causing the injury set forth in his petition.

Trial was had in the district court to a jury. After plaintiff had introduced his evidence, and finally rested, the defendant orally moved the court to instruct the jury "to find and return a verdict in favor of the defendant and against the plaintiff" on the ground of the insufficiency of the evidence. Thereupon the plaintiff's attorney, before the motion thus presented in behalf of the defendant had been ruled upon, orally submitted the following in behalf

of his client to the consideration of the court: "Comes now the plaintiff, the defendant having made a motion for an instructed verdict, and joins in with him and asks the court to instruct the jury to return a verdict for the plaintiff and against the defendant for the same reasons given by the defendant in her motion." The ruling of the district court that immediately followed this procedure was: "That ends the case; the first motion will be sustained, and the second motion will be overruled."

Thereupon, pursuant to instruction of the district court duly given, the jury returned a verdict in favor of the defendant and against the plaintiff, which verdict was duly and regularly entered in said cause. This was followed by the filing of motion for new trial on part of plaintiff, which was overruled, and from which ruling the plaintiff appeals.

These facts thus appearing in the record necessitate the application of the well-established rule in this jurisdiction that, where both parties to an action ask for a directed verdict, the action of the court in granting one request has the same force and effect as would a verdict of the jury. Neither party can thereafter predicate error on the court's failure to submit the case to the jury. *Adler v. Royal Neighbors of America*, 90 Neb. 56; *Howell v. Bowman*, 89 Neb. 389; *Davison v. Land*, 89 Neb. 58; *Henton v. Sovereign Camp, W. O. W.*, 87 Neb. 552.

The reason which underlies this rule of procedure is set forth in *Segear v. Westcott*, 83 Neb. 515, in the following language: "Where each of the parties to a trial by jury requests the court to charge them to return a verdict in his favor, he waives his right to any finding or trial of the issues by the jury, and consents that the court shall find the facts and declare the law. An acceptance of these waivers and a peremptory instruction by the court in favor of either party constitutes a general finding by the court of every material issue of fact and of law in favor of the successful party. The case is then in the same situation in which it would have been if both parties had filed a

written waiver of a jury and it had been tried by the court. Each party is estopped by his request from reviewing every issue of fact upon which there is any substantial conflict in the evidence, and the only questions which the instruction presents to an appellate court are: Was the court's finding of facts without substantial evidence to sustain it? And was there error in its declaration or application of the law?"

See *United States v. Bishop*, 125 Fed. 181; *Bowen v. Chase*, 98 U. S. 254; *Beuttell v. Magone*, 157 U. S. 154; *Laing v. Rigney*, 160 U. S. 531; *Chrystie v. Foster*, 61 Fed. 551; *Stanford v. McGill*, 6 N. Dak. 536; *Provost v. McEncroe*, 102 N. Y. 650; *Sturmdorf v. Saunders*, 102 N. Y. Supp. 1042; *Aber v. Twitchell*, 17 N. Dak. 229; *Larson v. Calder*, 16 N. Dak. 248.

The controlling question presented and determined in the district court upon the pleadings and the evidence was that of negligence. Upon all the evidence before it, the district court, in the due exercise of its lawful powers, in effect, determined that the defendant had not failed in his duty to the public, of which the plaintiff was one. Accepting, for the purposes of this discussion, plaintiff's contention that the rule of law applicable to this case is, "that it is the duty of the owner of property abutting on a public highway or street to exercise reasonable care to prevent injuries to passers-by from its defective or dangerous condition," wherein does the evidence affirmatively disclose that the defendant has failed to do so?

In this connection it is to be also remembered that in this jurisdiction, upon the issue of negligence, the burden of proof rests upon him who alleges it, and the burden of proof does not shift during the trial. *Spears v. Chicago, B. & Q. R. Co.*, 43 Neb. 720; *Swift & Co. v. Holoubek*, 60 Neb. 784; *Riley v. Missouri P. R. Co.*, 69 Neb. 82; *Lincoln Traction Co. v. Shepherd*, 74 Neb. 369.

Then, too, upon all matters of disputed evidence, and upon all questions presented by the undisputed evidence wherein different and reasonable minds might fairly arrive

at different conclusions as to the issuable facts to be determined, this tribunal is concluded by the findings of the trial court.

At this point we do not overlook plaintiff's contention that the doctrine expressed by the maxim *res ipsa loquitur* is applicable, and the facts in the instant case impose on this court a present duty of defining its position on the principle embodied in this maxim quoted. With this contention we cannot agree. Under the circumstances of this case, even if the extreme construction of the doctrine *res ipsa loquitur* would, in a proper case, receive favorable consideration by this tribunal, it can avail nothing here. In the instant case, all the details of the occurrence are established by plaintiff's own evidence. We know why, as well as how, the unfortunate results were occasioned.

Even in jurisdictions where the maxim quoted has been unequivocally accepted, "The general rule, however, is that, where the evidence adduced is equally consistent with the absence as with the existence of negligence in the defendant, the case ought not to be left to the jury; and the maxim, *res ipsa loquitur*, ought not to be applied unless the facts proved are more consistent with negligence in the defendant than with a mere accident." Broom, Legal Maxims (8th ed.) 254. See, also, *McAnany v. Shipley*, 189 Mo. App. 396.

So, also, "Where the evidence shows the precise cause of the accident, * * * there is of course no room for the application of the doctrine of presumption." *Cassady v. Old Colony Street R. Co.*, 184 Mass. 156, 163.

"A plaintiff, suing for injuries by being struck by a board falling from a building while passing along the sidewalk, and showing by his evidence that the board had been loose for a long time, and demonstrating just how and why the accident happened, and exhibiting at the trial the board, showing that the nails were old and rusty, cannot rely on the doctrine of *res ipsa loquitur*, though the petition charges general negligence only; and a charge, giving him the benefit of the presumption arising from the doctrine, is

reversible error." *McAnany v. Shipley*, 176 S. W. 1079 (189 Mo. App. 396).

The conclusion follows that the nature of the evidence before the district court imposed the duty of determining the issues involved in the case without reference to the presumption embodied in the maxim under discussion.

In the light of the principles just enumerated, the evidence may be said fairly to sustain the following: The board that caused the accident was sound and undecayed. It was put in place as part of the original construction 35 years ago, and during all the time that elapsed since that time up to the date of the accident remained in place. At the time of the original construction, the ends of this board were fitted to other construction of the building so that they were not exposed or accessible to paint, and the board was well fastened to the building by iron nails. Nothing in the record is to the contrary, and, indeed, it appears as unquestioned that the building, including the bay window, was well and solidly constructed at the time it was built. The record does not disclose that it was ever permitted to fall into dilapidation and decay. In fact, a fair inference to be drawn from the evidence is, that the building itself, considered as an entirety, omitting from consideration the board in question, was at the time of the accident, and had been prior thereto, in proper state of repair. Indeed, the district court, in view of the facts before it, might well have reached the conclusion that the board causing the injury, in place in the construction of which it formed a part, was in plain view of the street and at such distance as permitted a proper and reasonable examination and inspection; that it was, in fact, under the daily and constant observation of occupant of the building, the defendant, not only from the street, but "off and on" close at hand from the interior; and that these inspections, frequently and carefully made, disclosed no evidence of displacement, lack of repair, decay or defect in the board itself, or in the nails that held it in place. And it must be admitted that, so far as disclosed by the record before us,

none of the many passers-by on this busy corner ever made any such discoveries or called attention to anything requiring attention in the maintenance of this building.

The accident occurred. The high wind tore off the board. It fell to the sidewalk. Plaintiff was injured. Then, it was first ascertained that on the under or inner side of this board, the one next to the building, the nails which secured it to the building, and which on its outer surface disclosed no defects, were, in fact, rusted off. But the evidence also supports the inference that immediately prior to the accident the outside of the construction, of which the board formed a part, and, indeed, the board itself, were in place, and appeared solid, substantial, and sound. The defects which, developing with passing time, caused the accident were at all times hidden and latent, and not discernable or discoverable, unless, in fact, the board had been actually removed from the building for the purpose of examination.

In this view of this situation, what were the demands of ordinary care? Certainly, such demands should not be in excess of the care that a prudent man who was not an expert in mechanics or in construction might be reasonably called upon to exercise. Latent defects which are concealed, and an incident to ordinary wear and tear, and so developed as to render discovery impossible, in the exercise of ordinary care, are casualties which no man can avoid without the exercise of extraordinary care and vigilance which the law does not impose. The defendant's full duty extended no further than to use reasonable care and prudence in keeping his building safe for persons rightfully entering it or passing by it.

Indeed, the record contains no evidence as to what precautions even a qualified expert on construction, maintenance and repair of building would have deemed necessary under the circumstances, or that such expert in determining the true condition of the materials in place would have applied any tests, or made any other further or different examination than from the evidence the district court was justified in finding were made by the defendant.

The district court heard the evidence, applied this rule evidently, and determined the questions involved adversely to the claims of the plaintiff. We cannot say from the record before us that it affirmatively appears that in so doing the district court erred. Therefore the duty is imposed upon us as a reviewing tribunal to affirm the judgment of the court below.

The judgment of the district court is

AFFIRMED.

WALTON ARNER V. SIOUX COUNTY, APPELLEE: SIDNER & THOMAS, APPELLANTS.

FILED JANUARY 24, 1928. No. 26208.

1. **Appeal: PARTIES.** Only those having an interest in the subject-matter of an appeal need be made parties thereto.
2. **Master and Servant: COMPENSATION: ATTORNEY'S FEES.** Notice to a claimant in compensation proceedings is not a condition precedent to the approval of attorney fees by the judge presiding at the trial.
3. ———: ———: ———: **NONJUDICIAL ACT.** The approval of attorney fees by the judge presiding at the trial, in compensation cases, is a nonjudicial act which may be done anywhere within his district.

APPEAL from the district court for Sioux county: EARL L. MEYER, JUDGE. *Reversed, with directions.*

V. N. Thomas and *Courtright, Sidner, Lee & Gunderson,* for appellants.

A. S. Schnurr and *J. E. Porter, contra.*

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

HOWELL, J.

This is an appeal from an order of the district court for Sioux county, (a) vacating and setting aside an order made by the late Judge Westover, on November 25, 1925, at cham-

bers, approving attorney fees in a compensation proceeding, and (b) adjudging that the appellants have no attorneys' lien upon the judgment in favor of the claimant. Appellants were attorneys for claimant. They also claim to have acted as attorneys for appellee, Dr. Ivins, in support of the allowance of $850 for surgical fees by the compensation commissioner.

We are first met with a motion to dismiss the appeal because the claimant, Arner, is not made a party in this court. The record shows he has assigned the $850 to Dr. Ivins and that Arner has no interest in this litigation. The motion to dismiss is denied.

It appears that on May 15, 1925, the district court for Sioux county gave judgment in a compensation case in favor of Arner for $850 for surgical expenses, and that Dr. Ivins performed the services for which the award was made. This court, on appeal, affirmed that award, and on December 16, 1925, appellants served notice of their attorneys' lien upon attorneys for the county of Sioux, claiming 25 per cent. of the above amount. On November 27, 1925, Judge Westover, by written order, approved the attorney fees for $212.50, which order was filed with the clerk of the court on December 1, 1925. Some time within 30 days prior to February 20, 1926, the sheriff of Sioux county served a notice of the claimed lien upon the county commissioners, made his return thereon, and the same was filed in the office of the clerk of the district court on the date stated. That notice recited the approval of the fee by Judge Westover. On December 19, 1925, Arner assigned the $850 in question to Dr. Ivins, which assignment was filed with the clerk of the court on January 4, 1926.

It will thus be seen that the acceptance by the attorneys for the county of appellants' notice of their lien, the approval of the fee by Judge Westover, and the assignment by Arner to Dr. Ivins gave to appellants, at least *prima facie*, a claim on the judgment in favor of Arner antedating the assignment. The grounds alleged by appellee for the vacation of the Westover order are: (1) It was made

at chambers without jurisdiction. (2) The order was entered without notice to Dr. Ivins. (3) Dr. Ivins had no day in court. (4) Dr. Ivins has a defense to the claim of appellants for attorney fees.

The trial court vacated the order of November 27, 1925, because, undoubtedly, it was made at chambers.

The three grounds first stated are untenable, the reason being that the act of approving the fee was nonjudicial. The law does not require notice as a condition precedent to the approval of fees "by the judge presiding at the trial." See section 3031, Comp. St. 1922. The purpose of that section is to prevent the filing of liens for exorbitant attorney fees. Its provisions are remedial and subject to liberal, but fair, construction. That section further provides that "after such approval, if notice in writing be given the defendant of such claim for legal services," the same "shall be a lien," etc.

The fourth ground referred to is that Dr. Ivins has a valid defense to appellants' claim. The decree appealed from provides: "This order is entered without prejudice to or deciding any cause of action which said Thomas & Sidner or V. N. Thomas may have, if any, against R. L. Ivins in a proper action." The fourth ground is fully met by that provision.

It follows that the trial court erred in setting aside the approval of the fee by Judge Westover, and in canceling the attorneys' lien. It seems that if one question is left open for litigation between the appellants and appellee as to the right of the appellants to recover at all, the question of the validity of the lien ought to be referred to the same fate, unhampered by an attempted cancelation of Judge Westover's approval of the fee, for without such approval there could be no lien.

The judgment of the district court is reversed and the cause remanded, with directions to dismiss the application of appellee to vacate and to set aside the order made by Judge Westover November 27, 1925, subject to the right of the parties hereto to litigate their differences in proper

proceedings. The costs in both the district and supreme courts are taxed to the appellee, R. L. Ivins.

REVERSED.

INDEPENDENT ELEVATORS, APPELLANT, V. PAUL DAVIS, SHERIFF, ET AL., APPELLEES.

FILED JANUARY 24, 1928. No. 26192.

1. **Appearance.** A general appearance in a cause vests the court with complete jurisdiction of the person of the defendant so appearing.
2. ———. Where leave was granted to file an amended petition making a copartnership a party defendant, and the copartnership by duly authorized counsel enters into a stipulation of facts for the submission of the cause to the court, and later participates in the trial by filing a brief in the name and on behalf of the copartnership, such conduct constitutes a general appearance giving the court complete jurisdiction of the person of the defendant.
3. **Partnership: PARTIES: WAIVER.** An action against "A and B., copartners doing business as A. & B. Co.," is not a suit against the partnership as a separate entity; but, where leave is granted to file an amended petition making a copartnership a party defendant, and an amended petition is filed naming the individuals as copartners doing business under the name and style of the copartnership, and the case is thereafter proceeded in by counsel and the court as though the copartnership were a party, no objection being made before judgment that it was not so named in the pleading, the irregularity is waived, and will not be considered in a suit to enjoin the enforcement of the judgment thereafter rendered against the firm.
4. **Judgment: PARTIES.** Where a party having an interest in a cause, without objection of any kind, participates in the trial thereof by stipulating for its submission and filing a brief for consideration by the court, he thereby submits himself to the jurisdiction of the court is bound by the judgment thereof, notwithstanding the facts that he was not named as a party, and no relief was prayed against him; these are matters which may be supplied by amendment.
5. ———: **VALIDITY.** A judgment against the copartnership in such case is not void, and, if erroneous, can only be overturned in a direct proceeding on appeal for that purpose, in the ab-

sence of fraud by the party procuring the same, or mutual mistake.

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

Butler & James and *Cordeal, Colfer & Russell,* for appellant.

J. L. Finley, Hines & Hines and *Perry & Van Pelt, contra.*

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

REDICK, District Judge.

Action in equity to enjoin proceedings to collect a judgment against the plaintiff on the ground, as alleged, that said judgment is void for three reasons: First, that the plaintiff was not a party defendant in the suit in which the judgment was rendered; second, that no cause of action against plaintiff was stated in the petition; and, third, that the judgment was not supported by the evidence. A trial in the court below resulted in a judgment for the defendants, and plaintiff appeals.

The case was presented to the lower court solely upon the record of the case in which the judgment was rendered, from which the following facts appeared without dispute. The petition was filed June 25, 1922, entitled, "Bertha Krug, Plaintiff, v. Henry Meyer, Fred Meyer, Bank of Benkelman, a corporation, and Independent Elevator Company, a corporation, Defendants." Service was had upon the elevator company as a corporation by delivering a copy of the summons to Eugene F. Ham as general managing agent, and the other defendants were regularly served. July 24, 1923, application for extension of time to plead was made, signed "Charles S. Briggs, attorney for defendants." August 20, 1923, demurrer to the petition was filed, signed "Charles S. Briggs, attorney for the defendants, for the purpose of this demurrer." The demurrer

was sustained and leave was given to file amended petition, which was done December 10, 1923, entitled, "Bertha Krug, Plaintiff, v. Independent Elevator Company, a corporation, Defendant." December 19, 1923, motion to strike amended petition as not being filed within the time limited by the order of the court was filed, signed, "Chas. S. Briggs, Attorney for defendant, Independent Elevator Company;" also a motion by all the other defendants to dismiss the action as to them, they not being named as defendants in the amended petition. Both motions were sustained, but permission to refile the petition was given, which was done January 29, 1924. February 13, 1924, Independent Elevator Company, by Briggs, attorney, moved to strike the amended petition, which motion being overruled on June 12, 1924, and Independent Elevator Company filed an answer denying the allegations of the petition, setting up the statute of limitations, and denying that it was a corporation under the laws of Nebraska.

September 27, 1924, plaintiff filed a motion for leave to amend the petition, naming as defendants in said motion "Eugene F. Ham and Ovid M. Kellogg, partners doing business under the firm name and style of Independent Elevators, the Independent Elevator Company, a corporation." The motion recited the history of the case up to that time, alleging the identity of all parties, and that plaintiff had been led to believe by defendant Ham that his organization was a corporation, and did not learn the contrary until the coming in of said answer: The prayer of the motion was for leave to file a second amended petition making "Independent Elevators, a copartnership, composed of Eugene F. Ham and Ovid M. Kellogg," the defendants. Leave being granted, second amended petition was filed, entitled, "Bertha Krug, Plaintiff v. Eugene F. Ham and Ovid M. Kellogg, partners doing business at Benkelman, Nebraska, under the firm name and style of Independent Elevators, Defendants," and upon this petition the case was tried. The action was for conversion of the proceeds of the sale of certain wheat of which plain-

tiff claimed to be the owner, of which claim defendants had notice while the proceeds were still in their hands, but which they paid over to a third party claiming them upon receiving a bond of indemnity to secure them against loss. And plaintiff prayed judgment against defendants Ham and Kellogg only. Under the same title as that contained in the second amended petition, the defendants Ham and Kellogg, "partners doing business under the firm name of Independent Elevators," filed their answer denying the allegations of the petition, except as to notice, and pleaded the statute of limitations. It may be here noted that the conversion was alleged as of August 30, 1919, and the action would have been barred by the statute of limitations August 30, 1923, about 13 months prior to the filing of the second amended petition. A general denial was filed in reply November 12, 1924, and a stipulation of facts entered into, both bearing the same title as that of the second amended petition. Jury being waived, the case was tried to the court upon the stipulation of facts and the records of the case. The journal entry of submission under the same title as the pleadings recited that the defendants "Independent Elevators, a partnership, composed of E. F. Ham and Ovid M. Kellogg," appeared by their attorney Charles S. Briggs, and the parties were allowed certain time to file briefs. December 1, a brief entitled Bertha Krug, Plaintiff, v. Independent Elevators, Defendant, was filed by Charles S. Briggs, attorney for defendant."

December 23, 1924, under the title, "Bertha Krug, Plaintiff, v. Independent Elevators, a partnership composed of Eugene F. Ham and Ovid M. Kellogg, Defendant," journal entry of judgment was recorded as follows:

"The court finds that the defendants Independent Elevators, Ovid M. Kellogg and Eugene F. Ham are indebted to the plaintiff, Bertha Krug, on the cause of action set forth in her petition herein filed, in the sum of eighteen hundred sixty-four and no 100 ($1,864) dollars, and that said amount shall draw interest from this date at 7% per annum.

"It is, therefore, considered, ordered and decreed by the court, that the plaintiff, Bertha Krug, have and recover from the defendants, Independent Elevators, Ovid M. Kellogg and Eugene F. Ham, the sum of $1,864, with interest from this date at the rate of 7% per annum, and the costs of suit, taxed at $——."

Motion for a new trial entitled, "Bertha Krug, Plaintiff, v. Eugene F. Ham, et al., Defendants," was by "defendants" filed upon the usual grounds, and that the petition did not state facts sufficient to constitute a cause of action, and that the same was barred by statute of limitations, which motion was overruled. Independent Elevators filed no motion for new trial, unless it may be considered as included in the term "defendants."

Thereupon Ham and Kellogg, as individuals, filed an appeal bond and docketed the case in this court, where the same in due course came on for hearing before Commission No. 1, resulting in a reversal of the judgment as to the individual defendants on the ground that, after they had been dismissed from the case presented by the original and first amended petitions they were no longer parties and when the second amended petition was filed the statute of limitations had barred plaintiff's claim. As the Independent Elevators had not appealed, the judgment as to it was affirmed. A motion for a rehearing was filed by the individual appellants asking a reversal also of the judgment as to Independent Elevators, on the ground that it had never been a party to the proceedings, was not served with process, and did not enter its appearance in the action. The motion was overruled, and upon the recording of the mandate in the district court an execution was issued upon the judgment and levied upon property of Independent Elevators. Thereupon this suit was brought to enjoin the proceedings.

The first question for consideration is the validity of the judgment under attack; if erroneous, it may not be overturned in this proceeding; if void, it need be given no consideration; and the only question would be whether plain-

tiff is entitled to relief in equity. Is the judgment void for want of jurisdiction upon any of the grounds suggested? A brief review of the facts disclosed by the record seems necessary, beginning with granting leave to file the second amended petition September 27, 1924.

The request granted was leave to make Independent Elevators, a copartnership, a party defendant; but the petition filed in response was against Ham and Kellogg, copartners as Independent Elevators, and judgment was prayed only against Ham and Kellogg, as individuals, not against Independent Elevators. Clearly this did not bring the latter into the case as a party. Ham and Kellogg answered as individuals; Independent Elevators filed no answer. Up to this point it must be conceded that judgment against the Independent Elevators would have been absolutely void, as being against one not a party, not served, and as to whom the petition made no allegations and asked no judgment. The following matters, however, appear of record: When originally sued as Independent Elevator Company, a corporation, it filed a demurrer to the petition in that character, later, a motion to strike the amended petition, and still later, about one year after suit was commenced and after the statute of limitations had barred the action, filed an answer, and for the first time alleged that it was not a corporation. Independent Elevators made no objection to the second amended petition and filed no answer; it approved by its counsel the journal entry submitting the cause for trial, containing the recital "the Independent Elevators, a partnership composed of Eugene F. Ham and Ovid M. Kellogg, appearing by their attorney, Charles S. Briggs;" and finally presented and filed a brief in the name of Independent Elevators, naming it as the sole defendant, and in which neither the name of Ham nor Kellogg appears in any connection. By the filing of this brief, Independent Elevators participated as a party in the trial of the cause; it urged on its own behalf all the defenses set up in the answer of Ham and Kellogg, with reference to which it may be said: "The hand is the hand of

Esau, but the voice is the voice of Jacob." In none of these proceedings is the point made that Independent Elevators was not a party to the suit, nor until the filing of motion for rehearing in supreme court. Considering these facts and circumstances, we are driven to the conclusion that the case was tried in the district court by both parties and their counsel and the judgment of the court went upon the theory or assumption that Independent Elevators had been made and was a party as by leave granted. We think it is too late, in a collateral action, for plaintiff to maintain that the district court had no jurisdiction of its person. On the contrary, we think that the appearances and conduct of plaintiff were sufficient to vest the court with complete power to determine the rights of the parties before it. The plaintiff in this action (defendant in that) participated in the trial of the cause without any suggestion or objection that it was not a party; it thereby submitted itself to the jurisdiction of the court and is bound by its judgment, all objections being waived. *Bedford v. Ruby*, 17 Neb. 97. The facts of this case and the procedure followed are most unusual, if not unique, but the conclusion above announced is based upon general principles and finds support in the decisions. In *Parks v. Hays*, 11 Colo. App. 415, defendant was sued as an individual, but he appeared and answered as an officer (state auditor); his successor also answered as an officer, and it was held that all irregularity as to pleading and process was waived. In *Denver & R. G. R. Co. v. Loveland*, 16 Colo. App. 146, where the court erroneously allowed another party to be substituted, and the latter appeared and moved for a continuance, the error was waived. In *Johnson Loan & Trust Co. v. Burr*, 7 Kan. App. 703, the trust company was ordered made a party defendant; it was not named in the petition nor charged by any allegations of the pleading, but was properly summoned and made default. Three years after judgment had been rendered against it, it filed a motion to vacate the same, and it was held that the filing of the motion was a general appear-

ance by which defendant "waived, not only all objections to the summons, but also to the entering of the judgment against it." In *Van Gundy v. Carrigan,* 4 Ind. App. 333, complaint was defective in failing to set out the names of new parties brought in by order of the court, and it was held that any objection was waived by an appearance and answer. In *First Baptist Church v. Harper,* 191 Mass. 196, Hattie M. Harper was not named as defendant, but, having appeared and answered, the irregularity was waived. In *McCord-Collins Co. v. Pritchard,* 37 Tex. Civ. App. 418, a suit was brought against the McCord-Collins Commerce Company, a foreign corporation. By the same counsel who afterwards represented McCord-Collins Company, defendant filed an answer in which no suggestion was made that it was not the proper party. Upon the trial it appeared that the action should have been against McCord-Collins Company, and the court directed the jury to find for the Commerce Company, but subsequently granted a new trial. Plaintiff then amended, dismissing his cause of action as to the Commerce Company, and making the McCord-Collins Company defendant, which was duly served, and answered, among other things, with the plea of the statute of limitations. The court held that the jury were justified in finding that the original answer filed on behalf of the Commerce Company was in fact the answer of the Collins Company and was such an appearance by the latter as would make it a party defendant and prevent the bar of the statute as applied to the cause of action set forth in the amended petition. In *Schroeder v. Hotel Commercial Co.,* 84 Wash. 685, it was held: "A judgment against one not named as a party to the action is not erroneous, where the court finds that the plaintiff was an assignee merely for collection; that the party against whom judgment was rendered was the real party in interest that it was represented in the action by its agents who were paid by it; and that it actually participated in the trial, though not a nominal party; since one not a technical party is bound by the decree if he be interested in the subject-mat-

ter of litigation and has exercised the right to participate." See, also, *Whitcomb v. Hooper*, 81 Fed. 946. The judgment may be erroneous, but it is not void.

To reach a different conclusion would require us to find that counsel for defendant in the first case had deliberately deceived and misled the court and opposing counsel into the belief that Independent Elevators was a party to the suit; this we are not inclined to do in view of the high standing of that gentleman at the bar of this state. The instant case is presented by other counsel.

Having concluded, for the reasons stated, that the judgment attacked is not void, it is at most erroneous and could only be set aside in a direct proceeding by appeal, of which remedy the present plaintiff failed to avail himself. *Pollock v. Boyd*, 36 Neb. 369.

In view of our conclusion, the other questions presented by the briefs need not be discussed. It would seem, however, that, plaintiff having appeared by counsel in the first case, its present predicament is the result of a failure to pursue the plain legal remedies appropriate to the situation, and therefore he has no standing in a court of equity. See *Koehler v. Reed*, 1 Neb. (Unof.) 836, and cases cited.

AFFIRMED.

BLUE RIVER POWER COMPANY, APPELLANT, V. FRANK HRONIK ET AL., APPELLEES.

FILED JANUARY 27, 1928. No. 25324.

1. **Dismissal.** Proceedings under a writ *ad quod damnum* are so far assimilated to an action as to be included in that term as used in section 8598. Comp St. 1922, providing for dismissal of actions.
2. ———. Such proceedings may be dismissed by the party instituting them upon the same terms as other actions may be dismissed.
3. ———. Under section 8598 Comp. St. 1922, plaintiff may, as a matter of right, dismiss his action without prejudice at any

time before final submission to the court or jury, where such dismissal will not prejudicially affect the rights of the defendant.

4. ———: DISCRETION OF COURT. Upon motion of plaintiff to dismiss an action, the discretion of the court is not called into action, unless it be made to appear that by so doing plaintiff will obtain an unjust advantage or defendant will suffer some legal prejudice.

5. ———: LEGAL PREJUDICE. The chance that defendant may be subjected to the annoyance of a second suit for the same cause and the fact that he has been put to expense of employing counsel to defend the suit dismissed do not constitute legal prejudice preventing dismissal; such injuries are *damnum absque injuria* and are, in legal contemplation, compensated by the allowance of costs.

6. ———: ———. Legal prejudice which will defeat plaintiff's motion to discuss is such as deprives defendant of substantive rights of property, or concerns his defense, which will not be available or may be endangered in a second suit.

7. ———: CONDITIONS. Where no substantial right of defendant is affected by the dismissal of the action by plaintiff, it is error for the court to condition such dismissal upon the payment by plaintiff of defendant's counsel fees.

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

Thomas, Vail & Stoner, for appellant.

Glenn N. Venrick, Francis H. Mayo, Merrill A. Russell and *John E. Mekota, contra.*

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

REDICK, District Judge.

Proceeding in *ad quod damnum* under section 3377 *et seq.*, Comp. St. 1922. The matter had progressed to the filing of the report upon inquest as to amount of damages. Defendants moved to confirm the report, and plaintiff moved to dismiss the proceedings. The motion to dismiss was allowed by district court upon condition that plaintiff

pay defendants their counsel fees, which the court fixed at $1,000. Plaintiff excepted and appeals. The only question for our determination is the authority of the court to attach the condition.

Under our laws a case may be dismissed "by the plaintiff before the final submission of the case to the jury, or to the court where the trial is by the court" as a matter of right. Comp. St. 1922, sec. 8598; *Snyder v. Collier*, 85 Neb. 552. But the court may, when justice requires it, impose reasonable terms, or refuse dismissal. *Horton v. State*, 63 Neb. 34. Some doubt is suggested as to the application of the above statute to a proceeding of the present character, section 3388, regulating these proceedings, provides: "Issues of law and of facts may be made up and tried as in other cases; and the court may quash the writ, or set aside the inquest, and may award a new writ on payment of all costs by the party who has built, or proposes to build, such milldam, or the court may dismiss the proceedings, or may ratify and confirm such inquest." By section 3397 it is provided: "Should no resistance be made to proceedings brought under this chapter, to obtain leave to build or continue a milldam, the costs shall be adjudged against the plaintiff; but if such proceedings be resisted in any stage thereof, the court shall equitably adjust the costs which are caused by such resistance, having regard to the event." And by section 3399: "Each juror shall be allowed one dollar for each day's attendance, and other costs shall be allowed as in other cases." The proceeding may be instituted by either the erector of the dam or the landowner to assess the damages, and, when brought, it is carried on as an ordinary action. It would seem that as the issues are to be tried as in other cases, and proceedings may be initiated by either party, it should be looked upon as an action which may be discontinued on the same terms as actions at law. In *Moore v. Waddington*, 69 Neb. 615, we held that an election contest was an action within the terms of the statute allowing plaintiff to dismiss.

Assuming that "a party should no more be compelled to

continue a litigation than to commence one, except where substantial rights of other parties have accrued, and injustice will be done to them by permitting the discontinuance" (*In re Butler*, 101 N. Y. 309), what rights have accrued to defendants in consequence of these proceedings, and what injustice will they suffer by their discontinuance? The only right they have is to damages for flooding their lands, but this they had before and still have. Such right did not accrue to them by reason of these proceedings. What injustice will be done to them by the dismissal? The only injustice claimed is that they have been subjected to liability for attorney's fees; but this presents no different situation from the dismissal without prejudice of an ordinary action, and in such case it can hardly be maintained that payment of defendant's attorney's fees may be made a condition of the dismissal, in the absence of statutory authority. In such cases the loss occasioned defendant by the exercise by plaintiff of a legal right is *damnum absque injuria*. *McCready v. Rio Grande W. R. Co.*, 30 Utah 1.

The "costs" referred to in sections 3388, 3397, and 3399 are the usual costs provided by statute. *McCready v. Rio Grande W. R. Co.*, 30 Utah 1. "Costs as in other cases." *Warm Springs Irrigation District v. Pacific Live Stock Co.*, 89 Or. 19. These were both condemnation cases, and by the latter it was held that, though the statute permitted the assessment of an attorney's fee after judgment, where proceedings were dismissed before final disposition, only costs could be taxed.

It is perfectly clear that, had these proceedings proceeded to judgment, the court would have been without authority to tax a fee for defendant's attorneys or otherwise. What, then, other than an arrogated authority exists to assess a fee as a condition of dismissal? Section 3388 permits the court to quash the writ "on payment of all costs," which, as we have shown, means costs provided by statute. What greater power does the court possess in sustaining a motion of plaintiff to dismiss than if it acted upon its own motion?

What, then, is meant by the language, "The court, in its discretion, may refuse to dismiss whenever justice to the court, or its officers, or to any of the parties, requires imposition of terms, or retention of the cause upon the docket," in *Horton v. State*, 63 Neb. 34? The answer is found in the opinion; it was applied in *Sheedy v. McMurtry*, 44 Neb. 499, by requiring payment of costs; in *Bryon v. Durrie*, 6 Abb. New Cas. (N. Y.) 135, to protect rights of attorneys (for plaintiff) under agreements as to fees; in *Stevens v. Railroads*, 4 Fed. 97, to protect a defendant in his plea of estoppel from the danger of a possible transfer of a lien; and in *Lane v. Morton*, 81 N. Car. 38, to enable a defendant to obtain restitution, as was the *Horton* case itself. The opinion by Roscoe Pound, C., continues:

"Of course, there must be some real and substantial right which has accrued to the adverse party in the very cause sought to be dismissed. Collateral consequences, such as subjection of the defendant to further litigation, or purposes not connected with the action in question, will not be allowed to interfere with the right given to plaintiffs by statute. *Banks v. Uhl*, 6 Neb. 145. Hence, ordinarily, the dismissal will be allowed as of course. *Beals, Torrey & Co. v. Western Union Telegraph Co.*, 53 Neb. 601. But we know of no case appealing to a court more strongly for application of its discretionary power than one in which money or property has been taken under an unwarranted and improvident judgment, which has been reversed, and the adverse party is entitled to restitution. It would require convincing argument and strong weight of authority to persuade us that a dismissal could be had as a matter of right in such case, before mandate filed and without reasonable opportunity to direct the court's attention to the claim for restitution, and the defendant thus deprived of his summary remedy and driven to the difficult and expensive remedy of another action. The discretion of the court in such cases is grounded on the requirements of justice to itself, its officers, and the adverse parties. It depends upon the existence of rights which would be

jeoparded by dismissal, not upon the manner in which the court becomes cognizant of such rights."

Our attention has not been called to any substantial right which has accrued to appellee *by virtue of these proceedings;* neither does it appear that appellant has obtained any advantage thereby which should be surrendered as a condition of dismissal. As stated in the brief of counsel for appellees, the condition may be imposed "for the protection of rights which would be otherwise jeopardized by the dismissal;" and, as already stated, their rights remain the same; they are still entitled to damages to their lands, and may on their own initiative institute proceedings *ad quod damnum* for their assessment, or actions at law for their recovery. In such case there is no basis for the exercise of discretion or imposition of terms beyond the payment of costs.

Appellees cite a number of cases to the general proposition that the court is vested with a discretion to condition a dismissal upon compliance with reasonable terms; but, with one exception, payment of attorney's fees was not required. *In re Waverly Water-Works Co.*, 85 N. Y. 478, makes strongly for appellees. That was a proceeding in eminent domain, and, after damages for taking the lot in question had been assessed, the company moved for leave to discontinue the proceeding, which was granted, "upon condition that the company pay the owner his expenses, charges, and counsel fees." After stating that the proceeding could not be dismissed without leave of court, it is said:

"The court in which an action is pending may impose terms beyond taxable costs as a condition of the discontinuance of the action. It may require the plaintiff to stipulate that he will not sue again for the same cause of action; or that, if he does sue again, the defendant may use the evidence already taken; or that he will not interpose the statute of limitations as a defense to a counterclaim which defendant has set up in case he should

sue the plaintiff thereon, or even that he will pay the counterclaim. The right to impose such conditions grows out of and is included in the right to refuse the discontinuance altogether."

This is a broader statement of the rule than we have met with elsewhere, even in the appellees' brief. The research of the writer has discovered but one other state where the rule as to attorney's fees has been applied as in the case last cited. *St. Louis R. Co. v. Southern R. Co.*, 138 Mo. 591, was an action to recover expense in employing counsel in a condemnation proceeding which had been dismissed. The court announced the general rule that costs (in which counsel fees are not included) are the only damages which the party sustains by the defense of a suit against him, but allowed the recovery as a settled rule in that state, saying, "Were the question of the recovery of such expenses on dismissal of condemnation proceedings a new one in this state, we would hesitate in sustaining this action," which remark probably was occasioned by the insistence in defendant's brief that the former decisions were a species of judicial legislation, and indicated the correctness in principle of a contrary ruling. On the other hand, in *Andrus v. Bay Creek R. Co.*, 60 N. J. Law 10, it was held: "A landowner cannot recover from a railroad company for counsel fees and other expenses incident to condemnation proceedings regularly instituted by the company and afterwards discontinued"—and stating it was not necessary to decide what were proper terms to impose where the question of dismissal was submitted to the discretion of the court. There may be reasons for greater liberality in imposing conditions where real property is proposed to be taken by the proceedings which interfere with its use and sale than where the only question is one of damages, but beyond this we think the rule is more accurately stated in 10 R. C. L. 238, sec. 200, as follows:

"As a general rule, when condemnation proceedings are dismissed or abandoned in good faith and without unreasonable delay, the owner of the land sought to be taken

is not entitled to be made whole for the expenses to which he has been put in preparation for trial or the loss he may have suffered by the removal of tenants or interference with his plans in regard to the use of the property. *Ford v. Board of Park Commissioners,* 148 Ia. 1; *Pittsburgh's Petition,* 243 Pa. St. 392; *McCready v. Rio Grande W. R. Co.,* 30 Utah 1.

"When, however, the proceedings were not instituted in good faith, or were kept alive for an unreasonable length of time, and finally abandoned, the owner is entitled to be compensated for his expenses and loss, either as an incident or condition of the abandonment, or as a separate action sounding in tort. *Mayor v. Musgrave,* 48 Md. 272; *Black v. Mayor,* 50 Md. 235." See, also, 14 Cyc. 406 D.

In *United States v. Dickson,* 127 Fed. 774, it was said: "It is the universally conceded right of every plaintiff to dismiss his suit whenever he sees fit, unless some propounded interests of the defendants should be affected," and a condemnation proceeding was declared to be no exception to the general rule.

In *Matter of Low,* 103 App. Div. (N. Y.) 530, it was held that counsel fees of the landowners were not allowable in eminent domain proceedings, unless by express statute. Landowners are not entitled to costs and expenses of defending proceedings as compensation. *New Milford Water Co. v. Watson,* 75 Conn. 237. Upon dismissal of proceedings to establish a road, costs only are allowed. *Kemper v. Calhoun,* 111 Va. 428.

The injury occasioned by the dismissal must be such as to deprive defendant of some substantial right not available in a second suit, or that may be endangered by the dismissal. *Young v. Georgia Home Ins. Co.,* 131 Ga. 54; *Stevens v. Railroads,* 4 Fed. 97; *Kemper v. Calhoun,* 111 Va. 428. The ordinary inconvenience of double litigation is not a legal prejudice, and can be compensated by costs. *Gilmore v. Bort,* 134 Fed. 658; *Penn Phonograph Co. v. Columbia Phonograph Co.,* 132 Fed. 808; *Southern Cotton*

Oil Co. v. Shore, 171 N. Car. 51; *Pullman's Palace Car Co. v. Central Transportation Co.*, 171 U. S. 138.

We have held that under the statute the plaintiff may dismiss his action as a matter of right at any time before final submission of the cause. *Snyder v. Collier*, 85 Neb. 552, and cases therein cited.

We are of the opinion that the only discretion which may be exercised in the matter is the protection of any rights which have accrued to defendant as a result of the bringing of the action, such as the preservation of a counterclaim, the restitution of property of which he has been deprived, the recovery of his costs, and the like; that in the absence of such considerations the right to dismiss is absolute; that the expense of employing attorneys in defending the action, or the liability to further litigation over the same matter, are not subjects calling for the exercise of discretion by the court as constituting legal prejudice to defendant.

The other matters discussed in the briefs need not be considered.

The judgment is reversed and cause remanded to the district court, with instructions to dismiss the proceedings at the cost of Blue River Power Company.

REVERSED AND DISMISSED.

LOUIS TOMJACK, APPELLEE, V. CHICAGO & NORTHWESTERN RAILWAY COMPANY, APPELLANT.

FILED FEBRUARY 13, 1928. No. 25305.

1. **Highways: NEGLIGENCE.** Where a culvert, adjacent to its tracks and on its right of way across a public highway, is built by a railway company in accordance with the general plans of highways and has been adopted as a part of the highway, negligence will not be predicated upon it merely by reason of its location and dimensions.
2. **Negligence.** Where plaintiff riding in a vehicle is injured by reason of the vehicle being so driven as to miss a culvert properly located and built on a public highway, and to fall

into a ditch at the end of the culvert, and plaintiff had opportunity but failed to warn the driver. it cannot be said that plaintiff's negligence is slight as compared with that of defendant, and plaintiff therefore cannot recover.

APPEAL from the district court for Holt county: ROBERT R. DICKSON, JUDGE. *Reversed, with directions.*

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

J. J. Harrington, contra.

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

GOSS, C. J.

This is an action for damages for personal injuries. From a verdict and judgment for $500 against it, defendant appeals.

Plaintiff was injured after dark on the night of December 25, 1923. He was riding on the front seat of Theodore Zaborowski's Ford touring car, driven by the owner. There were three other young men in the car. The injury occurred a little east and south of Ewing on state and federal highway No. 8. This highway is a well-graded and graveled road located in the main on a section line, but, in order to accommodate it to the Elkhorn river, the road for some distance north and south of that river lies to the west of the section line. The railroad is north of the river and runs in a northwest and southeast direction. The river runs in a northeast and southwest direction. When the wagon bridge was built across the river a few hundred feet farther south than the railroad crossing, the bridge was so built as to cross the river at more nearly a right angle than if it had been built on the section line, and so the bridge was built to the west of the section line and the north end of it was considerably farther west than the south end. To meet this situation the road, as soon as it crosses the railroad track, in going from the

north, turns with a sharp curve to the right toward the southwest, until about half way from the crossing to the bridge, when it turns to the left. A few feet south of the track, and as a part of the south approach, the railroad company built a bridge or culvert parallel with the rails to carry the water collected in the right of way ditch. This culvert is built of heavy planks, is 17 feet across, and is about 31 feet long east and west. It has a guard rail at either end. The road, the railroad, the bridge over the river, and the culvert or bridge under the highway just south of the railroad, have existed, in the manner described, for many years. The evidence shows that the culvert was originally built as a part of the public road; that this road was surveyed and approved by the state highway department, a map was made showing this culvert, a copy of the map was filed in Holt county as provided by law, and that this highway is a part of the official highway known as No. 8, and as laid out and approved by the state engineer's office.

On the night in question, the party drove from the north across the railroad and, instead of keeping in the driveway and crossing the culvert or bridge, they went into the ditch at the west end of the culvert. The car was wrecked and the occupants were injured.

Plaintiff alleged negligence in many words, but his claims may be shortly stated as two items of negligence on the part of defendant: (1) That the defendant failed to place its bridge in line of travel when approaching it from the north; (2) that the ditch west of the bridge is unguarded by any "light, sign, post, wing, fence, guard, shield, or warning of any kind."

The photographs, the blue prints and the testimony show that the bridge is on the line of travel. It would require a much longer bridge, a bridge covering most of the highway west of its center on the south side of the railroad tracks, if travel from the north is to go over the crossing without making any turn so as to leave the rails about at right angles when proceeding toward the river

bridge. Because of the turn in the highway at this point, it is obvious that this bridge or culvert, which is located just south of the angle or point of turning, could not be so placed that it could be approached at right angles by vehicles from both directions. The pivot is in the center of the line of travel and at the north side of the bridge or culvert. This railroad bridge or culvert has been here unquestioned by the authorities or by the public, and as a part of the highway, for upwards of 20 years. Nothing in its location or its construction indicates any negligence. The plaintiff argues that, because the crossing planks between the rails, with one plank on each side of the track, extend farther west than the west end of the bridge, he was invited to cross, or was justified in crossing, the west end of these planks, and that this led him to the ditch west of the bridge. This position loses sight of the fact that the railroad company put the planking just where it would be put in any north and south road crossed at an angle by rails. The highway at this point was a north and south road and under the evidence did not turn toward the west until the bridge or culvert was reached at a point nine feet south of the south rail. No driver going either way had any right or invitation to cross the planking and rails at right angles. If the car in which the plaintiff was riding had followed the traveled line of the road and had crossed the railroad track in the proper place, it would have found itself on the bridge or culvert. The evidence shows that the car went so far to the right that it missed the culvert or bridge entirely. Where a culvert, adjacent to its tracks and on its right of way across a public highway, is built by a railroad company in accordance with the general plans of highway and has been adopted as a part of the highway, negligence will not be predicated upon it merely by reason of its location and dimensions.

The second claim of negligence, as to the lack of guard or warning, is, it seems to us, equally as untenable as the first. If we hold that a 31-feet wide culvert is not suf-

ficient crossing for a stream or ditch and that it must be guarded, or hold that every turn in the road is ground for actionable negligence, unless some one is stationed there with cap and bells to warn the wild and reckless, then we shall lay upon those who build and maintain roads a greater burden than we feel the law justifies. But that is exactly what the plaintiff asks us to do in this case. It was the duty of the driver of the car after dark on this road to proceed so that his headlights would mark out the traveled road, and if he proceeded faster than he was able to see the road ahead of him, or, if he failed to keep a lookout, he was guilty of negligence. The fact that, in the circumstances heretofore outlined describing the road, the car missed the bridge, is evidence of such negligence that it seems amazing that any one would bring suit on account thereof. Plaintiff was in the front seat with the driver. Had the car been driven under proper control, there was ample time for the driver to stop, and for plaintiff to have warned him in time to stop, before he reached the railroad rails on the right of his true course. The driver testified that he had been going faster, but was going about 15 or 20 miles an hour as he was approaching the railroad crossing. He knew it was a crossing, because he testified he saw a train coming from the east. Going at this speed, on approaching the tracks, he could have seen the bridge in time to have stopped and to have driven to it instead of to the ditch; and, if plaintiff had been watching, he could have warned the driver, in time to stop, that he would miss the bridge if he kept on. Where plaintiff, riding in a vehicle, is injured by reason of the vehicle being so driven as to miss a culvert properly located and built on a public highway, and to fall into a ditch at the end of the culvert, and plaintiff had opportunity but failed to warn the driver, it cannot be said that plaintiff's negligence is slight as compared with that of defendant, and plaintiff therefore cannot recover. *Morrison v. Scotts Bluff County*, 104 Neb. 254.

We are of the opinion that the court should have dis-

missed the action or should have instructed the jury to return a verdict for the defendant. The judgment of the district court is reversed, with directions to dismiss.

REVERSED.

Note—See Negligence, 29 Cyc. 560 n. 25—18 L. R. A. (n. s.) 356; 22 A. L. R. 1301.

MARGARET TRALLE, ADMINISTRATRIX, APPELLANT, V. HARTMAN FURNITURE & CARPET COMPANY ET AL., APPELLEES.

FILED FEBRUARY 13, 1928. No. 25293.

1. **Master and Servant:** WORKMEN'S COMPENSATION ACT: LIABILITY. Common-law liability of third persons for negligence resulting in injury to an employee while engaged in the work of his employment is recognized by the workmen's compensation law. Comp. St. 1922, sec. 3041.
2. ——: ——: PURPOSE. An outstanding purpose of the workmen's compensation law is to shift from the employee to modern industry the burden of economic waste or loss "arising out of and in the course of his employment" as a result of his injury or death.
3. ——: ——: LIABILITY. Owners of a building leased by them for a furniture store are not necessarily entitled to immunity at common law as "employers" of a workman killed as a result of their negligence while he was in the service of a contractor engaged by lessee to remodel the interior of the building for the furniture business, in which they had no part, where their only connection with the remodeling was the granting of permission therefor, being "third persons" within the meaning of the workmen's compensation law.
4. **Landlord and Tenant.** An ordinance providing that all freight elevators shall be equipped with an overhead guard, but designating no one to comply with the regulation, imposes the initial duty of equipment on the owners.
5. ——: NEGLIGENCE. The failure to comply with an ordinance requiring the owners of a freight elevator to equip it with an overhead guard is of itself negligence.
6. ——: DEATH OF WORKMAN: PROXIMATE CAUSE. Where a workman properly using a freight elevator by invitation of the owners and lessors was struck on the head and killed by a

hammer which an employee of their lessee's contractor negligently allowed to fall into the elevator shaft, the proximate cause of the death was the failure of the owners and lessors to comply with their existing and continuing duty, unperformed at the instant when the hammer fell, to equip their freight elevator with an overhead guard in compliance with a mandatory ordinance requiring them to perform that duty, if nondelegable.

7. ———: ———: LIABILITY. A workman in the service of a contractor employed by a lessee to remodel the interior of a leased building may be entitled to the protection of an ordinance imposing upon the owners and lessors the mandatory duty to equip the freight elevator therein with an overhead guard.

8. ———: ———: ———. The leasing of real property does not necessarily exempt the owners from civil liability for failure to equip an elevator therein with an overhead guard required by ordinance.

9. ———: ———: ———. A mandatory duty imposed by ordinance upon the owners of a building to equip a freight elevator therein with an overhead guard may be nondelegable in the sense that they cannot by lease impose upon lessee the exclusive burden of compliance, so as to relieve themselves from pecuniary liability for their negligent failure to comply with the ordinance or to compel lessee to do so.

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

R. M. Switzler, for appellant.

Montgomery, Hall, Young & Johnsen, Johnson, Moorehead & Rine, Kennedy, Holland, DeLacy & McLaughlin and *Dressler & Neely, contra.*

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

ROSE, J.

This is an action to recover damages for alleged negligence resulting in the death of John P. Tralle, a workman. While he was operating a freight elevator in a store building at 415 South Sixteenth street, Omaha, August 19, 1924, a hammer fell into the elevator shaft, struck him on the

head and killed him. His widow, Margaret Tralle, as administratrix of his estate, brought this action against the following defendants: John R. Webster and John Potter Webster, owners of the store building; Hartman Furniture & Carpet Company, lessee of the owners, proprietor of the store, a corporation in possession of the realty under the lease; Peter Jacobson, a contractor employed by lessee to remodel for the latter the interior of the store building; Le Bron Electrical Works, a corporation engaged in the electrical business, subcontractor, employee of the contractor and employer of J. J. Cunningham who, while at work as an electrician, let the hammer fall into the elevator shaft. Tralle, when struck by the hammer, was operating the freight elevator, while moving materials for the contractor from the basement of the building to the fifth floor. The negligence pleaded as the proximate cause of the workman's death was the failure of the Websters, lessors, as owners of the building, to comply with a city ordinance providing:

"All freight elevator platforms hereinafter installed, or at present in service, shall be equipped with a wire-mesh guard over top of same, constructed of not lighter than No. 10 (U. S. St'd) guage round wire, with mesh not greater than 1½ inches."

The negligence of the Le Bron Electrical Works is pleaded by plaintiff as the concurring and contributing cause of the injury. The deceased workman left surviving him the plaintiff and a minor daughter who have no means of support except workmen's compensation which plaintiff is receiving from the insurer of Jacobson, the contractor, who refused to sue the Websters for the damages resulting from the negligence alleged. A copy of the lease from the Websters to the Hartman Furniture & Carpet Company is attached to the petition. The stipulated period of tenure under the lease was 12 years beginning March 1, 1924. Other provisions of the lease required lessee to keep the interior of the building in repair, to protect lessors from damages and to obtain permission for the

making of improvements. The right of the lessors to terminate the lease for lessee's noncompliance with its terms was also a provision of the lease. Plaintiff sought judgment for $50,000 against the Websters, lessors, owners of the store building, the Hartman Furniture & Carpet Company, lessee of the owners, and Jacobson, the general contractor, the latter to receive from the amount recovered in this action a sum equal to the workmen's compensation paid by him or his insurer to plaintiff. The facts outlined were pleaded in detail by plaintiff. The district court sustained separate demurrers by defendants to the petition and dismissed the action. Plaintiff appealed.

In the appellate court plaintiff does not complain of the dismissal as to the Hartman Furniture & Carpet Company, lessee, and its contractor, the latter having compensation insurance. It is nevertheless argued by her that the owners and lessors are charged with actionable negligence at common law and that they are not "employers" within the meaning of the workmen's compensation law and are not, therefore, entitled to immunity from the consequences of their negligent failure to equip their elevator with an overhead guard as required by ordinance. The position of plaintiff on this phase of the controversy is indicated by the following proposition as it appears in her brief:

"A mere owner is not an employer within the theory, meaning or intent of the workmen's compensation act, and is therefore not subject to liability under the act, but is a 'third person,' liable only to the obligations imposed by the common law."

On the contrary, the theory of lessors, owners of the building, is that they are "employers" within the meaning of the following provisions of the workmen's compensation law, and not, therefore, liable at common law for the negligence resulting in the death of the workman Tralle:

"Any person, firm or corporation creating or carrying into operation any scheme, artifice or device to enable him, them or it to execute work without being responsible to the workmen for the provisions of this article, shall be

included in the term 'employer' and with the immediate employer shall be jointly and severally liable to pay the compensation herein provided for and be subject to all the provisions of this article. This section, however, shall not be so construed as to cover or mean an owner who lets a contract to a contractor in good faith, or a contractor who, in good faith, lets to a subcontractor a portion of his contract, if the owner or principal contractor, as the case may be, requires the contractor or subcontractor, respectively, to procure a policy or policies of insurance from an insurance company licensed to make such insurance in this state, which policy or policies of insurance shall guarantee payment of compensation according to this article to injured workmen." Comp. St. 1922, sec. 3039.

Common-law liability of a third person for negligence resulting in injury to an employee engaged in the work of his employment is recognized by statute. Comp. St. 1922, sec. 3041.

The owners and lessors are not charged with the operation of "any scheme, artifice or device" to escape liability for compensation and are therefore not employers as defined by the first sentence in the section of the statute quoted. Under the second sentence in the section, are they entitled to immunity from common-law liability as employers or owners who required the contractor to provide compensation insurance? Does the petition show that the owners are third persons who are liable for damages, resulting from their negligence? These are difficult problems learnedly presented on both sides. The solution depends on the meaning of the workmen's compensation law. A proposition urged by the owners and lessors to sustain the dismissal of the action is stated in this form:

"Having given consent to remodeling by the lessee which required the contractor to take workmen's compensation insurance for the protection of his employees, under section 3039, Compiled Statutes 1922, the owners, as well as the lessee, have discharged their full duty to the employees of the contractor, and for injuries sustained in the

course of the work the owners are not liable at common law."

In the argument on the affirmative of this proposition it was said:

"It was the purpose of the workmen's compensation act to place upon the enterprise or activity the risk of industrial accidents happening on the job and in the course of the employment. The whole spirit of the act is to regard the enterprise or activity as the 'employer.' Here the enterprise or activity was the remodeling of the building, and those who were not strangers to that remodeling cannot, we think, be regarded as 'third parties' in their relation to workmen employed by the contractor." Citing *O'Donnell v. Baker Ice Machine Co.*, 203 N. W. (Neb.) 635.

It is generally understood that an outstanding purpose of the workmen's compensation law was to shift from the employee to modern industry the burden of economic waste or loss "arising out of and in the course of his employment" as a result of his injury or death. The granting of permission for the making of the improvement pursuant to a provision of the lease was the only connection of lessors with the remodeling. They did not employ any one. The petition does not show that they required compensation insurance for the employees of lessee or of the latter's contractor. The deceased workman was not a trespasser or a licensee. He was properly using the elevator. He was impliedly invited by lessors to do so. This is shown by allegations that it was a freight elevator, that it was in use as such, that it was part of the property leased for the furniture store, and that lessors granted lessee permission to remodel the interior of the building. With the furniture industry lessors had no connection. They could not select lessee's contractor or control his employees or give directions in regard to the furniture business. To hold that lessors and owners of the building were employers would stretch the workmen's compensation law beyond the purpose and scope of the legislation. The opinion in *O'Donnell v. Baker Ice Machine Co.*, 203 N. W.

(Neb.) 635, cited by lessors, was withdrawn upon rehearing. *O'Donnell v. Baker Ice Machine Co.*, 114 Neb. 9. If, however, the cogent reasoning in the withdrawn opinion were followed, it would not necessarily apply to the facts pleaded herein. The present case neither involves the duty of owners of a leased building to a trespasser nor a contract specifically requiring a contractor to protect his employees by compensation insurance—factors in the case cited by lessors. The better view of the workmen's compensation law, in the light of its purpose and language, is that lessors were not employers having immunity from liability at common law. It follows that the owners and lessors are "third persons."

It is next argued in support of the dismissal of the action that lessors are not liable at common law because, as contended, their failure to comply with the ordinance requiring an overhead guard was not the proximate cause of the workman's death. Reasoning of lessors on this point follows:

"It is clear that in this case the absence of the screen did no more than furnish a condition by which the injury was made possible by the subsequent independent act of a third person; that, if there was any negligence of the owners, it was merely passive and potential, while the act of Cunningham in dropping the hammer was the moving and effective cause and therefore the proximate cause." Citing, among other cases, *Steenbock v. Omaha Country Club*, 110 Neb. 794, wherein the following language was quoted:

"Where the negligence of one party is merely passive and potential, while that of the other is the moving and effective cause of the accident, the latter is the proximate cause."

"Proximate cause" in the law of negligence is sometimes a difficult term to apply owing to the variety and number of incidents resulting in personal injuries and to the diversity of judicial utterances on the subject. The nature of the duty imposed by the ordinance affects the

issue of proximate cause. The ordinance was passed to prevent personal injury and to preserve human life. It was a valid and proper municipal or police regulation. The ordinance imposed a duty owing to those invited to use the elevator. It applied by its terms to "all freight elevator platforms hereinafter installed, or at present in service." The initial duty to equip the elevator with an overhead guard fell upon the owners, since no one was specifically designated for the performance of that service. *McLaughlin v. Armfield,* 12 N. Y. Supp. 164; *Tvedt v. Wheeler,* 70 Minn. 161; *Welker v. Anheuser-Busch Brewing Ass'n,* 103 Minn. 189. The owners could have foreseen or anticipated an accident like the one resulting in the workman's death. Persons using the uncovered elevator were obviously exposed to the danger of objects falling into the shaft from the elevator door on each floor of a high building. Violation of an ordinance regulating the speed of vehicles in streets has often been held to be evidence of negligence, but the ordinance under consideration falls within the class of legislation imposing positive or mandatory duties for the protection of the public and resulting in the doctrine that noncompliance is of itself negligence. *Vanderveer v. Moran,* 79 Neb. 431; *Stevens v. Luther,* 105 Neb. 184; *Strahl v. Miller,* 97 Neb. 820; *McCarthy v. Village of Ravenna,* 99 Neb. 674; *Butera v. Mardis Co.,* 99 Neb. 815; *Hoopes v. Creighton,* 100 Neb. 510.

In the present case, does the petition show that the negligent failure to equip the elevator with an overhead guard was the proximate cause of the workman's death? The failure to comply with the ordinance was existing negligence that continued to the very instant when the hammer fell. It was not, therefore, a remote cause. Noncompliance with the ordinance was harmless or inactive until there arose a situation that made the protection of a guard necessary for the saving of human life. When that situation arose, the continuing negligence or unperformed duty of the owners became an active and concurrent cause

of injury—the very injury it was the purpose of the ordinance to prevent. In this view of the situation, the active cause attributable to the owners and the electrician's dropping of the hammer were simultaneous operations of negligence. The former was the failure to perform the mandatory and continuing duty imposed by ordinance and the latter was a mere accident in the handling of a common tool. The required guard would have prevented the casualty. The petition so alleges. The ordinance would not afford the full measure of protection, if the owners could escape civil liability for noncompliance on the ground that the dropping of the hammer was the proximate or actionable cause of injury. That theory of defense might unnecessarily facilitate the shifting of responsibility to irresponsible persons.

The workman in the building, while properly using the elevator by invitation, was entitled to the protection of the regulation. In *Ward v. Ely-Walker Dry Goods Building Co.*, 248 Mo. 348, 45 L. R. A. n. s. 550, the following principle was announced:

"Failure to comply with an ordinance requiring a roof over the sidewalk while materials are being placed in a building in process of construction at or near the street line is the proximate cause of injury to a workman injured by fall of a tool onto the walk."

The principal case cited by lessors in their argument on this question, *Steenbock v. Omaha Country Club*, 110 Neb. 794, differs from the present one. The report of the former shows that an employee of the Omaha Country Club, for the purpose of repairing a flagpole, placed it temporarily across a driveway in the club grounds. A chauffeur drove an automobile against the flagpole which hit and injured a caddy waiting near the driveway for employment. The negligence of the chauffeur was held to be the proximate cause of the injury, the rule announced being:

"The negligent placing of a flagpole across its driveway by the defendant Omaha Country Club, which flag-

pole was thereafter knocked against plaintiff's back by the careless and negligent driving of defendant Crofoot's car, thereby causing plaintiff's injury, is not the proximate cause of such injury." *Steenbock v. Omaha Country Club*, 110 Neb. 794.

In the case cited, injury to the caddy in the ordinary course of events could not have been foreseen by the country club under the circumstances, while the caddy's peril must have been obvious to the chauffeur who negligently caused the impact in broad daylight. There was no ordinance or statute imposing upon the Omaha Country Club a mandatory duty to keep the driveway free from obstruction at all times.

There was elaborate argument on the proposition that under the lease the owners lost possession of the building and the right to enter it for the purpose of complying with the ordinance and consequently were not liable to plaintiff for the negligence of lessee's servants. This position does not seem tenable. The lease is a part of the petition. It required permission of lessors for the making of interior repairs and obligated lessee to protect the former from damages, but it also authorized them to terminate the tenancy for noncompliance with the terms of the lease. The duty of lessee also to equip the elevator with an overhead guard while controlling and operating it under the lease, or to permit the owners and lessors to do so, was therefore enforceable. The leasing of real property does not necessarily exempt the owners from liability for failure to supply safeguards required by law. *Tvedt v. Wheeler*, 70 Minn. 161. There is a prevailing tendency to hold mandatory duties nondelegable. *Bianki v. Greater American Exposition*, 3 Neb. (Unof.) 656; *Wilson v. Thayer County Agricultural Society*, 115 Neb. 579; 37 Yale Law Journal, 113; *Sciolaro v. Asch*, 198 N. Y. 77, 32 L. R. A. n. s. 945.

On this point the conclusion is that the petition fairly charges that noncompliance with the ordinance requiring an overhead guard for the freight elevator was the proximate cause of the workman's death.

Other propositions argued by lessors at considerable length are that lessee took the premises as it found them and that neither lessee nor its contractor nor the latter's employee is entitled to recover damages for injuries resulting from the failure of lessors to furnish the overhead guard, since fraud or concealment of secret dangers are not shown. For the reason given in the discussion of proximate cause, lessors are not exempt from liability under the doctrine of *caveat emptor*.

Under a separate head it is also contended that lessors owed to the workman no duty to equip the elevator with an overhead guard, but the views already expressed are to the contrary.

The district court erred in sustaining the demurrer of the Websters. The dismissal is therefore reversed as to them and the cause remanded for further proceedings.

REVERSED.

Note—See Landlord and Tenant, 32 L. R. A. n.s. 945; 9 R. C. L. 1252; 36 C. J. 239 n. 37—Workmen's Compensation, L. R. A. 1916A, 360; L. R. A. 1917D, 98; L. R. A. 1918F, 524; 28 R. C. L. 834.

ROSINA REUTER, APPELLANT, V. JOHN REUTER ET AL., APPELLEES.

FILED FEBRUARY 13, 1928. No. 25296.

1. **Deeds: CONSTRUCTION.** The statutory rule for construing a conveyance of real estate requires the court to give effect to the expressed intent of the parties as collected from the instrument as a whole. Comp. St. 1922, sec. 5594.
2. ———: ———. The statutory rule for construing instruments conveying real estate applies to deeds.
3. ———: ———. Where granting and restricting clauses in a deed are not inconsistent or illegal, resort to the *habendum* is permissible for the purpose of ascertaining the character and extent of the estate granted to the first taker.
4. ———: ———. Though the granting clause in a deed for land, if considered alone, would be sufficient to convey the fee,

it may be shown by the instrument as a whole that a life estate only was conveyed.

5. ———: ———. A deed containing a granting clause in the form "do hereby grant, bargain, sell, convey and confirm unto" the grantee named the land described, when immediately followed by conditions that grantee, a daughter of grantor, shall not convey nor incumber the land and that upon her death the title "shall vest in her children and their descendants as by right of representation," *held* to convey to her a life estate, with remainder in fee over to a designated class consisting of such children of grantee as may be alive at her death and of such of her grandchildren as may be children of her deceased children.

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

Dort & Witte, for appellant.

A. E. Henry, contra.

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

ROSE, J.

This is a suit in equity for the construction of a deed to a quarter section of land in Pawnee county and to quiet in plaintiff the fee simple title thereto. The following excerpt from the deed contains the provisions in controversy:

"Know All Men By These Presents:

"That I, Frank J. Wenzl, a widower, of the County of Pawnee and State of Nebraska, for and in consideration of the sum of one dollar and other good and valuable consideration in hand paid, do hereby grant, bargain, sell, convey and confirm unto Rosina Reuter, my daughter, of the County of Richardson and State of Nebraska, the following described real estate, situated in Pawnee County, and State of Nebraska, to wit: The northwest quarter of section twenty-eight, in township three north, in range ten, east of the sixth principal meridian, containing 160 acres, more or less, according to United States government sur-

vey. This conveyance is made subject to the following express conditions: That the said Rosina Reuter, grantee herein, shall not convey nor incumber the said premises during the term of my natural life; that the said Rosina Reuter shall pay to me the sum of one hundred dollars on the thirty-first day of December each year during the term of my natural life, and the said annuity shall be and remain a charge and lien upon the said real estate until the same is fully paid; that upon the death of the said Rosina Reuter the said land shall descend to, and the title thereto shall vest in, her children and their descendants as by right of representation."

The deed contained covenants of warranty and was dated November 2, 1915. At that time grantee, Rosina Reuter, was the mother of children now living. She is plaintiff, and pleads that the deed was duly executed, delivered and recorded; that the restricting clauses were inserted for the sole purpose of securing to grantor, while living, the annual payments of $100 each; that grantee paid each installment at maturity; that grantor died August 23, 1922; that the wife of the grantor departed this life April 26, 1900; that the following provision of the deed is void:

"Upon the death of the said Rosina Reuter the said land shall descend to, and the title thereto shall vest in, her children and their descendants as by right of representation."

Grantee and her husband, John Reuter, have now unmarried children, named, respectively, Frank Reuter, Leonard Reuter, and Gladys Reuter. They have also a married daughter, Eulalia A. Reuter Burgett, wife of Oscar Burgett. The Burgetts named have a daughter Marie Burgett, a minor, granddaughter of plaintiff, the grantee. Gladys Reuter, daughter of plaintiff, is also a minor. John Reuter, husband of plaintiff, their children and the grandchild, Marie Burgett, are defendants.

The suit is defended only by the minors, Gladys Reuter and Marie Burgett, who are represented by A. E. Henry,

their guardian *ad litem*. The answer amounts to a plea that the deed to plaintiff conveyed to her a life estate only, with remainder over to a class consisting of her surviving children and of any surviving children of her deceased children at the time of her death.

Upon a trial of the issues the district court dismissed the suit. Plaintiff appealed.

The propositions of law upon which plaintiff relies for a reversal and for a decree in her favor are that the deed as a whole shows it was the intention of grantor to convey to grantee a fee simple title; that the fee was conveyed to plaintiff in clear and decisive terms; that after such a grant the estate thus conveyed could not be cut down to a life estate; that the restrictions were inserted to secure the stipulated payments; that the clause relating to the vesting of title in grantee's children and their descendants is inoperative under the rule in Shelley's Case and the statute relating to perpetuities.

The positions thus taken by plaintiff do not seem to be tenable. A Nebraska statute provides that courts in construing a conveyance of real estate shall carry into effect the true intent of the parties, "so far as such intent can be collected from the whole instrument, and so far as such intent is consistent with the rules of law." Comp. St. 1922, sec. 5594. The statutory rule applies to deeds. *Moran v. Moran*, 101 Neb. 386. It was held by a divided court in later cases that the rule in Shelley's Case is in force, and that it conforms to public policy and does not conflict with the statutory rule. *Myers v. Myers*, 109 Neb. 230; *Yates v. Yates*, 104 Neb. 678.

According to the legislative test, it is the duty of the court to give to each word and sentence in the conveyance such significance as will carry into effect the true intent of the parties thereto. *Rupert v. Penner*, 35 Neb. 587; *Albin v. Parmele*, 70 Neb. 740; *Benedict v. Minton*, 83 Neb. 782; *Moran v. Moran*, 101 Neb. 386. Where granting and restricting clauses properly construed are not inconsistent or illegal, resort to the *habendum*, in connection with all

other provisions, is permissible for the purpose of ascertaining the character and extent of the estate granted to the first taker. This is shown by the opinions in the cases cited. In *Loosing v. Loosing*, 85 Neb. 66, 74, it was said:

"The later clause, or clauses, may be read in connection with the first one for the purpose of advising the court whether it actually did transfer the fee, and if it does not in itself clearly and unequivocally do so, and by a comparison thereof with the remaining parts of the instrument the court is convinced that the testator did not in fact intend to vest the greater title in the first taker, the instrument will be construed accordingly."

If the rule in Shelley's Case is in accord with the statutory test of expressed intent "collected from the whole instrument," as held in *Yates v. Yates*, 104 Neb. 678, and *Myers v. Myers*, 109 Neb. 230, the statute itself and the earlier interpretations thereof by the judiciary are entitled to respect.

What estate was conveyed to plaintiff by the deed in the present case? The granting clause contains the words, "Do hereby grant, bargain, sell, convey and confirm unto Rosina Reuter," and describes the land. Standing alone the granting clause would convey the entire interest of grantor to grantee under the statute providing:

"Every conveyance of real estate shall pass all the interest of the grantor therein, unless a contrary intent can be reasonably inferred from the terms used." Comp. St. 1922, sec. 5591.

The statute permits a reasonable inference that the entire interest of grantor is not conveyed to grantee, if "the terms used" limit the estate. Some of the "terms used" may be found in the *habendum*, as held in the cases already cited, if effect is to be given to every part of the instrument. The granting clause does not state precisely that grantor conveys to grantee all his right, title and interest in the land or that he conveys to her his fee simple title thereto. In *Rupert v. Penner*, 35 Neb. 587, 599, the granting clause, technically called "premises," and the

habendum were the same as in the case at bar. Both are construed, the court saying:

"Counsel for defendants claim that the *habendum* contradicts the granting clause, and they invoke the familiar doctrine that, when the *habendum* in a deed is repugnant to the limitations appearing in the premises, it will not control the terms of the premises. We do not think this rule is applicable to the construction of the instrument under consideration, for the reason that the premises and the *habendum* are not contradictory. No definite estate is mentioned in the former, while the latter describes what estate in the property is conveyed. Such being the case, effect should be given to the limitations contained in the *habendum.*"

It is further stated in the opinion from which the foregoing excerpt is taken that the ruling therein is in harmony with the statutory rule. Immediately following the granting clause in the present case, the grantor uses the expression that "This conveyance is made subject to the following express conditions," stating them. Each is introduced by "that," referring back to "conditions." In substance the conditions are: That grantee shall not convey nor incumber the premises; that she shall pay grantor each year of his life $100; that deferred instalments shall be a lien on the land until paid; that upon the death of grantee the title to the land "shall vest in her children and their descendants as by right of representation." Taken all together, the grant to plaintiff, the conditions, and all other parts of the deed show that grantor intended to, and did, convey a life estate to grantee and the estate in remainder to "her children and their descendants as by right of representation."

Under this interpretation of the deed the granting clause and the *habendum* are consistent and effect is given to every part of the instrument which, thus construed, shows that grantor did not intend to convey to grantee a fee simple title but conveyed to her a life estate. This construction seems to be unavoidable when the grant to plaintiff is

construed according to the statutory test of expressed intention disclosed by the deed as a whole. Comp. St. 1922, sec. 5594. What then becomes of the estate in remainder or the fee upon the death of plaintiff? The deed itself answers the question in these words:

"Upon the death of the said Rosina Reuter the said land shall descend to, and the title thereto shall vest in, her children and their descendants as by right of representation."

The word "heir" is not used in the disposition of the remainder in fee. The entire deed shows that grantor, after conveying the life estate to plaintiff, directed where the remainder in fee should go by designating a class consisting of such children of plaintiff as may be alive at her death and of such of her grandchildren as may be children of her deceased children. In this view of the entire deed it is a lawful conveyance of both the life estate and the remainder in fee to different takers without conflicting with the rule in Shelley's Case or the statute relating to perpetuities.

AFFIRMED.

Note—See Deeds, 12 L. R. A. n. s. 956; 24 L. R. A. n. s. 514; 42 L. R. A. n. s. 379; 8 R. C. L. 1046, 1047; 2 R. C. L. Supp. 712; 5 R. C. L. Supp. 492; 6 R. C. L. Supp. 534; 18 C. J. 256 n. 73, 305 n. 38, 331 n. 20, 337 n. 69.

BERTHA C. REUTER, APPELLANT, V. JOSEPH P. REUTER ET AL., APPELLEES.

FILED FEBRUARY 13, 1928. NO. 25297.

Deeds: CONSTRUCTION. A deed containing a granting clause in the form "do hereby grant, bargain, sell, convey and confirm unto" the grantee named the land described, when immediately followed by conditions that grantee, a daughter of grantor, shall not convey nor incumber the land and that upon her death the title "shall vest in her children and their descendants as by right of representation," *held* to convey to her a life estate only.

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

Dort & Witte, for appellant.

A. E. Henry, contra.

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

ROSE, J.

This is a suit in equity for the construction of a deed to 120 acres of land in Pawnee county and to quiet in plaintiff the fee simple title thereto. The following excerpt from the deed contains the provisions in controversy:

"Know All Men By These Presents:

"That I, Frank J. Wenzl, a widower, of the County of Pawnee and State of Nebraska for and in consideration of the sum of one dollar and other good and valuable consideration in hand paid, do hereby grant, bargain, sell, convey and confirm unto Bertha C. Reuter, my daughter, of the County of Pawnee and State of Nebraska, the following described real estate, situated in Pawnee County, and State of Nebraska, to wit: * * * This conveyance is made subject to the following express conditions: That the said Bertha C. Reuter, grantee herein, shall not convey nor incumber the said premises during the term of my natural life; that the said Bertha C. Reuter shall pay to me the sum of seventy-five dollars on the thirty-first day of December each year during the term of my natural life, and the said annuity shall be and remain a charge and lien upon the said real estate until the same is fully paid; that upon the death of the said Bertha C. Reuter the said land shall descend to, and the title thereto shall vest in, her children and their descendants as by right of representation."

The suit was defended by Arthur Reuter, minor son of a deceased daughter of grantor. The minor was represented by A. E. Henry, guardian *ad litem,* who interposed

the defense that plaintiff acquired from her father under her deed a life estate only. The district court sustained the defense and dismissed the suit. Plaintiff appealed.

The appeal is controlled by the opinion in the companion case of *Reuter v. Reuter, ante,* p. 428, and for reasons stated therein plaintiff acquired under her deed a life estate only and consequently is not entitled to equitable relief.

AFFIRMED.

CONCORD STATE BANK, APPELLANT, V. WILLIE JAEGER: JOHN WEIERSHAUSER, APPELLEE.

FILED FEBRUARY 13, 1928. No. 25263.

Bills and Notes: CONSIDERATION: EVIDENCE. In an action where want of consideration is shown for signing a promissory note with the maker thereof, it is competent for such signer to submit evidence tending to prove that he signed the note as an accommodation to, and at the request of, the bank which was the owner of the note, and that such accommodation signer is not liable for the payment of such promissory note.

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

D. Van Donselaar and *W. D. McCarthy,* for appellant.

McCarthy & McCarthy, contra.

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

DEAN, J.

The Concord State Bank, hereinafter called the bank, began this action September 11, 1924, in the district court for Dixon county, to recover a judgment in the sum of $3,312 on a promissory note on which, at the time of the trial, the signatures of Willie Jaeger and John Weiers-

hauser, defendant, appear as apparent makers. The parties were both named in the summons as defendants, but service was had on Weiershauser only, and the action proceeded against him alone. Jaeger made no appearance in the case, though he was called as a witness. The jury found for the defendant. The plaintiff bank's motion for a new trial was overruled. Thereupon the court rendered a judgment on the verdict in favor of the defendant. The bank has appealed.

Following is a copy of the original note sued upon, being exhibit A as it appears in the record:

"Concord, Nebraska, Sept. 20, 1922.
"No. 24004. Due Mar. 11, '23.

"Mar. 1, 1923, after date, for value received, I, we, or either of us promise to pay to Concord St. Bank or order twenty-seven hundred forty-two and no/100 dollars, $2,742.00. The Concord State Bank, Concord, Neb., with interest at 8 per cent. per annum from date until due, payable annually with interest at ten per cent. per annum after due until paid. The makers and indorsers severally waive presentment for payment, protest and notice of protest and non-payment, and each of us personally hereby charge our own separate estate with the payment of this note.

"W. Jaeger.
"P. O. Dixon, Nebr. John Weiershauser."

The evidence is so conflicting throughout that it cannot be reconciled. Only two witnesses testified on the part of the bank, and two on the part of the defendant. The note in suit was first introduced, and evidence was offered by the bank tending to prove that no part of the principal or accrued interest had been paid. On this point there is no controversy.

The defendant then offered evidence tending to prove that the signature of Weiershauser on the note was obtained by a bank officer upwards of 30 days after it was signed by Jaeger, and that Weiershauser received no consideration whatever from the bank nor from any person for affixing

his signature thereto, and that neither Jaeger nor any person other than the bank officer ever, at any time, asked him to sign the note. From the defendant's evidence it appears that he signed the note on the representation by the bank official that it was "for the accommodation of the bank," and that the bank never "at any time agreed to extend that debt" for Jaeger if he, the defendant, "would sign the note with Willie Jaeger." The defendant emphatically denies that he entered into the agreement as stated by plaintiff.

It appears from the defendant's viewpoint that the bank officer who obtained the defendant's signature came to the defendant's farm more than a month after the date of the note, with the note in his possession, and met the defendant at the gate of his farmyard as he was leaving for the field to pick corn, and that he then and there induced the defendant to sign the note as an accommodation to the bank, and not as an accommodation to the bank officer nor to Jaeger.

The material evidence of the defendant was corroborated by Jaeger throughout, and it is also disclosed by Jaeger's evidence that he, Jaeger, got all the money for which the note in suit was executed, and that he never even spoke to the defendant in respect of his signing the note. On the part of the bank considerable evidence was submitted by both of the witnesses called to testify in its behalf. Their evidence covers a wide range and has to do with Jaeger's former dealings with the bank. These witnesses denied many of the facts to which the defendant and Jaeger testified. And the plaintiff bank also submitted evidence which, if accepted by the jury, might have resulted in a verdict and judgment for the bank.

From the evidence presented we conclude that the defendant Weiershauser became an accommodation signer solely at the request of an officer of the bank, and that he received no consideration for such signing, and that, as such accommodation signer, he is not liable to the plain-

tiff bank under the evidence and the terms of the note in suit.

Complaint is made by counsel for the bank that they were hindered in their presentation of the argument to the jury in that the court placed a limitation as to the time that might be occupied for argument. But it is well settled in this state that this feature of the jury trial is committed to the discretion of the trial judge, and in the absence of an abuse of such discretion, and we find none in the present case, this court will not interfere with the court's ruling.

In this jurisdiction we are firmly committed to the proposition that, where disputed relevant facts are fairly submitted to the jury, under instructions that fairly apply the law thereto, a reversal of the judgment cannot be had in this court. We conclude that the evidence fairly supports the verdict, and that the trial court was justified in overruling the plaintiff's motion for a new trial.

The bank complains of the giving of instruction No. 11. The instruction follows:

"If you find from a preponderance of the evidence that the original indebtedness represented by the note in suit was negotiated for by the defendant, John Weiershauser, and that he obligated himself to pay the same by signing the original note representing said indebtedness, and that the note in suit is a renewal of the same, or the renewal of a former renewal of said original note, then the defendant, John Weiershauser, is a joint maker of the note in suit, and your verdict must be for the plaintiff for the amount due upon said note."

In view of the evidence on this feature of the case, we do not think prejudicial error can be predicated on the giving of the instruction complained of from the fact that it tends to enlarge rather than to minimize the scope of the defendant's alleged liability.

Other assignments of alleged error are urged upon our

attention that we do not find it necessary to discuss, and therefore do not decide.

The judgment is

AFFIRMED.

GOOD, J., dissents.

LOVANE FITZSIMMONS V. STATE OF NEBRASKA.

FILED FEBRUARY 13, 1928. NO. 25991.

1. **Criminal Law:** APPOINTMENT OF ASSISTANT PROSECUTOR. Immediately before the trial began of one accused of a felony, the court, over defendant's objections, appointed a lawyer to assist in the prosecution who had been, and was long known to the public to be, an associate, but under a partnership name, of one of the defendant's lawyers. *Held*, that such appointment tended to prevent a fair and impartial consideration of the cause by the jury, and to bring the profession and the courts into disrepute.
2. **Constitutional Law:** TRIAL. It is an elementary proposition of our criminal jurisprudence that every person accused of crime shall have a fair and impartial trial; nor shall he be deprived of life, liberty or property without due process of law. Both the federal Constitution and our state Constitution contain the above guaranties. And it is one of the boasts of Anglo-Saxon civilization that every man, no matter what his estate or condition, shall have a fair and impartial trial when he is charged with a commission of a crime.

ERROR to the district court for Dodge county: FREDERICK W. BUTTON, JUDGE. *Reversed.*

C. E. Abbott, J. C. Cook, and *Rodney S. Dunlap,* for plaintiff in error.

O. S. Spillman, Attorney General, and *George W. Ayres, contra.*

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

DEAN, J.

An information was filed against Lovane Fitzsimmons in Dodge county by the county attorney, wherein Fitzsimmons was charged with having maliciously and feloniously shot Earl Foote, October 23, 1926, with intent to kill. The jury found the defendant guilty. Upon his motion for a new trial being overruled, the court imposed a sentence of one year in the state penitentiary. The defendant prosecutes error.

At the outset we are confronted by an issue which is raised by the defendant in respect of objections to the appointment of the Honorable John F. Rohn to assist county attorney Mahlin in the prosecution, for reasons hereinafter appearing. And it is obvious that, in view of the record before us, the issue so raised must control our present decision without reference to the merits other than that contained in the opening paragraph. Before the trial began, objection to the appointment of Mr. Rohn was made. The defendant's motion was overruled and the case proceeded to trial with the result herein above noted.

More than 100 pages of legal cap are devoted to affidavits which have to do with the issue in respect of the appointment complained of. In his affidavit J. C. Cook, defendant's leading counsel, avers that Mr. Rohn is an associate in the firm of Abbott, Rohn & Dunlap, and that this association was then, with affiant, actively engaged in the defense of Fitzsimmons. In support of their argument the defendant's counsel introduced in evidence a photograph of the door leading into the offices of the above-named association on which the following names appeared for about 10 years last past, namely, "Abbott, Rohn & Dunlap, Lawyers," and on the door, immediately below, are the following names: "C. E. Abbott, J. F. Rohn, R. S. Dunlap, J. P. Corbett."

In his affidavit Charles E. Abbott, a practicing attorney at Fremont for 29 years, avers that, three months before the case was called for trial, he was employed to assist Joseph C. Cook, the leading counsel, in the defense of Fitz-

simmons, and that he first found out that John F. Rohn intended to participate in the prosecution from the fact that Mr. Rohn was seated by the side of the county attorney when the case was called for trial, and that, from his viewpoint, "by reason of all the facts, this affiant believes that the participation of said Rohn in said case and his identity with affiant and said Dunlap under said association, and the other facts stated, that the defendant's interests will be seriously prejudiced in said case and that he cannot thereby have a fair and impartial trial. That affiant and Mr. Rohn have been associated together for 15 years; they own all their office equipment jointly and have both joint and separate clients and business matters." Mr. Abbott further avers: "That this affiant expressly states that he does not believe that the said Rohn would knowingly, in the prosecution of the case, take advantage of any information acquired by him in said association, or knowingly do anything unethical or improper." This statement in respect of Mr. Rohn's probity is not challenged in the record. To substantially the same effect, in respect of the merits, is the affidavit of the defendant's leading counsel and two more disinterested persons.

The defendant in his affidavit avers that, on the morning when the case was called for trial, Mr. Rohn seated himself at the side of the county attorney, and that this affiant and some of the lawyers and others present remarked: "Well! the association of Abbott, Rohn & Dunlap is on both sides of this case."

Mr. Rohn in his affidavit avers that he has had office arrangement with Abbott, and that the firm was known as Abbott & Rohn, and later as Abbott, Rohn & Robins, and subsequently was known as Abbott, Rohn, Robins & Dunlap,; that no partnership existed between Abbott and affiant except as to joint ownership of furniture, equipment, and the library and also "the business coming to said firm from and over foreign connections and in addition to that certain old matters which had not been completed;" that with the above exceptions the affiant and Abbott and

Dunlap have practiced separately to all intents and purposes; that they have not shared in any of the fees or profits of their business "except as might be arranged in certain specific cases, the same as arrangements might be made between attorneys occupying separate and distinct offices;" that the partnership between himself and Abbott has not been completely dissolved because they have not agreed on the value of the joint office equipment "and certain foreign connections," and that "it has always been the practice that only the party wanted answer the telephone or listen in on the conversation, and this affiant has scrupulously observed said practice during all of this time and believes that the said Charles E. Abbott and said Rodney S. Dunlap have also scrupulously observed said practice;" that long before the trial affiant announced in open court that he and Abbott were no longer operating under a partnership agreement, but merely "under a loose office arrangement and association;" that separate books were kept; that while affiant and Abbott and Dunlap have generally not appeared on opposite sides of law suits, about two months before the trial of the present case affiant was on one side and Abbott and Dunlap on the other side; "that he did not know for certain that either Mr. Abbott or Mr. Dunlap had been retained" to assist in the defense of Fitzsimmons until very recently; that no conversations were carried on by either Fitzsimmons or Cook or Dunlap or Abbott with affiant or in his hearing concerning any matters connected with the Fitzsimmons case; that he did not know definitely until the case was called for hearing that he would be appointed or that his assistance would be asked in the prosecution of the case.

In view of the facts disclosed by the record, we cannot lend our approval to the participation of Mr. Rohn in the prosecution of the defendant. An association of persons, such as the record discloses Abbott, Rohn & Dunlap are shown to have been, cannot, under our practice, divide their forces and permit one member of the association

to take one side of a lawsuit, either civil or criminal, and the other member or members take the opposite side. To do so would be altogether out of harmony with the age old ethics of the profession, and, of course, it cannot be sanctioned by this court. Such conduct would be far removed from the bounds of propriety and honorable conduct in the practice of the law and would lead to intolerable abuses. And in a criminal case it would be unfair to the defendant and unfair to any state or any government where a fair and impartial trial is one of the constitutional guaranties.

We do not think the defendant was fairly tried. It is an elementary proposition of our criminal jurisprudence that every person accused of crime shall have a fair and impartial trial; nor shall he be deprived of life, liberty or property without due process of law. Both the federal Constitution and our state Constitution contain the above guaranties. And it is one of the boasts of Anglo-Saxon civilization that every man, no matter what his estate or condition, shall have an impartial trial when he is charged by the state with an infraction of the criminal code. *Coxbill v. State*, 115 Neb. 634.

The judgment of the district court is reversed and the cause is remanded for further proceedings consistent with the views expressed herein.

REVERSED.

GOOD, J., dissenting.

I do not think there was prejudicial error in the appointment of Mr. Rohn to assist the county attorney in the prosecution of this action. The record discloses that Mr. Abbott, of counsel for the defense, and Mr. Rohn had been copartners in the practice of law; that the partnership had been practically dissolved, but not completely so. It seems that, so far as their law libraries, furniture and certain old business were concerned, the partnership continued; that, as respects new business, it was dissolved. It appears that even some months prior to the appoint-

ment the two had appeared on opposite sides of a case in the same court, in which the appointment was made. There is no claim that the firm of Abbott, Rohn & Dunlap was employed by defendant, only that Abbott was so employed by him. It does not appear that Mr. Rohn, who was appointed to assist in the prosecution, was ever consulted by the defendant or ever consulted by either of defendant's counsel, or that defendant and his counsel ever consulted together in the presence of Mr. Rohn. No confidence was reposed in him by defendant or his counsel; therefore, no confidence could be violated. I fail to see wherein defendant could have been prejudiced by the appearance of Mr. Rohn as assistant to the prosecutor. If the trial was otherwise fair and no prejudicial error in the trial occurred, why should one who has been adjudged guilty escape his just deserts, and why should the state be put to the expense of another trial when justice has been fairly administered?

I do not wish to be understood as commending the appointment of Mr. Rohn as an assistant prosecutor, under the facts disclosed, but I utterly fail to see where defendant was prejudiced by such appointment and think that the judgment of conviction should not be reversed upon that ground.

STATE, EX REL. O. S. SPILLMAN, ATTORNEY GENERAL, V. FARMERS BANK OF CRAWFORD ET AL., APPELLANTS: FRANK L. HALL, CLAIMANT, APPELLEE.

FILED FEBRUARY 13, 1928. No. 25377.

Banks and Banking: GUARANTY FUND: DEPOSITS. Where the owner and holder of a certificate of deposit, issued by a state bank, which certificate is not within the protection of the depositors' guaranty fund for the sole reason that the holder is receiving an excess rate of interest thereon, surrenders such certificate to the bank and takes in lieu thereof the obligation of the bank, denominated as a bill payable, and on which he does not receive an excess rate of interest, and thereafter he transfers such

bill payable to another, and such other person presents the bill payable to the bank while it is a going concern, and exchanges it for a certificate of deposit, drawing interest at the legal rate, such certificate represents a deposit within the protection of the depositors' guaranty fund.

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

C. M. Skiles, Homer L. Kyle, Allen G. Fisher and *Samuel L. O'Brien,* for appellants.

J. E. Porter, contra.

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

GOOD, J.

From a judgment of the district court, finding and decreeing a claim of Frank L. Hall against the failed Farmers Bank of Crawford, Nebraska, and its receiver to be entitled to preference and payable from the depositors' guaranty fund, the bank and its receiver appeal.

The claim is based on a certificate of deposit issued to Mrs. R. S. Q. Hamaker while the bank was operating as a going concern. For a valuable consideration she assigned and transferred the certificate to Hall, the claimant. The receiver of the bank, by his written objections, resisted payment of the claim upon the ground that Mrs. Hamaker was a stockholder of the bank at the time the certificate was issued, and that the claim was subject to a set-off on account of her double liability as a stockholder.

In this court the only question presented and relied on for reversal is whether the certificate of deposit represents a *bona fide* deposit of cash, or its equivalent, placed in or at the command of the bank; and whether the certificate of deposit represents such a claim as falls within the protection of the depositors' guaranty fund.

The receiver advances two propositions of law: (1) That the transfer of a certificate of deposit, even to an innocent

purchaser for value, cannot bring it under the protection of the bank guaranty law, if the original deposit was not so protected; and (2) that an obligation of a state bank which does not represent a *bona fide* deposit cannot be brought under the protection of the guaranty fund merely by converting the form of the obligation into a certificate of deposit.

Both of these propositions are well-established rules in this jurisdiction and are so conceded by counsel for claimant, but the question arises as to whether the facts in this case give rise to the application of these principles of law.

On the 7th of June, 1921, one Kleeman deposited in the Farmers Bank $7,000 and took therefor two certificates of deposit, which certificates, on their face, bore interest at 5 per cent. per annum. It is admitted, however, that Kleeman received an additional rate of interest, greater than 5 per cent., on these certificates, and that they were therefore without the protection of the depositors' guaranty fund. On the 31st of December 1921, these certificates were renewed and two other certificates were issued to Kleeman, one for $2,000 and one for $5,000, which, on their face, bore interest at 5 per cent. The record does not disclose whether there was any agreement or understanding that he should have an additional rate of interest upon these renewal certificates.

On the 2d day of May, 1922, the department of trade and commerce caused the bank to close its doors, but no application for a receiver was made. Up to this time no interest had been paid to Kleeman on the renewal certificates of deposit. Negotiations were entered into, after the doors of the bank were closed, for its reopening and continuing in business. The department of trade and commerce, as a condition to reopening, required that all certificates of deposit which had been drawing a rate of interest in excess of 5 per cent. should be made a direct obligation of the bank and be without the protection of the guaranty fund, and that such claims should be called nominally, "bank bills payable." Pursuant to this agree-

ment and on the 8th day of June, 1922, the bank was reopened and there were issued to Mr. Kleeman in lieu of his certificates of deposit, three bills payable, aggregating $7,000 and drawing interest at 5 per cent. from the 31st day of December, 1921, being the date of renewal certificates, and payable one year from the 8th of June, 1922. Mr. Kleeman transferred one of these bills payable for $3,000 for a valuable consideration to Mrs. Hamaker, who, on the 6th day of June, 1923, presented the same to the bank for payment; interest thereon was calculated at the rate of 5 per cent. from December 31, 1921, and she surrendered the bill payable and received therefor a certificate of deposit for the amount of the bill payable, with interest at 5 per cent. which aggregated $3,215. This certificate draws interest from its date at 5 per cent. per annum.

It appears that, as a condition to permitting the bank to open again for business free from its control, the department required the stockholders to pay an assessment upon their stock of 100 per cent. This assessment was paid at about the same time that Mrs. Hamaker exchanged the bill payable for the certificate of deposit in controversy. At that time the bank was a going concern. The department of trade and commerce found and determined that the bank was solvent and permitted it to thereafter transact business, free from the department's control.

It is obvious that Hall occupies the same position as would Mrs. Hamaker if she had retained ownership and possession of the certificate of deposit. His rights are no greater and no less than hers would have been. It is also apparent that Mrs. Hamaker's rights are no greater than would have been the rights of Mr. Kleeman, had he retained the bill payable and exchanged it for the certificate of deposit. What then are, or would have been, the rights of Kleeman, had the certificate been issued to him in lieu of and for the bill payable? Clearly, he was, in the first instance, a depositor in the bank, but his deposit was without the protection of the guaranty fund

because he was contracting for and receiving an excess rate of interest thereon. At the time he surrendered that certificate, evidencing his deposit, he took another piece of paper, called a "bill payable," but which is not in evidence, and the form or wording of which is not disclosed by the record.

It may be that the bill payable, although it drew only 5 per cent., was not protected by the guaranty fund because it was taken with the understanding and agreement that it should not be so protected. This question we find it unnecessary to determine. Had Kleeman exchanged the so-called bill payable for a certificate of deposit, while the bank was a going concern, and which did not draw an excess rate of interest, nor violate any other provision of the guaranty fund law, it seems clear he would have held a deposit, within the protection of the guaranty fund, under the rulings of this court in the cases hereinafter referred to. The transaction, as we view it, is the same as though he had retained his original certificate of deposit until it was exchanged for a new one which did not transgress any provision of the guaranty fund law.

This court has heretofore held in *State v. American Exchange Bank,* 114 Neb. 626: "Where interest at a greater rate than 5 per cent. has been paid by a state bank upon certificates of deposit, but such practice is abandoned while the bank is a going concern, certificates in renewal at 5 per cent., upon which a greater rate is not paid nor contemplated, may be proper charges against the bank guaranty fund."

In *State v. American Exchange Bank,* 112 Neb. 834, it was stated in the third paragraph of the syllabus: "When money is deposited in a state bank and certificate of deposit issued therefor drawing 6 per cent., and afterwards, while the bank is a going concern, in ordinary course of business, such certificate is surrendered and new certificate issued in lieu thereof drawing 5 per cent., *held,* that, on subsequent failure of the bank, ordinarily the latter is entitled to be paid out of the depositors' guaranty

fund." A like ruling was made in *State v. Citizens State Bank,* 114 Neb. 867, *State v. Farmers State Bank,* 112 Neb. 788, and *State v. Wayne County Bank,* 112 Neb. 792.

The facts bring the instant case within the rule above announced. The district court rightly found and determined that the claim in controversy was entitled to a preference and payable from the depositors' guaranty fund.

The judgment is

AFFIRMED.

IN RE ESTATE OF LOGAN ENYART.
F. H. MARNELL, ADMINISTRATOR, ET AL., APPELLEES, V. GEORGE S. KOSER, APPELLANT.

FILED FEBRUARY 13, 1928. No. 26155.

1. **Adoption.** The statutes of Nebraska relating to the adoption of minor children contemplate two kinds of adoption; one an unrestricted adoption; the other an adoption restricted by the terms and conditions set forth in the petition for and consent to adoption.
2. ———. If no terms or conditions are contained in the petition for or consent to the adoption of a minor child, then the adoption is unrestricted, and the rights of the adopted child and adoptive parent are governed by the provisions of section 1572, Comp. St. 1922.
3. ———: RIGHT TO INHERIT. The right to inherit property of a deceased person is created by statute. The legislature may confer upon adopted children and adoptive parents the right to inherit, each from the other.
4. ———: ———. In case of the unrestricted adoption of a minor child, section 1572, Comp St. 1922, confers on the adopted child and the adoptive parent the right to inherit, each from the other.
5. ———: ———. Where, in the manner provided by statute, the natural parent of a minor child consents to its unrestricted adoption, he thereby relinquishes and surrenders his right to inherit from such child.

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

Pitzer & Tyler and *Lloyd E. Peterson,* for appellant.

Paul Jessen, contra.

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

GOOD, J.

This appeal arises out of the proceedings to probate the estate of Logan Enyart, deceased, who died intestate and left surviving him no widow or issue. From an order and judgment of the county court, finding that George S. Koser, the natural father of decedent, was not the heir and entitled to inherit, and determining that Katherine Enyart, the adoptive mother of decedent, was entitled to inherit, Koser, the natural father, appealed to the district court. A trial in that court resulted in findings and judgment, similar to those in the county court, from which Koser has appealed to this court.

From the record it appears that on the 29th of September, 1903, by proceedings in all respects regular and valid, Katherine Enyart, with the consent of her husband, adopted Logan E. Koser, then one year of age. George S. Koser and Hazel K. Koser, the parents of the minor child, consented to the adoption and relinquished all right to the custody of and control over the child to the adoptive mother. By the adoption proceedings the child was given the name of Logan Enyart. July 29, 1925, Logan Enyart departed this life intestate, unmarried and without issue. He left an estate consisting of lands in Custer county, Nebraska, and some personal property.

The principal question for determination is: Did the adoption proceedings and decree of adoption deprive the natural father of the right to inherit from his son?

The question presented is new in this jurisdiction. The courts of last resort of many of our sister states have passed upon the question, but the decisions are not harmonious. It is to be noted that the statutes concerning adoption proceedings vary greatly in the different states,

and we have found no statute of any other state that is precisely like our own. The decisions of other courts, therefore, can afford no safe guide to a decision in the instant case.

Our statute relating to adoption of minor children provides that an adult person, under certain conditions, may adopt a minor child. If the parents of such child are living, their consent in writing must be obtained, and, if the adopting person is married and living with his or her spouse, the consent of such spouse to the adoption must be also obtained. The statute contemplates that the person desiring to adopt shall file in the county court a petition, and therein set forth the terms and conditions on which the adoption is desired to be made. Before a decree, the parents or persons having legal control of such minor child are required to file a written consent, wherein they voluntarily relinquish all right to the custody of and power and control over said minor child and all claim and interest in and to his or her services and wages. Thereafter, a time is appointed by the county court for a hearing, and a notice must be given of the time and place thereof; and, if upon such hearing the court shall find that the adoption is for the best interests of said minor child, a decree shall be entered in accordance with the terms and conditions of said petition and consent. It is further provided by section 1572, Comp. St. 1922: "Unless the terms and conditions in such consent and petition otherwise provide, the person or persons adopting, and the child adopted shall after adoption, sustain toward each other the usual relation (and the adopted child shall have bestowed upon him or her equal rights, privileges and immunities of children born in lawful wedlock) of parent and child, and shall have all the right and be subject to all the duties of that relation, and the parents of such adopted child shall, thereafter, stand relieved of all parental duties toward, and all responsibility for, said minor child and shall have no right over it." The brackets do not appear in the statute. The reason for the interpolation will appear later.

At common law, adoption of heirs or children was unknown. For some time after the enactment of adoption statutes the courts were inclined to their strict construction because they were said to be in derogation of the common law. Later, the humanitarian aspects and purposes of such statutes were recognized, and the courts generally evinced a disposition to give them a liberal rather than a strict construction. This court has adopted the rule of liberal construction. *Ferguson v. Herr,* 64 Neb. 659. It is evident that our statute contemplates two kinds of adoption; one is restricted by the terms and conditions contained in the petition for and consent to the adoption; and the other is an unrestricted adoption. If no terms and conditions are contained in the petition and consent, the adoption is without restriction and is subject to and governed by the terms of said section 1572.

The petition for adoption, involved in this action, contained no restrictions or conditions relative to the rights and privileges of the adopting parent or adopted child. The first 12 words of section 1572, Comp. St. 1922, therefore, have no application to the facts herein involved. The decree in the adoption proceedings found that, in the manner required by law, the natural parents of Logan E. Koser had voluntarily relinquished all right to the custody of and control over said minor and to his services and wages, and that it was for the best interests of said minor child that he should be so adopted. Following the findings, the court decreed that "the right to the custody of and power and control over said Logan E. Koser and its services and wages by its father and mother, George S. Koser and Hazel K. Koser, shall and do cease and determine from this date, and that said Logan E. Koser shall be the adopted child of said Katherine Enyart upon the conditions of the sworn statements made herein, and shall take the surname of said Katherine Enyart, and be known as Logan Enyart, and be subject to her exclusive custody and control, and shall possess all the rights, privileges and

immunities of children born in lawful wedlock." Neither the petition, consent nor decree of adoption contains any restriction or conditions limiting the right of the adopted child to inherit from the adoptive parent, nor the right of the adoptive parent to inherit from the adopted child. The respective rights of the adopted child and the adoptive parent to inherit, one from the other, if they exist, must be found by virtue of the provisions of section 1572, Comp. St. 1922.

From a careful examination of section 1572, *supra*, it seems clear that what the legislature meant to say, concerning the mutual relations of the adoptive parents and the adopted child, may be better understood by omitting the words included in the brackets, as set out above. It would then read: "The person or persons adopting, and the child adopted shall after adoption, sustain toward each other the usual relation of parent and child, and shall have all the right and be subject to all the duties of that relation." This statute, therefore, defines and fixes the relationship existing between the adoptive parent and the adopted child. Pursuant to this statute, the decree of adoption created, in law, between the adoptive parent and adopted child, the relation of parent and child, and further provided that after adoption they shall have all the right and be subject to all the duties of that relation. Under our statute of descent, as it then existed and now exists, one of the rights of the child was to inherit from its parents, if they died intestate. It was likewise one of the rights of the parent to inherit from the child, if the latter died intestate, leaving surviving no widow or issue.

The right of inheritance is created by statute. It is within the power of the legislature to determine what persons or whether any person shall inherit from one who dies intestate, and to determine what proportion of the decedent's estate shall descend to any particular person or class of persons. The legislature creates and may take away the right to inherit. It is within the power of the legislature to confer the right of inheritance upon adopted

children or adoptive parents, as well as upon natural children and parents. If there are no restrictions, limitations or conditions in the adoption, our statute of adoption creates the legal relation of parent and child and gives to the adoptive parent and the adopted child all of the rights that pertain to that relation by virtue of the statute of descent.

Construing our statute of adoption and descent together, this court has heretofore held that the adopted child inherits from the adoptive parent. *Ferguson v. Herr, supra; Martin v. Long,* 53 Neb. 694. But the right conferred by statute is a reciprocal one, because it depends upon a relation that is created by the adoption under our statute. The relation of parent and child having been thus created the right of the adoptive parent to inherit is the same as was or would have been that of the natural parent. The natural parent consented to the establishment of this relation. By his formal act, he consented that another should step into his place and, in legal effect, become the parent of his child, and thereby consented that such other person should have all the right which he, himself, but for the adoption, would have had. By his own voluntary act, Koser transferred from himself to Katherine Enyart the right of a parent to inherit from the adopted child, Logan Enyart.

Much has been said and written upon the natural rights flowing from the ties of kinship, relative to the right of inheritance, but, as we view the question, it is to be determined not as a matter of sentiment but as a matter of law, which has been settled by the law-making power of the state.

Under our statutes of adoption and descent and under the facts as they are disclosed by the record, Katherine Enyart is the legal heir of and is entitled to inherit the estate left by Logan Enyart, deceased.

Other questions were presented on oral argument and in the briefs, but the conclusion which we have reached

upon the one discussed renders it unnecessary to consider others.

The judgment of the district court is

AFFIRMED.

Note—On right to inherit, see 43 L. R. A. n. s. 1056; 1 R. C. L. 613; 1 R. C. L. Supp. 215.

HARRISON STATE BANK, APPELLANT, V. FIRST NATIONAL BANK OF OMAHA ET AL., APPELLEES.

FILED FEBRUARY 13, 1928. No. 25520.

1. **Banks and Banking:** DEPOSITS. "A deposit in a bank made in the ordinary course of its business is presumed to be general, and not special." *State v. Farmers & Merchants Bank*, 114 Neb. 378.
2. ———: GENERAL DEPOSITS. "When money is so deposited, it ceases to be the money of the depositor, and becomes the money of the bank, and the depositor becomes a creditor of the bank to the extent of such deposit, which credit the bank can apply to a matured debt owing to it by such depositor." *State v Farmers & Merchants Bank*, 114 Neb. 378.
3. ———: CHECKS. It is a general rule, subject to certain exceptions, that the issuance and delivery of a check or draft to the payee does not create an assignment *pro tanto* of the funds drawn against, nor does it give rise to a cause of action, either at law or in equity, in favor of such payee as against the bank on which drawn, unless and until it has been accepted or certified to by the drawee.
4. **Customs:** ALLEGATION AND PROOF. It is incumbent upon one relying on a special custom as a basis for recovery, not only to allege and prove such custom, but also to prove that the person sought to be bound thereby had knowledge thereof and contracted in reference thereto.
5. **Pleading.** One claiming under an exception to a general rule carries the burden of alleging and proving facts which would bring him within such exception.
6. **Cases Distinguished.** *Gruenther v. Bank of Monroe*, 90 Neb. 280, and *Soppe v. Mechaley*, 103 Neb. 264, examined and distinguished.

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

S. L. Winters, for appellant.

Congdon, Finlayson & Burke, Boyd & Metz, E. D. Crites, F. A. Crites and *Brome & Ramsey, contra.*

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

THOMPSON, J.

Appellant brought this suit in the district court for Douglas county to recover judgment for the sum of $1,685.79, with interest, against the appellee First National Bank of Omaha, and for equitable relief against it and other appellees. Judgment was entered in favor of each appellee, and the action dismissed at appellant's costs, to reverse which it appeals.

For the sake of brevity, the parties to this suit will be designated herein as follows: Appellant as plaintiff; First National Bank of Omaha as defendant; First National Bank of Harrison as Harrison National Bank; Ralph S. Pryce, receiver, who was succeeded during the trial by Harry Hall, as receiver; Sioux National Bank of Harrison as Sioux Bank.

As a basis for the equitable relief sought, the plaintiff alleged, in substance: That the Harrison National Bank and the plaintiff were situate at Harrison, Nebraska; that it was customary between them to meet on the afternoon of each day, in one or the other of the banks, to clear such day's business as between them, which was done by totaling the respective amounts of checks paid by the one for the other, and each giving to the other its check for the sum of such respective totals, drawn on its correspondent bank, in which it had deposited money for that purpose; that such custom was by each of the payees, as to the checks herein involved, relied upon, as was well known to each of the correspondent banks; that by reason thereof

the respective checks in suit were each an equitable appropriation *pro tanto* of the funds so held by the bank on which it was drawn and that such fund to that extent was not affected by the insolvency of the Harrison National Bank, nor subject to offset on other of its indebtedness owing to the depository bank.

The facts leading to this deduction on the part of plaintiff were each and all denied by the defendant. Without entering into a discussion as to the effect of the federal statute regulating the priority of liens in the distribution of the assets of an insolvent national bank, and the construction given to such statute by the courts of the United States as evidenced by the conclusion reached in *First Nat. Bank of Chicago v. Selden,* 120 Fed. 212, and *Cook County Nat. Bank v. United States,* 107 U. S. 445, and other cases, it is sufficient to say that the evidence adduced as reflected by the record does not sustain the plaintiff's allegations, but on the contrary reveals the following pertinent facts: That the plaintiff and defendant banks are corporations organized under the law, for the purpose, and located, as by their respective names indicated, and were operating as such at the dates covered by the transactions here receiving our consideration. However, the Harrison National Bank became and was insolvent on and prior to the 4th day of February, 1924, and at the close of business on February 2, 1924, closed its doors, and by order of the comptroller of the currency, owing to such insolvency, such doors were never reopened. On the 12th day of February, 1924, a receiver was duly appointed to wind up its affairs, in pursuance of which its assets were sold as hereinafter indicated. In the course of its business the Harrison National Bank had as its correspondent bank the defendant, wherein it kept a reserve account subject to check or draft in the ordinary course of business, and plaintiff had as its correspondent the Live Stock National Bank of Omaha (hereinafter referred to as Live Stock Bank), in which it kept a deposit similar to that of the Harrison National Bank. Plaintiff and the

Harrison National Bank, as was their usual practice, met on the afternoon of each day, by and through their respective representatives, and each gave to the other a draft (called by plaintiff a check) for the full amount of clearances for that day on its correspondent bank. In pursuance of this practice, on February 1, 1924, the Harrison National Bank executed by its assistant cashier and delivered to plaintiff a draft drawn on defendant for $475.30, payable to J. L. Gerlach, plaintiff's cashier, and for the plaintiff's use and benefit; and on the same day and at the same time J. L. Gerlach, as such cashier of plaintiff, executed and delivered to the Harrison National Bank a draft on the Live Stock Bank for $1,975.26, the same being the amount due from plaintiff to such Harrison National Bank for the day's business. On the following day the Harrison National Bank executed by its assistant cashier and delivered to plaintiff a draft drawn on defendant for $1,210.49, payable to J. L. Gerlach, cashier of plaintiff, and for the latter's use and benefit; and on the same day and at the same time J. L. Gerlach, as plaintiff's cashier, executed and delivered to the Harrison National Bank a draft drawn on the Live Stock Bank for $2,462.78, which was the amount then due the Harrison National Bank from plaintiff on such day's business. The two drafts held by the Harrison National Bank were forwarded to defendant to be collected and credited by it to the deposit account of the sending bank. The two drafts held by plaintiff were forwarded to the Live Stock Bank for collection and credit to plaintiff's deposit account. The Live Stock Bank, however, was first to present its two drafts to defendant for payment, which it did on February 4, 1924. Payment thereof was refused by defendant, for the reason that the Harrison National Bank had closed its doors to business under the order of the comptroller of the currency, owing to its insolvency, and further that defendant had been so notified. These two drafts were duly protested for the above indicated reasons, and form the basis of this action. On the next day defendant presented the two drafts which plaintiff

had given to the Harrison National Bank to the Live Stock Bank and received payment therefor, which funds were by defendant placed on deposit to the credit of the Harrison National Bank in its account with defendant. A year or more prior to the receipt of such last named item the Nebraska National Bank of Omaha had been organized, and in due course of business the Harrison National Bank had become indebted to it in the sum of $25,000, or over, and had secured such indebtedness by placing with such creditor as security collateral consisting of notes and mortgages of the value of at least $40,000. After making such $25,000 loan and receiving the collateral, the Nebraska National Bank became insolvent, was taken charge of by the comptroller of the currency, and in the course of the liquidation of its assets, and about three months prior to the transactions here in question, the note evidencing this indebtedness of $25,000 together with the collateral securing the same, had been sold and delivered, by and through the orders of such comptroller, to the defendant, for a consideration that is unquestioned in this case. Shortly after receiving payment of the two drafts from the Live Stock Bank, the defendant offset the amount then on deposit in its bank to the credit of the Harrison National Bank, to wit, $20,952.51, by crediting the same on the note secured by such collateral (which note was then past due), and subsequently other amounts were so collected and credited by defendant. These transactions were reported to the receiver of the Harrison National Bank, which reports, under the direction of the comptroller of the currency, were in all things approved. On June 28, 1924, the receiver of the Harrison National Bank, in furtherance of the liquidation of its assets, entered into a contract of sale, under the direction of the comptroller, with the Sioux Bank, whereby this collateral was sold and afterwards by the receiver turned over to it for a valuable consideration, and later, as provided in such contract of sale, there was paid to defendant by the Sioux Bank the balance due on the $25,000 note of the Harrison National Bank. A fur-

ther and detailed report of the acts of the defendant in offsetting the deposit of the Harrison National Bank against indebtedness owing by the latter to the former was made by defendant to the receiver on August 16, 1924.

The record is without evidence showing notice of plaintiff's claim to any one connected with this suit (save that the drafts were presented to defendant for payment by the Live Stock Bank on February 4, 1924, as heretofore stated) or that plaintiff held or claimed to hold an equitable lien as against the defendant, or any property held by it belonging to the Harrison National Bank or the trust growing out of its insolvency, until the commencement of this action in October, 1924. Further, there is no evidence showing, or tending to show, an agreement, either verbal or written, between the plaintiff and the Harrison National Bank, or between them or either thereof with this defendant, changing any of the deposits in question from a general to a special deposit, as between the depositor and the depository bank. Neither is there any evidence showing notice to either of the depository banks of the claimed custom existing between plaintiff and the Harrison National Bank in their mode of clearance of each day's business, or the claimed relation of such transactions to the respective deposits on which checks and drafts were drawn.

From the foregoing facts, we conclude as follows:

That the deposit in defendant bank, as also that in the Live Stock Bank, was general in its nature, and, as between the parties hereto, it simply created a status of debtor and creditor between the depositor and the depository bank. *State v. Farmers & Merchants Bank,* 114 Neb. 378.

That it was defendant's duty to refuse payment of the drafts drawn on it by the Harrison National Bank in favor of J. L. Gerlach, cashier; a breach of which duty would have rendered it liable for damages.

That the defendant was acting within its legal rights when it offset the indebtedness held by it against the Harrison National Bank by the deposit of such latter bank. "The rule may be broadly stated, that the bank has a gen-

eral lien on all moneys and funds of a depositor in its possession for the balance of the general account." Morse, Banks and Banking (5th ed.) sec. 324; *State v. Farmers & Merchants Bank,* 114 Neb. 378; *First Nat. Bank of Chicago v. Selden,* 120 Fed. 212; *New York County Nat. Bank v. Massey,* 192 U. S. 138. This same rule applies even where the note evidencing the indebtedness is secured by collateral, as in the instant case. *Livingstain v. Columbian Banking & Trust Co.,* 77 S. Car. 305; *Cockrill v. Joyce,* 62 Ark. 216.

That the issuance and delivery of the drafts in question was not an assignment *pro tanto* of the funds drawn against, and did not give rise to a cause of action, either at law or in equity, in favor of the payee named therein as against the bank on which they were drawn, unless and until such drafts were accepted or certified to by the drawee bank, neither of which took place in this case. Comp. St. 1922, sec. 4799; *Superior Nat. Bank v. National Bank of Commerce,* 99 Neb. 833; *Gasper v. Security State Bank,* 109 Neb. 495. The same rule is controlling in the federal courts. "A check holder, as such, cannot maintain either an action at law or a suit in equity against the bank on which the check is drawn; the check being held, as between maker and payee, not to be an assignment *pro tanto,* even in equity, of the indebtedness owing by the bank upon which the check had been drawn." *First Nat. Bank of Chicago v. Selden,* 120 Fed. 212. This statement is supported by *Laclede Bank v. Schuler,* 120 U. S. 511, and *Fourth Street Bank v. Yardley,* 165 U. S. 634.

That the claimed custom, if any such existed, was one special in its nature, of which the depository bank was without notice. Hence, defendant was not bound by reason of such claimed custom. *First Nat. Bank of Hastings v. Farmers & Merchants Bank,* 56 Neb. 149; *Bixby v. Bruce,* 69 Neb. 78.

That one claiming under an exception to a general rule carries the burden of alleging and proving facts which

would bring him within such exception. This burden certainly has not been met by the record before us.

The facts in the instant case are plainly distinguishable from those under consideration in *Gruenther v. Bank of Monroe*, 90 Neb. 280, and *Soppe v. Mechaley*, 103 Neb. 264.

As the record in this case is without substance which would make it an exception to the general rules hereinbefore announced, and as we have found that the plaintiff's claim of lien, under the record, is without basis in contract, in duty imposed, or in equity, it necessarily follows that the judgment of the trial court is right, and it is,

AFFIRMED.

RIVETT LUMBER & COAL COMPANY, APPELLANT, V. ANTON P. LINDER ET AL., APPELLEES.

FILED FEBRUARY 13, 1928. No. 25796.

Appeal. The opinion in *Rivett Lumber & Coal Co. v. Linder*, 113 Neb. 567, examined and construed.

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

Hainer, Flansburg & Lee and *Brome & Ramsey*, for appellant.

Sidney W. Smith and *Anson H. Bigelow, contra.*

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

THOMPSON, J.

So far as material for our present consideration, this was an action in equity heretofore instituted in the district court for Douglas county by the appellant herein to foreclose a mechanic's lien. There was a decree entered, in usual form in such cases, in favor of plaintiff and against the defendants, Anton P. Linder, and Eunice E. Linder, and John J. Healy, as a balance due it for materials furnished in the sum of $2,433.41, and the court ordered that

if such sum was not paid within 20 days the properties covered by such lien be sold and the proceeds applied to the payment of plaintiff's debt. To reverse such judgment appeal was had to this court, and the issues were determined as reported in *Rivett Lumber & Coal Co. v. Linder,* 113 Neb. 567, wherein it will be found that we concluded, as to the materials used in the construction of a garage and repairs placed on three certain old dwellings on the premises, that such materials were improperly included in the items going to make up the $2,433.41 and should be deducted therefrom, or speaking literally in such opinion we said:

"The building materials used in the erection of the garage cannot be made the basis for a lien claimed by reason of the erection of certain dwellings, nor can they legally be charged therein. * * * The plaintiff bid on a bill or list of lumber and material which was to be, and was, supplied in triplicate, and entered into the construction of the three dwellings, and materials included in such bill or list and the extras furnished in connection with the erection of these dwellings, and furnished within the limitations of the statute, creating the right to a lien, are proper items in the lien and their payment is secured thereby. But those items which went into the construction of the garage are not so protected, and, in so far as they are included in the amount found due the plaintiff, such finding and decree are not supported by the evidence. * * * What has been said as to the material used in the erection of the garage applies with even greater force to the material furnished for the repairs on the old dwellings already on the lots covered by the lien and charged in the liens sought to be foreclosed as furnished under the contract 'for the erection of certain dwellings.' It follows that the finding of the referee and the trial court, so far as it is based upon the value of material used in the erection of the garage and the repairs of the old dwellings, is unsupported by evidence. The appellant is entitled to

have deducted from the amount of the lien the amounts charged therein for materials that entered into the garage and for the materials used in the repair of the old dwellings and which were charged in the lien. * * * The case is reversed and remanded for further proceedings in conformity with this opinion."

After adopting this opinion, a mandate in harmony therewith was issued and sent to the district court for Douglas county, where the same was filed, and later the cause was again called for hearing, and plaintiff furnished proof of the different items of materials claimed to have been used in the construction of the garage and in the repair of the old dwellings, and the value thereof which aggregate $628.18, and asked that such sum be credited on the original judgment and decree in the case, and that the judgment and decree as thus corrected be permitted to remain in full force and effect, or that a new decree be entered, as it may suit the purpose of the court, for the sum of $1,805.23, being the balance due plaintiff after deducting the $628.18 from the $2,433.41. To all of which defendants Linder objected, which objections were sustained by the court, and the action dismissed. To the sustaining of such objections, and the dismissal of the action, the plaintiff excepted, and for reversal prosecutes this appeal.

As we glean from the record, the briefs submitted, and the oral arguments, we are lead to conclude that the theory of the defendants, as well as that of the trial court, was that the cause was reversed and remanded for trial generally, while plaintiff's theory was that the cause was reversed and remanded simply for the purpose of permitting a hearing to ascertain the materials used in the construction of the garage and those used in repairs placed on the old dwellings, and that the ascertained values of these should be added and the amount thereof credited upon the sum found and entered in the original judgment or decree as of its date, save as to dates and the amount found due

to plaintiff. This theory of the plaintiff, with which we agree, is clearly in harmony with the purpose and intent of our previous opinion.

Further, we conclude from the evidence that the plaintiff was right in its computation of the value of the materials that entered into the construction of the garage, as well as those used in the repair of the old dwellings, to wit, that such value was the sum of $628.18. From the foregoing, it follows that the trial court erred in not entering a new decree in harmony with plaintiff's theory as hereinbefore indicated, and also erred in dismissing the action.

The judgment of the trial court is reversed, and the cause remanded, with directions to it to enter a new decree identical with the original, except as to dates, and except that the amount found due and owing to plaintiff shall be $1,805.23, with interest thereon at 7 per cent. per annum from the date of the original decree; further, plaintiff shall pay all costs made by it, and the defendants Linder all costs made by them, since the filing of the mandate in the trial court.

REVERSED.

RALPH E. WEAVERLING, APPELLEE, V. LOUIS W. MCLENNAN ET AL., APPELLEES: LINCOLN LIFE COMPANY, APPELLANT. LINCOLN LIFE COMPANY, APPELLANT, V. LOUIS W. MCLENNAN, APPELLEE.

FILED FEBRUARY 13, 1928. No. 25323.

1. **Equity.** The equitable principle expressed in the maxim, "He who comes into equity must come with clean hands," being founded on public policy, public policy may require its relaxation or limitation. Even when the parties have been found to be *in pari delicto*, relief has at times been awarded on the ground that in the particular case public policy has been deemed to be best conserved by that course.

2. ———. Where equity has assumed to act, it must do complete justice, regardless of whether litigants originally came into court with unclean hands.

3. ———. Record and evidence examined, and *held* to sustain the findings and decree of the district court.

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

Paul F. Good and *Joseph S. Wishart,* for appellant.

Frederick J. Patz, Sterling F. Mutz, J. W. Kinsinger, A. W. Richardson and *Hall, Cline & Williams, contra.*

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

EBERLY, J.

This action was commenced as an action in equity in the district court for Lancaster county, Nebraska, by Ralph E. Weaverling, whose pleadings designate Louis W. McLennan, the First National Bank of Lincoln, Nebraska, the First Trust Company of Lincoln, Nebraska, and the Lincoln Life Company, defendants. In this action Harriet P. Collman, as executrix of the last will and testament of O. Jansen Collman, deceased, intervenes, praying equitable relief against McLennan.

The Lincoln Life Company, a dissolved corporation, after the commencement of the above proceedings, likewise commenced a separate action against McLennan in the district court for Lancaster county, Nebraska. By stipulation of all parties in interest the district court consolidated the above actions in which issues had been properly joined, which thereafter proceeded to trial as an action in equity in which, speaking generally, the interests of all parties named above, excepting McLennan, were opposed to the interests which McLennan asserted as defendant. The decree entered by the district court, in so far as it was favorable to McLennan, was brought to this court for review by trial *de novo* by the Lincoln Life Company, who appears here as the sole appellant. This entire litigation, so far as now before us, had its sources in, and arose out of, the transaction covering the increase of the capital

stock of the appellant company in the month of April, 1920.

Previous to that time the Lincoln Life & Accident Company, subsequently known as the Lincoln Life Company, and hereinafter to be referred to as the insurance company, was engaged in a successful business in Lincoln, Nebraska. O. Jansen Collman was the general manager and director thereof, and due to control of stock and undoubted experience in the insurance business exercised a preponderating influence in its affairs. McLennan owned one share of stock, was superintendent of agents and agencies, and also, by grace of Collman, was a director of the company. The president of the company was not "active," as that term is understood in insurance circles, and the actual management of the company's affairs devolved largely, if not exclusively, on O. Jansen Collman.

During the spring of 1920 those then controlling the destiny of this insurance company became desirous of having it enter the insurance business in the state of Minnesota. In order to comply with the laws of that state, as a prerequisite to the commencement of business therein, it was necessary that the assets of the insurance company be substantially increased, and in view of circumstances detailed in the evidence it was deemed highly important that such increase be secured, and the right to carry on business in that state be acquired, not later than May 1, 1920.

The evidence in the record is practically undisputed, and indicates with reasonable certainty that the plan first adopted to secure the desired end contemplated (a) an increase of the capital stock by 1,202 shares; (b) that these shares should be sold at $300 a share prior to May 1, 1920; (c) that McLennan should be in charge of the selling campaign.

A considerable portion of the new stock had been sold under this plan when, unfortunately for the venture, the results of the general deflation of that year became evident. The result was to so chill sales that, when the latter part of April, 1920, arrived, it was patent that some 460 odd

shares of stock could not be then disposed of in the manner planned prior to May 1 ensuing. It is also patent that, when this emergency became apparent, a further agreement was entered into between the interested parties, but what the terms and conditions of that agreement were is a matter of dispute, and on it the evidence conflicts.

However, it is quite certain, and, in fact, without serious dispute in the evidence, that under the inspiration and leadership of Collman the unsold stock, so far as the stock register of the insurance company, at least, was concerned, was issued in substantially equal amounts to Collman and McLennan; that Collman with McLennan's assistance negotiated "loans" to the extent of $136,000 with various banks in Lincoln and vicinity. The ultimate agreements with these banks for these "loans" contained, contemplated, and provided for, at least, the following: That Collman and McLennan should execute individual notes bearing interest at 8 per cent. aggregating the amount named; that stock of the insurance company issued on that date was to be deposited as collateral to such loans; that this collateral so deposited was to be sold by the insurance company and its agencies as soon as possible; that the banks were to receive the proceeds of such sales; that the proceeds thus received were to be by the banks indorsed on the notes which the collateral secured; that the banks, in consideration of the notes received (made by Collman and McLennan), were to issue directly to the insurance company certificates of deposit of equal amount payable to it, bearing interest at the usual rate; that in addition the understanding was that the insurance company was to hold, and was not to cash, such certificates of deposit thus issued, and banks issuing same should be required to pay out nothing thereon, except to the extent that the note for which such certificate was issued thereafter was actually paid to the bank issuing the same; that the subsequent renewals of unpaid notes or unpaid portions thereof and unpaid certificates or unpaid portions thereof, which passing

time might necessitate, should be identical as to date, due date, and amount.

It seems that in carrying out this plan "loans" aggregating $136,000 were made, of which McLennan executed and delivered the following: First National Bank of Lincoln, Nebraska, $30,000; Lincoln State National Bank, $10,000; Elgin State Bank of Elgin, Nebraska, $24,000; Farmers State Bank of Dodge, Nebraska, $12,000; First National Bank of Lincoln, Nebraska, $20,000. This last named note was executed and delivered jointly with O. Jansen Collman. The total of these notes amounts to $96,000. There were issued to McLennan at this time by the insurance company 283 shares of stock, all of which, together with other shares of borrowed stock, were by him deposited as collateral security for the notes thus executed by him with the banks making the loans. The bank receiving the note advanced no cash thereon, but issued in lieu of cash certificates of deposit to the insurance company direct in an amount equivalent to the face of the notes received bearing the usual rate of interest, which certificates were then received by Collman in behalf of the insurance company and placed in its assets as "admitted assets." The insurance company, by proper authorities and after examination, was thereupon approved as having assets sufficient to enable it to do business in Minnesota, and as having properly increased its capital stock.

It also appears that some of the stock thus pledged was thereafter sold. The proceeds were turned over to the bank and by it credited on the notes secured by the stock so sold. The insurance company was then first permitted to withdraw the amounts equivalent to the shares thus received by the bank. And it also appears both the unpaid portions of the certificates as issued by the banks and notes executed by McLennan were renewed by the respective makers from time to time in identical amounts with identical face and date, and with identical maturities. In fact, the course of business contemplated by the agreements which preceded making the "loans" ap-

pears to have been observed by all parties as long as the insurance company was a going concern, except in one instance where O. Jansen Collman assumed authority, without concurrence of McLennan to abrogate it or modify it in part with the Lincoln State National Bank. Thereafter, Collman, the "moving spirit of the company," died.

In 1924 the surviving stockholders authorized the company to dispose of its business, which was done and the company voluntarily dissolved. It was and is perfectly solvent, and its affairs are now in the hands of the statutory trustees for liquidation. It appears that the assets for distribution among the stockholders will amount to $240 for each share of stock outstanding.

The present appeal now presented to this court involves an attempt on part of the interests opposing McLennan to compel the payment of the unpaid portions of the indebtedness originally represented by the $96,000 notes by McLennan as his personal obligation without recourse to the assets of the stockholders for indemnification. The latter, as his defense, and also as a basis for affirmative relief in this consolidated action, contends that the course of business hereinbefore recited was due to, and controlled by, an express agreement; that this agreement contained, in addition to the provisions which have actually and substantially been carried out by all the parties thereto, also as an essential part thereof, and as originally entered into by all parties thereto (including the insurance company) provisions which contemplated and provided that the transaction of which the $96,000 indebtedness formed a part, in its entirety, was but a loan of credit by McLennan to the insurance company; that all of said sums borrowed were for the benefit of it, and that it actually received the same; that this agreement also involved and contained an express agreement and understanding on part of the insurance company to fully indemnify this defendant and to save him harmless from any loss occasioned by the transaction before us; that the indebtedness created was in truth and

in fact the indebtedness of the insurance company; that the provisions of this contract requiring said indebtedness to be discharged by the proper application of the proceeds of the sale of stock pledged, and providing for the issuance of certificates of deposit by the banks with the agreement that such certificates should not be cashed by the insurance company until the notes or renewals thereof for which said certificates of deposit had been originally issued by the banks had been actually paid, were designed and intended to accomplish this desired end.

With all and every part of this contention the appellant took issue in the court below. These propositions were submitted to the district judge on conflicting evidence largely oral in its character, and from the decision of that court sustaining the defendant's contention the insurance company appeals.

It is undoubtedly true when an action in equity is appealed, it is the duty of this court to try the issues *de novo*, and to reach an independent conclusion without reference to the findings of the district court. But when evidence on material issues so conflicts that it cannot be reconciled, this court will consider the fact that the trial court heard the witnesses and observed their manner of testifying, and must have accepted one version of the facts rather than the other. In this view of the case we find no difficulty in adopting as our independent conclusion the determination as to facts made by the trial court. *Greusel v. Payne*, 107 Neb. 84.

At this point we will consider the contention of the appellant that the law will not lend its aid to the party whose defense to an action is based on an illegal and immoral contract or agreement, or as tritely expressed, "He who comes into equity must come with clean hands." In the discussion of this proposition it is but fair to concede that the obvious purpose of all concerned in the transaction before us with reference to the increase of the capital stock of the insurance company; including the appellant as well as the defendant, was to substantially circumvent the re-

quirements of the state of Minnesota on the subject of admission of the company to do business in that state, and as a means to that end to deceive the insurance authorities of our state. But, it must be admitted that the deception itself was actually achieved by the appellant acting through its own officers of which Collman was the moving and controlling spirit who made use of the certificates of deposit.

The defendant herein, in the light of the accepted evidence of the record, occupied the relation to this situation which, for want of a better term, we will denominate as an accessory before the fact of deception. While it may be conceded that the plan actually followed was not intended to, and did not, so far as the record discloses, operate to the injury of the stockholders or of the insurance company, and may have indeed promoted the financial interest of both, it must be admitted that deception was contemplated and involved.

The effect of the now questioned transaction was to create a distinct fund evidenced by the certificates of deposit and their unpaid renewals. This fund is now in possession of the statutory trustees who, under the findings of this court, were and are chargeable with notice of the actual facts as to its source. They now seek to retain this fund for division among the surviving stockholders discharged of all obligations brought into being by its very creation.

However, in the present proceedings in which appellant trustees were of the moving parties, the powers of equity have been invoked and relief secured against the defendant as to causes of action growing out of, connected with, and identified as, part of the same questioned transaction. Under these circumstances is the maxim, "He who comes into equity must come with clean hands," applicable? May it properly be used to secure a denial to the defendant of equitable relief to which that portion of the questioned transaction plainly entitles him, and at the same time compel compliance with obligations which the same inseparable transaction imposes upon him? It would seem not.

The maxim quoted being founded on public policy, public policy may require its relaxation. Even when the parties have been found to be *in pari delicto,* relief has at times been awarded on the ground that in this particular case public policy has been found to be best conserved by that course. 21 C. J. 189, sec. 175. Rather, it would seem that the facts before us required the application of the well established principle: "Where equity has assumed to act, it must do complete justice, regardless of whether litigants originally came into court with unclean hands." *Wenzlaff v. Tripp State Bank,* 50 S. Dak. 6.

We have not overlooked the other assignments of error presented by appellant. However, we deem the principles announced herein as controlling so far as the contentions made are deemed material.

We therefore find that the findings and decree of the trial court are correct as to all material matters before us, and the judgment of the district court is

AFFIRMED.

Note—See Equity, 4 A. L. R. 63; 10 R. C. L. 393; 2 R. C. L. Supp. 1009; 5 R. C. L. Supp. 553; 21 C. J. 137 n. 24, 189 n. 68.

FRED W. FITCH, APPELLANT, V. DAILY NEWS PUBLISHING COMPANY, APPELLEE.

FILED FEBRUARY 13, 1928. No. 25169.

1. **Libel and Slander:** NEWSPAPER PUBLICATIONS. Newspapers have a certain duty to perform, which is to print the news and tell the truth about it, yet newspapers are liable for whatever they publish, just the same as a private individual would be, having the same rights and immunities as are enjoyed by the general public, and no other.

2. ———: ———. The headline, title or heading of any published article is a part thereof, and if printed above a privileged article it must give a fair reflection of a truthful report to follow.

3. ———: PLEADINGS. It is a general rule that parties are privileged from suit for accusations made in their pleadings, and that such pleadings should ordinarily be removed from the office of the clerk of the court only for the use of interested parties.
4. ———: JUDICIAL PROCEEDINGS. Privilege extends to all matters which have been made the subject of judicial proceeedings, even though such proceedings were merely preliminary, interlocutory, or even *ex parte*, and after such proceedings a newspaper is entitled to privilege in giving fair reports of the contents of the instrument on file and the action of the court thereon.
5. ———: ———: PRIVILEGE OF THE PRESS. A newspaper is not restricted to the naked facts in reporting privileged court pleadings or proceedings, but is allowed to make comment, state opinions, and draw inferences from the facts, provided it is fair, just, impartial, done in good faith, and free from animus against the party complaining.

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

F. W. Fitch, Weaver & Giller and *H. L. Mossman,* for appellant.

Gurley, Fitch & West, contra.

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

PAINE, District Judge.

On December 1, 1925, Fred W. Fitch, the appellant, who was the plaintiff in the lower court, brought this appeal from a dismissal of his action in the district court for Douglas county, Nebraska. The plaintiff, who was and is a practicing lawyer in the city of Omaha, brought an action for malicious and defamatory libel against the Daily News Publishing Company of Omaha, defendant in the court below and appellee in this court.

Plaintiff charged that the libelous article was published on the front page of the home edition of the Omaha Daily News upon July 13, 1922, under a six-column headline and

subheads, and that it was false, garbled, scandalous and sensational. He further charged that he had been injured in his good name, suffered mental pain and anguish, sickness and nervous prostration, as well as the loss of a portion of his practice as a lawyer, to his total damage in the sum of $50,000. Defendant admitted the publication, but alleged that the facts therein were contained in a petition for a divorce filed against plaintiff by his wife upon the same day; that the article was published in good faith, without malice, as a matter of general information, being a report of court records upon which a restraining order had been issued, by the district judge to prevent plaintiff from molesting his wife, and that there having been judicial action thereon it was privileged. The records further disclosed that on March 2, 1923, a divorce was granted to the plaintiff's wife upon some of the grounds of extreme cruelty set out in the published article.

The libel case was tried to a jury upon May 12, 1925, and all of the evidence of both parties taken. At the close of the trial the defendant asked that the action be dismissed for lack of sufficient evidence, or in the alternative that the court instruct a verdict in its favor on the ground that the article was a publication of a judicial proceeding and unqualifiedly privileged, and that no presumption of malice existed and no express malice had been proved, which motion was sustained by the court. Plaintiff then asked to be allowed to withdraw his rest and be allowed to introduce evidence of express malice, which request was denied.

1. As to the duty of a newspaper, Judge Anderson, in deciding a case in the federal court of Indiana, said: "I have had occasion to say before that a newpaper has a certain duty to perform. It was well stated by a former President of the United States that it is the duty of a newspaper to print the news and tell the truth about it. It is the duty of a public newspaper, such as is owned and conducted by these defendants, to tell the people, its subscribers, its readers, the facts that it may find out

about public questions, or matters of public interest; and it is its duty and its right to draw inferences from the facts known—draw them for the people." *United States v. Smith,* 173 Fed. 227.

Ordinarily, the right of a newspaper to comment or criticize in regard to public matters extends and is limited to that enjoyed by the public generally, and this is true, whether the publication is in the form of an item of news, an advertisement, or correspondence. Defamatory matter published in good faith, in the honest belief in its truth, is not privileged if false because it was published as a matter of news. 36 C. J. 1272, 1273.

"The usual constitutional guaranty of the 'freedom of the press' does not secure to libelers immunity from civil or criminal prosecution, but is intended simply to secure to the conductors of the press the same rights and immunities, and such only, as are enjoyed by the public at large." 17 R. C. L. 349, sec. 95.

2. Many decisions have discussed the law relating to the headlines set out in the newspaper, and in the case on trial the headline, going across six columns and reading, "Claims He Suspected Imaginary Lover," is strongly objected to by the plaintiff.

The readers of newspapers have a right to expect that the bold headlines constitute a summary of the news to follow, but they are often lacking in this respect. It frequently happens that they mildly distort the account and offer an enticing bit of the article that is most sensational. Instead of being a short summary, they are just the paper's advertisement of its news to attract attention.

The decisions of our courts limit the use of headlines in two ways: First, by holding that libel may be found in the headlines; and, second, that the headlines are only privileged when they give a fair idea of the article which follows.

"The title or heading of a published article is a part thereof and must be considered in determining whether

the publication is libelous." 17 R. C. L. 350, sec. 97; *Dorr v. United States*, 195 U. S. 138.

"Courts have wisely held that the sting of libel is frequently contained in the headlines which are privileged only when they are a fair indication of a truthful report." *Brown v. Globe Printing Co.*, 213 Mo. 611, 127 Am. St. Rep. 627. And in this case the bold-type headings, which were fairly suggestive of the facts to be given below, are held to be within the rule announced.

3. As a general rule only the parties interested in a case are authorized to examine and receipt for the files in a case.

"In the English chancery it is held to be a contempt of court to publish a pleading of one party in a newspaper, or, it would seem, the whole proceedings, before the matter has come to be heard." *Cowley v. Pulsifer*, 137 Mass. 392. American courts do not go this far and generally hold that, in the publication of pleadings, newspapers must publish nothing libelous or stand ready to prove the truth of the charges made.

"One of the reasons why parties are privileged from suit for accusations made in their pleadings is that their pleadings are addressed to courts where the facts can be fairly tried, and to no other readers.

"If pleadings and other documents can be published to the world by any one who gets access to them, no more effectual way of doing malicious mischief with impunity could be devised than filing papers containing false and scurrilous charges, and getting those printed as news. The public have no rights to any information on private suits till they come up for public hearing or action in open court; and, when any publication is made involving such matters, they possess no privilege and the publication must rest on either nonlibelous character or truth to defend it." *Park v. Detroit Free Press Co.*, 72 Mich. 560.

4. "The publication in a newspaper of the contents of a petition for the removal of an attorney from the bar, filed in the office of the clerk of this court in vacation, but

which has not been presented to the court or entered on the docket, and which includes actionable allegations, unless justified, although the publication is a fair and correct report of the petition, is not privileged."

This is the syllabus of the decision entered by Judge Oliver Wendell Holmes in the Massachusetts case of *Cowley v. Pulsifer*, 137 Mass. 392. In this case, which has been often referred to as the leading case, Judge Holmes reviews many of the English cases and holds:

" 'Though the publication of such proceedings may be to the disadvantage of the particular individual concerned, yet it is of vast importance to the public that the proceedings of courts of justice should be universally known. The general advantage to the country in having these proceedings made public more than counterbalances the inconveniences to the private persons whose conduct may be the subject of such proceedings.'

"The chief advantage to the country which we can discern, and that which we understand to be intended by the foregoing passage, is the security which publicity gives for the proper administration of justice."

Therefore, when a bill has been filed in court and acted upon by the judge, it has been held that a publication of the contents of such bill, if it is a fair statement of the proceedings had, with an honest view of giving useful information to the general public, and will not tend to obstruct the course of justice or interfere with a fair trial, is then not a libelous publication, and this case is cited and discussed in the case of *Kimball v. Post Publishing Co.*, 199 Mass. 248, also a Massachusetts case, and it cites Lord Esher, who held that the publication after an *ex parte* application had been granted was a privileged report, and says: "If this were not so, then in the language of Lord Esher, 'the ridiculous result would follow that, where the trial of a case of the greatest possible interest lasted fifty days, no report could be published until it was ended.' "

While the evidence as given in the bill of exceptions in this case is not entirely free from doubt, yet it indicates

that the Daily News had a carbon copy of the petition for divorce which had been filed during the morning of the day of publication in the office of the clerk of the district court, and that the article claimed to be libelous had been set up in type so that it could be proof-read in crude form during the noon hour, but its publication was being held in abeyance until the restraining order was issued before it would be released for printing, and that it was actually released at 2:10 P. M. and appeared on the front page of the home edition of the Omaha Daily News which went to press at about 3 P. M. Neal Jones, the managing editor of the Omaha Daily News, testifying makes answer as follows: "I instructed the city editor to ascertain whether a restraining order had been issued in this case to determine whether or not this was merely a petition which might be filed and hurriedly withdrawn or whether it was in good faith, whether Mrs. Fitch really intended to carry out her action for divorce. When I learned that the suit was in good faith and was convinced that it was, and that the action would proceed, then I instructed them to run the article which appeared in the newspaper in evidence."

And the court concludes that Judge Sears had entered the restraining order at an *ex parte* hearing prior to the publication of the article in question, thereby under the rules set forth making the article in question privileged.

"It is not open to dispute that a fair report in a newspaper of pending judicial proceedings is proper, and that this privilege extends to all matters which have been made the subject of judicial proceedings, though such proceedings may be merely preliminary, or interlocutory, or even *ex parte*. For example, it will render privileged a fair report of the charges made in a bill in equity which has been presented to the court and upon which the court has acted by making an order that the defendants shall appear and show cause why an injunction shall not be issued against them." *Lundin v. Post Publishing Co.*, 217 Mass. 213; *Kimball v. Post Publishing Co.*, 199 Mass. 248, 19 L. R. A. n. s. 862.

"A publication in a newspaper of a report of preliminary proceedings before a justice of peace on a criminal charge, resulting in holding the party to bail or committing him for the action of the grand jury, when substantially correct, and made in good faith, and without malice, is entitled to the ordinary privilege accorded to reports of proceedings before courts of justice." *McBee v. Fulton*, 28 Am. Rep. 465 (47 Md. 403).

5. A newspaper publication, to be privileged as a publication of judicial proceedings, must be fair; that is, just, impartial, and free from animus against the party complaining; and it must be correct and accurate so as to give the public a reasonably correct statement of the matter involved. *Jones v. Pulitzer Pub. Co.*, 240 Mo. 200.

"Although a person may publish a correct account of the proceedings in a court of justice, if he discolors or garbles the proceedings or adds comments and insinuations of his own in order to asperse the character of the parties concerned, it is libelous." 17 R. C. L. 346 sec. 92.

A newspaper is allowed to make comments, draw deductions, and slightly add to court documents, if such inferences are fair, honest, and truthful deductions from the privileged proceedings, but of course it does not follow that a newspaper has permission to publish a lie at any time. We hold that the report of the divorce action was reasonably fair to the plaintiff, and printed in good faith, solely as a matter of news and of public interest.

The above is a brief discussion of the points of law involved in this case. Much of the evidence taken was directed to matters about which there was no dispute between the parties. The matter published was privileged, and the few comments and headlines, while not in good taste, were within the limits of the law as set forth above. The evidence for the plaintiff was in the opinion of the trial court so slight that a verdict for the plaintiff could not have been sustained, and we are satisfied that the trial court

was justified in disposing of the case by a dismissal, and the case is hereby

AFFIRMED.

Note—See Libel and Slander, 36 C. J. 1253 n. 60, 1272 n. 51, 55, 1274 n. 79; 32 L. R. A. 831; 17 R. C. L. 349; 3 R. C. L. Supp. 661; 40 A. L. R. 583; 17 R. C. L. 350; 5 R. C. L. Supp. 940; 6 R. C. L. Supp. 1009.

STATE, EX REL. O. S. SPILLMAN, ATTORNEY GENERAL, V. CLINTON STATE BANK, APPELLANT: JOHN CERNY, SR., APPELLEE.

FILED FEBRUARY 13, 1928. No. 25343.

Banks and Banking: GUARANTY FUND: DEPOSITS. Where certain Liberty bonds were purchased by a bank for a customer, but were never delivered to the customer, being left with the bank for safe keeping, and were subsequently sold by the bank without the consent of the customer, neither the bonds nor their proceeds constituted a deposit within the protection of the state guaranty fund.

APPEAL from the district court for Sheridan county: WILLIAM H. WESTOVER, JUDGE. *Affirmed in part, and reversed in part.*

C. M. Skiles and *R. L. Wilhite,* for appellant.

Irving R. Butler, contra.

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

REDICK, District Judge.

Claim of John Cerny, Sr., against Clinton State Bank, insolvent, in the hands of a receiver duly appointed. Claimant filed his petition alleging that on April 24, 1918, through the Clinton State Bank, claimant subscribed for and purchased third liberty loan bonds in the sum of $500, and on October 15, 1918, fourth liberty loan bonds in the

sum of $1,500; that said bonds were never delivered to claimant, but were left in the care of said bank for safekeeping, and subsequently, without the knowledge or consent of claimant, were sold by said bank. Petitioner prays that his claim may be allowed against the bank and paid out of the state guaranty fund. F. C. Hill, receiver, demurred to the petition on the ground that it did not state facts sufficient to constitute a cause of action, nor to show a claim properly allowable against the depositors guaranty fund. The demurrer was overruled and judgment entered allowing the same against the bank and ordering payment out of the guaranty fund. The receiver refused to plead further, elected to stand upon his demurrer, and brings the case here by appeal.

The demurrer should have been sustained. The statute provides only for the protection of state bank depositors, and it has many times been held that to create a deposit within the meaning of the statute "it is necessary that money or its equivalent shall in intention and effect be placed in or at the command of the bank under circumstances which do not transgress specific limitations of the bank guaranty law." *State v. Farmers State Bank,* 111 Neb. 117, and *State v. Atlas Bank,* 114 Neb. 650. The transaction of depositing money in a bank is one well understood; the title to the money deposited passes to the bank and the relation of debtor and creditor is created between the parties by express contract or necessary implication. It was this class of transactions that the statute was intended to cover. The transaction in question is of an entirely different nature; the title to the money or the bonds purchased therewith did not pass to the bank; it was a mere bailee for a specific purpose, and when it sold the bonds without the consent of claimant it was guilty of conversion, and plaintiff's claim was in tort, not in contract. The bonds, when procured, constituted a special deposit, the title to which was in the claimant, not in the bank. The claim of plaintiff presents none of the requisite character-

istics of a deposit protected by the guaranty law. These propositions are sustained by the following cases: *State v. Farmers Bank,* 110 Neb. 676; *State v. Atlas Bank,* 114 Neb. 650.

The case of *State v. American State Bank,* 108 Neb. 98, is not in point. There the agreement was for a deposit, but the banker placed the funds to the credit of another account, which fact the court held did not prevent the claim of the customer from becoming a deposit in ordinary course. Also *State v. Brown County Bank,* 112 Neb. 642, is not in point. In that case the bank received from claimant funds which it knew were the proceeds of sale of cattle upon which the claimant held a mortgage, but the claimant was ignorant of the source of the funds, and the bank placed the same to the credit of the mortgagor, and it was held that the fund under the circumstances constituted a deposit; from the circumstances the law implied an agreement for a deposit. In the present case no such implication arises. The other cases cited by claimant are likewise inapplicable.

It follows that the judgment of the district court must be reversed in so far as it orders the claim paid from the state guaranty fund, and the cause remanded, with leave to claimant to file an amended petition claiming a preference upon the assets of the bank, if advised that the facts warrant such claim; judgment allowing claim against the general assets of the bank is affirmed.

AFFIRMED IN PART, AND REVERSED IN PART.

STATE, EX REL. O. S. SPILLMAN, ATTORNEY GENERAL, V. CLINTON STATE BANK, APPELLANT: GEORGE W. CALDWELL, ADMINISTRATOR, APPELLEE.

FILED FEBRUARY 13, 1928. No. 25344.

Case ruled by and judgment reversed on the authority of *State v. Clinton State Bank, ante,* p. 482.

APPEAL from the district court for Sheridan county: WILLIAM H. WESTOVER, JUDGE. *Affirmed in part, and reversed in part.*

C. M. Skiles and *R. L. Wilhite,* for appellant.

H. B. Muffly and *L. T. Fleetwood, contra.*

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

REDICK, District Judge.

Claim of George W. Caldwell, administrator, against the receiver of Clinton State Bank for the value of liberty bonds in the sum of $2,150, which were left in the bank for safe-keeping, by Mary J. Caldwell, since deceased. Upon demurrer of the receiver to the petition of claimant being overruled and judgment entered for claimant against the bank for the full amount and ordering the same paid out of the state guaranty fund, the receiver appeals.

The case is ruled by *State v. Clinton State Bank, ante,* p. 482.

It is therefore ordered that the judgment of the district court be reversed in so far as it orders the claim paid from the state guaranty fund, and the cause remanded, with leave to claimant to file an amended petition claiming a preference upon the assets of the bank, if advised that the facts warrant such claim; judgment allowing claim against the general assets of the bank is affirmed.

AFFIRMED IN PART, AND REVERSED IN PART.

GRACE L. DWYER, APPELLANT, V. RICHARD O. WEYANT ET AL., APPELLEES.

FILED FEBRUARY 29, 1928. No. 25537.

Usury: MORTGAGES. "A mortgage which, by its express terms, requires the mortgagor to pay the maximum legal rate of interest on the debt which it secures, and, in addition, to pay the taxes upon the mortgagee's interest in the mortgaged premises, is usurious." *Stuart v. Durland,* 115 Neb. 211.

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

R. L. Wilhite, for appellant.

Ruby & Tucker, contra.

Heard before GOSS, C. J., ROSE, DEAN, GOOD, EBERLY and HOWELL, JJ., and REDICK, District Judge.

PER CURIAM.

This is an action to foreclose a real estate mortgage. Defendant alleged usury as a defense. The trial court found that the contract was usurious and entered a decree, depriving plaintiff of any interest, and crediting all payments that had been made, as against the principal. From this decree, plaintiff appeals.

The note, to secure which the mortgage in controversy was given, required the payment of 10 per cent. interest from its date, and by its terms was to run for a period of five years from date. The mortgage contained a clause requiring the mortgagors to "pay all taxes which may be levied upon this mortgage and the indebtedness secured hereby, and hold mortgagee harmless therefrom."

The facts disclosed by the record bring the mortgage contract squarely within the rule announced in *Stuart v. Durland,* 115 Neb. 211, wherein it was held: "A mortgage which, by its express terms, requires the mortgagor to pay the maximum legal rate of interest on the debt which it secures, and, in addition, to pay the taxes upon the mortgagee's interest in the mortgaged premises, is usurious."

The district court properly held that the contract was usurious, and therefore plaintiff was not entitled to recover any interest. All of the payments which had been previously made upon the note were properly credited upon the principal.

The decree is in conformity with law and is therefore

AFFIRMED.