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# REPORTS OF CASES

IN THE

# Supreme Court of Nebraska

SEPTEMBER TERM, 1929, AND JANUARY TERM, 1930

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## VOLUME CXIX

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HENRY P. STODDART,
OFFICIAL REPORTER

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CASES DETERMINED

IN THE

# SUPREME COURT OF NEBRASKA

SEPTEMBER TERM, 1929.

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CHARLES B. CALLAWAY, APPELLANT, V. FARMERS UNION COOPERATIVE ASSOCIATION OF FAIRBURY, APPELLEE.

FILED OCTOBER 3, 1929. No. 26680.

1. **Pleading:** VARIANCE. There can be no recovery if there is a material variance between the allegations and the proof. The *allegata* and *probata* must agree.
2. **Evidence** in the record examined, and *held* to sustain the action of the trial court in directing a verdict for defendant.

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

*J. A. Brunt* and *Heasty, Barnes & Rain,* for appellant.

*J. C. Hartigan* and *A. C. Pancoast, contra.*

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

EBERLY, J.

This is an action by a member of a farmers union cooperative association against the association to recover a "patronage dividend" alleged to be due and payable to plaintiff. After issue joined there was a trial to the jury, at the close of which the district court directed a verdict for the defendant, and from this verdict and the judgment of dismissal entered therein, plaintiff prosecutes this appeal.

Summarizing, the gist of plaintiff's petition is that he has been continuously a member of the defendant association since 1919 and is such at the present time; that he

transacted business with the defendant during the year ending June, 1926, amounting to $24,000. "Plaintiff further alleges that the by-laws provide for the holding of an annual meeting of said association, and that said annual meeting shall be held in June of each year; that a business year of said association shall be from one annual meeting to the next; that profits are prorated at the annual meeting on business done during the year preceding the annual meeting;" that at the annual meeting in June, 1926, a "morata (patronage) dividend of 5 per cent. was earned and declared to the stockholders;" that payment of this dividend so declared has been wrongfully refused to him, though due demand therefor has been made upon the defendant association. To this petition the defendant demurred, for the reason that "the petition does not state facts sufficient to constitute a cause of action." The demurrer was overruled. The defendant then answered by a general denial.

It is to be noted that plaintiff in his petition does not expressly, or by necessary implication, allege that the "patronage dividend" for which he sued was declared by the board of directors. This would seem to follow as the necessary inference from the statements of his petition relating thereto, in connection with the by-laws pleaded, that "profits are prorated at the annual meeting (of defendant association) on business done during the year preceding the annual meeting," and "that at the annual meeting (of the stockholders) in June, 1926," a *pro rata* "dividend of 5 per cent. was earned and declared to the stockholders on the value of business transacted with the corporation for the business year."

It is the generally accepted doctrine that, in the absence of other authority, it is the duty of the board of directors, and not of the stockholders, to determine whether or not a dividend shall be declared, but there is authority for the proposition that stockholders may, however, act in conjunction with directors in the declaration of dividends, or the same result may be accomplished by the unanimous ac-

tion of all of the stockholders. 7 Thompson, Corporations (3d ed.) sec. 5273.

Giving the plaintiff's petition this liberal construction, what are the proofs in the record to sustain its allegations?

Plaintiff offered in evidence a copy of the minutes of a "called meeting" of the directors of the Farmers Union Cooperative Association held in Fairbury, on the 3d day of June, 1926, there being five members of the board present. This record was received over objection and disclosed that this board of directors at that meeting declared a "patronage dividend of 2/10 per cent. on live stock and 5 per cent. on grain and coal and merchandise." It will be noted that this cannot be termed an annual meeting; that the only annual meeting provided for by the by-laws, a copy of which is in evidence, is the "annual meeting" of the stockholders of the association. But plaintiff did introduce, as exhibit 5, the minutes of the annual meeting of the stockholders of this association held at the courthouse at Fairbury, Nebraska, June 16, 1926. The following constitutes a true copy thereof:

"Courthouse, Fairbury, Nebr. June 16, 1926.

"The stockholders of Farmers Co-op Ass'n met in their regular annual meeting on June 16, 1926. The meeting was called to order by the President Mr. F. S. Wells at 8:30 p. m. Minutes of the meeting of June 16, 1925, were read and approved. Manager report read and approved and showed a net gain to be $5,576.47.

"Omer Burd, Sec."

In connection with this subject the defendant introduced exhibit B, which is the minutes of a "called meeting" of the board of directors of the Farmers Union Cooperative Association held in Fairbury on the 16th day of June, 1926, at 9:30 a. m. A copy of these minutes is as follows:

"Farmers Union Co-op Ass'n, Fairbury, Nebr.

"At a called meeting of the board of directors of the Farmers Union Co-op Ass'n held in Fairbury on the 16th day of June, 1926, at 9:30 a. m. There being all members of the board of directors present. Meeting called to order

by Pres. Wells. On motion by W. C. Ware seconded by John Schoenrock that we reconsider and rescind the action of the board declaring a patronage dividend. Motion carried. Motion made that the earnings of the corporation now undistributed be carried to the surplus account of the corporation for the purpose of replacement and reserve. Motion carried.

"Omer Burd, Sec."

It is quite apparent that this evidence wholly fails to substantiate plaintiff's claim that in the June, 1926, annual meeting of the stockholders any dividend was declared and ordered to be paid either by the stockholders as such or the stockholders acting in conjunction with the board of directors. Indeed, the conclusion is inevitable that in the June 16, 1926, meeting the only business transacted was the convening of the stockholders; the calling of the meeting to order at 8:30 p. m.; the reading and approval of the minutes of the meeting of June 16, 1925; the reading and approval of the manager's report. We can only conclude from the absence of any reference to the subject of dividends in the minutes of this annual meeting of the stockholders heretofore set out, as well as a total lack of other competent evidence in the record establishing the affirmative, that there was no consideration of or action taken by the stockholders at this annual meeting on the subject of dividends whatever. It was a subject that did not enter into or form any part of the business transacted at that time. In view of these facts, the rule of law applicable to the situation before us is that "there can be no recovery if there is a material variance between the allegations and the proof. The *allegata* and *probata* must agree." *Elliott v. Carter White-Lead Co.*, 53 Neb. 458; *Cockins v. Bank of Alma*, 84 Neb. 624. And, as applied to the instant case, the plaintiff's petition cannot be sustained for want of proof. But should we liberalize the rule of construction applicable to plaintiff's petition to the extent that it might be held by implication to include an allegation that the dividend in suit was actually determined, ordered and declared by the board

of directors of defendant (a construction which, in view of the demurrer in the record, and the continued and consistent objection of defendant to the admission of plaintiff's evidence, would be unwarranted), still, there is no sufficient evidence in the record before us upon which a judgment in his favor could be sustained. As already appears, at a called meeting of the directors of the Farmers Union Cooperative Association held in Fairbury on the 3d day of June, 1926, there being five members only of the board present, a resolution was adopted to the effect "that we declare a patronage dividend of 2/10 per cent. on live stock and 5 per cent. on grain and coal and merchandise." But it also appears that at a called meeting of the board of directors of the Farmers Union Cooperative Association held in Fairbury on the 16th day of June, 1926, at 9:30 a. m., there being all members of the board of directors present, the action of this board of June 3d declaring a patronage dividend was reconsidered and rescinded and the earnings of the corporation then undistributed were directed to be carried to the surplus account of the corporation for the purpose of replacement and reserve. Following this last action by the board of directors, there was held the annual meeting of the stockholders of the Farmers Union Cooperative Association, which convened at 8:30 p. m. on the same day, approved the minutes of the previous annual meeting, heard and approved the manager's report, and adjourned.

Under the facts disclosed by the record, was the board of directors in its meeting on June 16, 1926, justified and empowered in reconsidering and rescinding the action of the same board taken on the 3d of June previously? This corporation had been in existence since 1919. Sections 1 and 2 of article 7 of the by-laws in force since the date of its organization provided:

"Section 1. Out of the proceeds of the business the operating expenses and the interest on indebtedness shall first be paid.

"Section 2. Out of the profits there shall be set aside each year as a sinking fund 10 per cent. until such surplus

equals 50 per cent. of the paid-in capital; said sum to be used in payment for improvements and new buildings, to make up losses, and for such other purposes as the board of directors shall determine."

A compliance with these provisions would have resulted in the possession of a surplus by the defendant association of 50 per cent. of its capital stock. But no amounts whatever, in obedience to the provisions of the by-laws quoted, had been, up to that time, set aside as therein directed. Query: Was the action of the board of directors on June 3d directing and declaring a dividend, under the existing circumstances, lawfully possible, in view of the provisions of section 2 above quoted? Waiving the question last propounded, we find the acts of rescission of the board of directors of June 16 have ample support and authority in the by-laws of the defendant association. This organization had by the terms of its constating act, at the time of its organization, ample authority conferred by statute to make by-laws "for the management of its affairs and for the distribution of its earnings." In the exercise of this power thus conferred, it adopted a by-law which provides that 20 per cent. of the members may ask that a proposed measure (of the board of directors) "be submitted to the stockholders for approval or rejection. Upon the receipt of a petition containing the proposed measure and signed by such per cent. it shall be the duty of the president to call a special meeting of the stockholders," and that "at such special meeting a majority vote shall be sufficient to approve or reject the measure submitted to the meeting for approval or rejection." Whatever the individual opinion of the attorneys in this case may be or the members of this court possess concerning the value of the principle of the initiative and referendum as a political proposition, these by-laws having been adopted contemporaneously with the organization of the association, and thus forming an essential part of the membership contract, good faith demands their enforcement unless their provisions are contrary to law or in excess of the power conferred upon the associa-

tion. We find no reason that would justify our failure to give the provisions quoted full force and effect in the instant case. If they are to be deemed in force and applicable, it would follow that the term "proposed measure" used therein properly construed, in view of its commonly accepted definition, would embrace the subjects of proposed declarations of dividends and the application and disposition of corporate earnings by the board of directors. Therefore, the action of the board on the 3d day of June being expressly subject to revision or veto may not be deemed final or binding upon the corporation until the reasonable time for referendum and review has expired. If this power of referendum exists, it is our duty to construe it so as to make it effective. This by-law also provides that "if the measure is approved it shall go into effect at once." This language implies that until the time for referendum has elapsed the action taken is not in effect. Therefore, no rights are or can be created by or through it against the corporation until this "reasonable time" has expired.

It would also follow that until the action taken by the board of directors is in effect or has created new rights against the corporation it may be rescinded or modified by the corporate agency involved. This was lawfully done in the instant case when the entire board of directors on the 16th of June reconsidered and rescinded their previous action declaring a patronage dividend and made other and different disposition of the corporate earnings of defendant.

It must also be remembered that this act of rescission was likewise subject to revision under the terms of the by-laws referred to, but, so far as the record discloses, no action thereon has been taken from which it might, if necessary, be inferred that the last action was in accord with the desires of the stockholders in whom the by-laws vest supreme control.

In view of the circumstances referred to, the action of the board of directors on June 3d not being final, but subject to revision and rejection, and having actually been rescinded within a reasonable time, the principle, which would apply

in cases where the board is the actual and final arbitrator in whom is vested the duty and discretion to determine whether or not a dividend shall be declared, has no application. So the conclusion follows that, even if the petition in the instant case be given the enlarged construction suggested, the facts would not entitle the plaintiff to the relief for which he prays.

The action of the trial court, therefore, in directing a verdict in favor of the defendant was correct and the judgment is

AFFIRMED.

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HILMA C. WILLIAMS, APPELLEE, V. ELAM C. WILLIAMS, APPELLANT.

FILED OCTOBER 3, 1929. No. 26745.

1. Divorce: PROPERTY SETTLEMENT: MODIFICATION. Where the parties to an action for divorce have before the trial of such case entered into a contract for a property settlement and alimony payments and this contract is approved by the court, the same will not be set aside or modified, except upon a showing of fraud or such change in the circumstances of the parties as, in the opinion of the court, would require a change in the payments.
2. ———: ———: ———. Evidence examined and *held* to support the decree of the trial court, except that an item of insurance premiums, which, according to the contract, were paid for the benefit of the plaintiff, should be credited, under the contract, as part of the payments made to the plaintiff.

APPEAL from the district court for Douglas county: CHARLES LESLIE, JUDGE. *Affirmed as modified.*

*Frank H. Woodland,* for appellant.

*A. C. R. Swenson* and *R. E. Robinson, contra.*

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

RYAN, District Judge.

This is an appeal from an order of the district court for

Douglas county, refusing to modify the provisions of a divorce decree in regard to alimony. The decree was entered on September 26, 1924. The petition to modify was filed March 8, 1928, and was based primarily upon a claim that fraud was practiced upon the defendant in securing the contract of property settlement and alimony and the fact that the burden placed upon the defendant by the provisions for alimony was too heavy and that his income was decreasing. The provisions in regard to alimony were based upon a contract entered into some time in June, 1924, shortly before the trial of the original divorce suit. The divorce suit was brought by the plaintiff. It would serve no good purpose here to set out in detail the reasons for the separation of these parties. It is sufficient to say that it is admitted that the defendant had by his conduct with the woman who is now his wife given the plaintiff ample cause for divorce or separation and that the defendant himself had no cause of action for divorce.

It appears from the record that the plaintiff had consulted one Philip E. Horan, a practicing attorney in Omaha, and contemplated bringing a suit for separate maintenance and did not wish an absolute divorce. Mr. Horan was also the attorney for the company of which Mr. Williams, the defendant, was president. Mr. Horan took the matter up with Mr. Williams and, after some negotiations, a property settlement was agreed upon, a summary of which is as follows: First, payment to Mrs. Williams of $1,000 in cash and setting over to her the family home, worth about $6,000, and the family automobile. Second, payment of $250 a month to Mrs. Williams. Third, payment of $50 a month to Mrs. Williams for the support, maintenance and education of their minor son, Carlton, who was at that time eleven years of age; these payments to be increased to $60 a month when he should reach high school, and to $100 a month while he should be in college, and to cease upon the completion of his education. Fourth, payment by Mr. Williams of premiums on $10,000 of life insurance upon his life, payable to Mrs. Williams; these premiums amounting to

$245 a year. Fifth, the assignment of one-third of Mr. Williams' stock in the Williams-Murphy Company to the Omaha Trust Company, as trustee for Mrs. Williams, said stock to be paid to Mrs. Williams upon Mr. Williams' death, should he predecease her, but to be returned to Mr. Williams in case she predeceases him. Sixth, in case of reduction of Mr. Williams' income, total payments provided for by contract to be reduced so as not to exceed 40 per cent. of his earnings.

At the time of entering into this contract Mr. Williams owned 500 shares of stock in the Williams-Murphy Company, the value of which he estimated at $70 a share. In addition to this he had $14,000 in cash, which was loaned to the company, and he also owned a lot in the north part of Omaha, which he afterwards sold for $2,200. This property was in addition to the home and the automobile which he gave to his wife.

The Williams-Murphy Company is a wholesale grocery concern. It appears from the record that there is no income or dividends paid upon the stock, but that all the earnings of the company are used in the payment of salaries, so that, aside from his salary, Mr. Williams has no other income. At the time of the divorce his salary was $10,000 a year. A little less than two years after the divorce decree was entered Mr. Williams' salary was reduced to $7,500 a year, so that, under the sixth provision of the above summary of the contract, the payments for the support and education of the minor son ceased and his payments amounted to only $250 a month. The record also shows that, in addition to the payments of $250 a month, Mr. Williams has kept up the premiums on the life insurance policy in the sum of $245 a year. A short time before the commencement of this action in the district court Mr. Williams attempted to have the contract for a property settlement construed so as to include the $245 insurance premiums within the limitation providing the total payments should not exceed 40 per cent. of his income, but this was denied him by the trial court.

The principal ground for modification urged by the appellant in his petition in the district court and in his brief filed in this court is that a fraud was practiced upon him by Mr. Horan, the plaintiff's attorney, and he alleges that he protested to said Horan against such large payments each month, continuing over an indefinite period and terminating only upon plaintiff's death or her remarriage, and that said Horan advised him that if he did not consent to such a provision the court would in its divorce decree require him to pay a sum of money as permanent alimony, the income of which would approximate the sum of $250 a month, which said sum this petitioner could not pay, and that, acting upon this advice, he signed the contract above referred to. At that time it appears also from the record that the plaintiff intended to file suit for separate maintenance and did not wish an absolute divorce, and that a part of the consideration for the defendant's agreeing to the property settlement was her agreement to bring suit for an absolute divorce. Since the divorce the defendant has remarried, built a new and expensive home and his living expenses have greatly increased.

The trial court found that no fraud was perpetrated upon the defendant, inducing him to enter upon the property settlement agreed upon between plaintiff and defendant herein, prior to the commencement of the divorce action, and that the terms of the property settlement were reasonable under the circumstances of the case; that the reduction in the defendant's salary does not justify a modification of said settlement and the decree confirming the same, in view of the provision in such settlement limiting payments by the defendant to the plaintiff and the minor child of plaintiff and defendant to 40 per cent. of defendant's income, and the court further found that the increased expenditures incurred by the defendant, subsequent to the divorce decree and his subsequent remarriage, do not justify any modification of the terms of said decree.

We are satisfied, from a careful reading of the record, that there was no fraud practiced upon the defendant by the

plaintiff's former attorney. The appellant, however, contends that, under the decisions of this court, it is not proper to allow alimony in continuing monthly or annual instalments throughout the lifetime of a wife, and cites *Cochran v. Cochran,* 42 Neb. 612, and *McGechie v. McGechie,* 43 Neb. 523, in support of that doctrine. Those are both early cases, and in the later case of *Chapman v. Chapman,* 74 Neb. 388, which was decided more than ten years later, this court criticized the decisions in the above cases in this language: "That practice (referring to the practice of allowing a lump sum as alimony, rather than continuing payments) was sanctioned and the contrary course disapproved by this court in *Cochran v. Cochran,* 42 Neb. 612, and *McGechie v. McGechie,* 43 Neb. 523, but we think without mature or adequate deliberation."

Moreover, we have in this case the additional feature of a contract entered into as a basis of a property settlement, and, in this connection, it is well to note that the defendant's principal asset was his earning capacity. He did not have any substantial amount of property, out of which a full judgment for alimony could be paid. He was anxious that the plaintiff sue for an absolute divorce, rather than follow out her intentions and ask for separate maintenance only, and, judging from his conduct, no doubt this was in a large part the consideration for him making a fairly generous provision for the plaintiff. Whether or not the defendant consulted any attorney other than Mr. Horan, the record shows that he was quite capable of taking care of his rights. It was at his insistence that the 40 per cent. limitation was inserted in the contract. He procured a reduction of the cash payment to be made by him; he procured a reduction in the amount of the monthly payments to be made by him for the benefit of his son, Carlton; and there is nothing in the record to indicate in any way that he signed the contract as the result of any fraud or misrepresentation practiced upon him.

The defendant, it is true, does not appear to be as prosperous as he once was. This is accounted for by two cir-

cumstances: His income has been reduced to the extent of $2,500 a year, and, in addition to the alimony payments which he is required to make, he has increased his living expenses considerably. As soon as the statutory six months' period had expired, the defendant remarried. He built a new home in an exclusive residential district of Omaha, at a total cost, inclusive of the lot, of about $22,000, in contrast with the $6,000 home which was set aside to the plaintiff. In order to provide this new home, it was necessary for him to borrow $10,000 upon it from a building and loan company, and the annual payments on this building and loan company mortgage amount to $1,200.

Appellant also cites several cases from other jurisdictions where alimony had been reduced on the ground that the defendant had remarried and had a second family to support, or partly upon that ground. In this regard we believe that, under the circumstances in this case and in similar cases, the first wife and family should have the first consideration, and we are unable to say, from all the circumstances in this case, that the contract, voluntarily entered into by the parties, is in any respect unreasonable or unjust. We do feel, however, that, under the provision contained in this contract that the total payments provided for by the contract should not exceed 40 per cent. of the defendant's income, the insurance premiums, which amount to $245 a year, should be included within the 40 per cent. limitation.

With this modification the decree of the district court is affirmed.

AFFIRMED AS MODIFIED.

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## MARGARITO GONZALEZ V. STATE OF NEBRASKA.

FILED OCTOBER 3, 1929. No. 27038.

1. **Contempt.** Summary proceedings for contempt of court will not lie except where the contempt is committed in the presence of the court and where the court has judicial cognizance of the facts constituting the contempt.
2. ———. Where it is necessary to adduce evidence to determine whether or not a contempt has been committed a formal com-

plaint must be filed and an opportunity given the accused to make a defense.

3. ———: JUDGMENT. A judgment of contempt must state the facts constituting the contempt, and a judgment which merely states the conclusion of the court will not sustain a sentence of imprisonment for contempt.

ERROR to the district court for Lancaster county: JEFFERSON H. BROADY, JUDGE. *Reversed.*

*Dale P. Stough* and *Sanden, Anderson & Gradwohl,* for plaintiff in error.

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

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

RYAN, District Judge.

Margarito Gonzalez was found guilty of contempt of court in the district court for Lancaster county, and was sentenced to serve a term of thirty days in the county jail for that offense, and he brings the proceedings to this court for review upon petition in error.

The plaintiff in error was the plaintiff in an action brought in the district court for Lancaster county against the Chicago, Burlington & Quincy Railroad Company for damages. At the beginning of the trial of that suit an interpreter was requested for the plaintiff. There followed a discussion and inquiry as to the necessity for an interpreter, and the plaintiff in error was questioned at some length by the court as to his ability to speak and understand the English language. At the conclusion of this examination the court granted the request and an interpreter was sworn and the case proceeded.

At the close of the plaintiff's testimony the court directed a verdict for the defendant, and then proceeded to call several witnesses and examined them at length as to the plaintiff's ability to speak and understand the English language. At the conclusion of the examination the court entered this finding:

"Immediately upon disposal of causes of actions as above set forth, the court made full and complete examination of plaintiff and other witnesses upon the question of whether the plaintiff should not be held in contempt, in that he has deceived the court on his ability to understand English, both by hearing and understanding and also speaking the English language. On conclusion of such hearing the court held said Gonzalez in contempt of court and committed to jail for a period of thirty days."

Then follows the formal judgment and sentence for contempt. No other proceedings were had. No formal complaint was filed, accusing Gonzalez of any specific crime or of contempt. He was cited before the court immediately at the conclusion of the proceedings in the civil action, and all that is recited anywhere in the record is the mere conclusion that "he has deceived the court on his ability to understand English, both by hearing and understanding and also speaking the English language."

The law on the subject of contempt of court has been well settled by the previous decisions of this court and other courts in this country, and, after a careful consideration of the decisions of this court and others, we are convinced that the conviction cannot be sustained. *Beckett v. State,* 49 Neb. 210; *Crites v. State,* 74 Neb. 687; *O'Chander v. State,* 46 Neb. 10; *Wilcox v. State,* 46 Neb. 402; *People v. Stone,* 181 Ill. App. 475; *Riley v. Wallace,* 188 Ky. 471; *Ex parte Hudgings,* 249 U. S. 378; *Finegold v. State,* 112 Neb. 64.

The attorney general invokes the statutory power of a court to inflict punishment for a "wilful attempt to obstruct the proceedings, or hinder the due administration of justice," in an attempt to sustain the conviction. Comp. St. 1922, secs. 9189, 9190. But the record fails to show that the court acted or attempted to act under the authority contained in these provisions. Nowhere throughout the several pages of the proceedings does the expression appear, and in the record made on the motion to vacate the sentence there is no reference to any "attempt to obstruct the pro-

ceedings, or hinder the due administration of justice." The judgment of the court does not find that the defendant has attempted to "obstruct the proceedings, or hinder the due administration of justice," but states a mere conclusion of the court.

The record discloses that the trial court did not make the finding or impose the sentence as the result of facts of which it had judicial cognizance. The recitation is made that a "full and complete examination of the plaintiff and other witnesses" was had, and it was upon the evidence thus adduced and considered that the court determined the plaintiff in error was guilty of contempt of court.

In commenting upon a similar state of facts in a recent case this court said: "The record, therefore, is fatally defective and the action taken will not support the sentence imposed. If Finegold was not subject to summary punishment, a written complaint and an opportunity to make a defense were necessary to a conviction for contempt. If he was guilty of contempt in the presence of the court, his conviction should state the conduct constituting the contempt. In neither respect is there a compliance with the law." *Finegold v. State*, 112 Neb. 64.

The conviction cannot be sustained, and the judgment of the trial court is reversed and the cause remanded for further proceedings.

REVERSED.

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## THOMAS MURRAY V. STATE OF NEBRASKA.

FILED OCTOBER 3, 1929. No. 26864.

1. **Criminal Law: PRELIMINARY EXAMINATION: PLEA IN ABATEMENT.** "When the quantity or sufficiency of the evidence to justify the holding of a person to answer for a crime in the district court is called in question by a plea in abatement, and it appears that there has been a preliminary hearing in form and substance, and that evidence has been introduced in support of

the complaint such as to invoke an honest exercise of judgment or discretion * * * as to the order or judgment to be entered, and from which a fair legal deduction may be reached that a crime has been committed, and there is testimony tending to show that the accused committed the offense, and he is held to await trial in the district court, a preliminary examination has been had within the meaning of the statute, and the plea in abatement would be unavailing." *Jahnke v. State*, 68 Neb. 154. Evidence at the preliminary hearing in this case examined, and *held* to justify the order of commitment by which the defendant was required to answer the charge of forgery in the district court.

2. ———: JURY: CHALLENGE TO ARRAY. The laws of this state have imposed upon the sheriff certain duties, among which are the selection and summoning of juries, as well as guarding them during the trial and subsequent deliberations. In the absence of any showing of actual misconduct, or conduct inconsistent with his official duties, it will not be presumed that he had any such personal or private interest in the prosecution as would disqualify him from acting officially in the performance of all duties specifically enjoined upon him by the statute. The mere indorsement of the name of a sheriff as a proposed witness for the state on an information in a criminal case, where such sheriff is not thereafter called as a witness and where there is no evidence of any prejudice on his part against the defendant, will not justify the trial court in sustaining a challenge to the array of jurors on the ground that the sheriff was disqualified to select, summon and guard such jury.

3. ———: INTENT: PROOF. When it becomes necessary in a criminal prosecution to show a particular intent to establish the offense charged, proof of other acts of the same or similar kind is admissible for that purpose, when such proof shows such connection between the different transactions, in point of fact and time, as raises a fair inference of a common motive in each. To be admissible, such proof should be sufficiently significant in character and sufficiently near in point of time to have a tendency to persuade a reasonable man to belief in the intent or motive sought to be proved.

4. ———: EXPERT WITNESSES: QUALIFICATIONS. The question of the qualifications of an expert offered in court as a witness is a preliminary one for the court. The weight to be given his testimony is a question for the jury, under proper instructions by the court. It is the prevailing rule that the decision of the trial court on the question of the qualifications of an expert witness will not be disturbed unless there has been a clear abuse

of discretion. *Held*, no error in the ruling of the trial court in the instant case.

5. ———: FAILURE OF ACCUSED TO TESTIFY: INSTRUCTIONS. Where, in a criminal prosecution, a defendant does not testify in his own behalf, it is not reversible error for the trial court to mention such neglect or omission in its instructions, when followed in the same connection with the direction that "nothing must be taken against him because he had not so testified." *Ferguson v. State*, 52 Neb. 432.

6. ———: NEW TRIAL. Whether a motion for a new trial in a criminal case, based upon alleged misconduct of jurors, should be sustained rests in the sound discretion of the trial court, and its ruling on such motion will not be disturbed unless an abuse of discretion is shown. *Simmons v. State*, 111 Neb. 644. Evidence on the question of alleged misconduct of jurors in the instant case examined, and *held* sufficient to establish the purity of the verdict.

7. Forgery: SUFFICIENCY OF EVIDENCE. The whole evidence, outlined and discussed in the opinion, *held* to point with such unerring certainty to the accused as the perpetrator of the crime charged as to fully sustain the verdict of guilty returned by the jury in this case.

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

*Bertrand V. Tibbels* and *Eugene D. O'Sullivan*, for plaintiff in error.

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

Heard before GOSS, C. J., ROSE, DEAN, GOOD and EBERLY, JJ., and REDICK and STEWART, District Judges.

STEWART, District Judge.

In the district court for Otoe county, one Thomas Murray, hereafter called the defendant, was prosecuted on an information containing three counts. In the first count he is charged with unlawfully and feloniously forging a promissory note for $5,000, purporting to be signed by one Henry Kasbohm. The second count charged him with uttering such forged note with intent to defraud; while the third count charged him with wilfully and unlawfully hav-

ing such forged note in his possession for the purpose of selling and disposing of it with intent to defraud. The trial resulted in a verdict of guilty on all counts. After overruling the defendant's motion for a new trial, the court sentenced him to an indeterminate term of from five to ten years in the penitentiary on the first and second counts, and one to ten years on the third count, together with a fine of $100 and costs of prosecution, sentences to run concurrently.

In this case, the petition in error contains 43 assignments of alleged error. In defendant's printed brief, these are reduced to 12 in number, all of which are presented and argued in 10 propositions of law. Only those which are argued in brief of counsel will be considered.

The accused first contends that the trial court erred in overruling his plea in abatement, based upon the insufficiency of the preliminary hearing. More definitely stated, his complaint is that the evidence offered by the state at the preliminary examination was insufficient to warrant the order of commitment by which he was held for trial in the district court. What we conceive to be the correct rule by which to determine the sufficiency of the evidence to justify holding the accused to answer for a crime in the district court is clearly stated by Holcomb, J., in the case of *Jahnke v. State*, 68 Neb. 154.

"When the quantity or sufficiency of the evidence to justify the holding of a person to answer for a crime in the district court is called in question by a plea in abatement, and it appears that there has been a preliminary hearing in form and substance, and that evidence has been introduced in support of the complaint such as to invoke an honest exercise of judgment or discretion * * * as to the order or judgment to be entered, and from which a fair legal deduction may be reached that a crime has been committed, and there is testimony tending to show that the accused committed the offense, and he is held to await trial in the ment would be unavailing."

district court, a preliminary examination has been had within the meaning of the statute, and the plea in abate-

In this case, the record shows that a preliminary hearing was had before the county judge, sitting as a committing magistrate. The state relied upon the testimony of two witnesses. Kasbohm, whose purported signature appeared on the promissory note in question, testified that it was not his signature and that he never authorized it. This was the appropriate proof of forgery, and, in the absence of countervailing evidence, was sufficient to establish the crime of forgery. The state then called the witness Robert O. Marnell, who testified that he was the cashier of the Merchants National Bank of Nebraska City to whom the alleged note was drawn; that he knew the defendant; had transacted business with him and with his bank, and that he knew the handwriting of the defendant. He further testified that he received the note in question and that it was accompanied by a letter in the handwriting of the defendant. It is true, as argued by counsel, that the letter of transmittal was not signed by the defendant and, in fact, was a printed form of transmittal slip evidently used by the defendant's bank for the transmitting of various items of exchange. However, this slip did contain certain written names and figures and these, no doubt, were the indications upon which the witness based his opinion that the handwriting was that of the defendant. The defendant offered no testimony. Thus, it appeared from the record before the magistrate that a forgery had been committed and that the forged instrument was in the possession of the defendant, unexplained. Here was the time and place for the defendant to speak, if by any explanation he could destroy the damaging inferences arising from the state's evidence. The hearing was for his benefit. We conclude that the evidence offered by the state at the preliminary examination in this case meets all the requirements of the rule announced in the *Jahnke* case; that it fully justified the order of commitment by which the defendant was required to answer the charge of forgery in the district court, and that his plea in abatement was properly overruled by the trial court.

It is next urged that the trial court erred in overruling defendant's challenge to the second array of jurors, based upon the fact that the panel was selected and summoned by one Carl Ryder, sheriff of Otoe county, who, it is claimed, was a material witness for the state and prejudiced against the defendant. The record shows that the sheriff was never called as a witness in this case. The county attorney, in his testimony, says that the name of the sheriff was indorsed on the information in pursuance of a custom established by his office, whereby the names of various court officials were indorsed in every prosecution as a precautionary measure; that the sheriff was not a material witness for the state and that he never had any intention of calling him. Upon motion of the county attorney, the name of the sheriff was ordered stricken from the information. No evidence appears in the record which in any way supports the charge that the sheriff bore any malice toward the defendant, or that he was guilty of any misconduct in his relations with the jury at any time. The laws of this state have imposed upon the sheriff certain duties, among which are the selection and summoning of juries, as well as guarding them during the trial and subsequent deliberations. In the absence of any showing of actual misconduct, or conduct inconsistent with his official duties, it will not be presumed that he had any such personal or private interest in the prosecution as would disqualify him from acting officially in the performance of all duties specifically enjoined upon him by the statute. Very recently this court considered the subject in the case of *Noonan v. State*, 117 Neb. 520. In this case, Judge Eberly, speaking for the court, announced the following rule:

"A sheriff who is not the prosecuting witness nor the sole witness in a criminal case, but whose evidence is affirmatively shown by the record to be corroborative merely, is not, by the fact that he is called as a witness and his name, as such, is indorsed upon the information charging the offense being tried, disqualified thereby from performing the duties of his office; nor do these facts render a panel

of jurors selected and summoned by him, under direction of the district court as provided by section 9078, Comp. St. 1922, vulnerable to challenge."

We find no error in the overruling of the defendant's challenge to the second array of jurors.

Further, objection is made by the defendant to the court's ruling on certain evidence offered through the witnesses Kasbohm and Shane. We shall first consider the testimony of the witness Kasbohm.

Exhibit No. 66 was a letter written by the defendant to his cousin on March 24, 1927, containing a list of what purported to be accommodation notes, including the note which is the basis of this prosecution. Included in this list are two other notes, each for $5,000, said by Murray to have been signed by Kasbohm. Over objection of the defendant, the witness was permitted to testify that he never signed nor authorized the signing of any note such as the three referred to in this exhibit. It is insisted that this ruling resulted in the admission of evidence tending to establish one crime in the prosecution of another.

The defendant, by his plea of not guilty, put in issue everything which it was incumbent upon the state to prove under the information filed in this case. Guilty knowledge and intent were elements of the offense charged. It is in proof of these facts that the courts have gone farthest in admitting facts apparently collateral to the issue. Frequently motive and intent can be proved in no other way. The state in this case, by showing the note in the possession of the defendant, together with evidence that it was a forgery, presented some proof from which intent and guilty knowledge on the part of the defendant might rationally have been inferred. We know of no rule of law which precludes the state from offering additional competent corroborative proof. The single circumstance of defendant's possession of such an instrument might possibly leave in doubt the secret intent and motive of the defendant. When viewed in connection with the other evidence disclosed by exhibit No. 66, and it was made to appear that at about the

same time the defendant had in his possession two other notes by the same man and the genuineness of which was being denied, it might well be said that the evidence objected to by the defendant was the most appropriate kind of proof and effectually removed all doubt and uncertainty as to the true intent of the defendant in the transaction relating to the note in question. When it becomes necessary in a criminal prosecution to show a particular intent to establish the offense charged, proof of other acts of the same or similar kind is admissible for that purpose, when such proof shows such connection between the different transactions, in point of fact and time, as raises a fair inference of a common motive in each. To be admissible, such proof should be sufficiently significant in character and sufficiently near in point of time to have a tendency to persuade a reasonable man to belief in the intent or motive sought to be proved.

Further complaint is made that the court, over objection of the defendant, permitted the witness Shane to give his opinion regarding the authorship of the note in question. The witness was offered by the state as an expert on handwriting. The defendant insists that he was not properly qualified as an expert and devotes much time to criticism of his testimony. The question of the qualification of an expert offered in court as a witness is a preliminary one for the court to determine. The weight to be given his testimony is a question for the jury, under proper instructions by the court. The trial court was evidently satisfied with the foundation for this testimony, and it is the prevailing rule that the decision of the trial court on the question of the qualification of an expert witness will not be disturbed by the reviewing court unless there has been a clear abuse of discretion. We find no such abuse of discretion in the instant case. Counsel for defendant in their brief have said much about the method by which this witness reached his final conclusions. This was a matter affording proper subject for cross-examination of the witness, but went only to his credibility and the weight to be given to his testimony.

The next assignment of error relates to instruction No. 11, given by the court on its own motion, which is as follows:

"You are instructed that the defendant has not testified in his own behalf in this case, as he had a lawful right to do. Nothing must be taken against him because he has not so testified."

This identical instruction has been considered by this court in the case of *Ferguson v. State*, 52 Neb. 432, and it was there held that the giving of such an instruction is not reversible error. Defendant points out that this instruction violates section 10139, Comp. St. 1922. This statute was given full consideration by this court in the case last above referred to and we are heartily in accord with the views there expressed. The instruction given by the court in this case was a cautionary instruction given for the benefit of the defendant and designed to prevent the jury from indulging any inferences prejudicial to him from the fact that he did not give testimony in his own behalf. If there is any real ambiguity in the first sentence of the instruction, the last certainly removes all uncertainty as to the meaning the court conveyed to the jury. It may further be said that, if the defendant was not satisfied with the form or substance of this instruction, another should have been tendered the trial court as a requested instruction. We see no merit in this objection.

The next assignment of error presented by this appeal relates to the manner in which the jury were guarded in the closing hours of the trial, after the case had been finally submitted to them. Defendant complains that, after the jury retired to deliberate, they were not kept together as the law requires, but were permitted to separate in different rooms at the hotel on the last night before the verdict was returned. It is pointed out that, under the decisions in this state, a presumption of prejudice arises by reason of a separation of the jury, and that the state in this case has failed to present sufficient competent proof to establish the purity of the verdict. It appears from the record that the

jury were permitted to occupy separate rooms at the hotel during at least the last night of their deliberation. Evidence as to what actually occurred was offered and considered by the trial court on the hearing of the motion for a new trial and is preserved in the bill of exceptions. We have examined all this evidence with great care and we fail to find the testimony of a single witness which even tends to support any charge that any member of the jury at any time was in contact with any improper influence of any kind. Affirmative proof was offered by the state that nothing improper took place during the separation; that at no time was the jury subjected to any outside influence, and that the verdict was arrived at upon the consideration of the evidence only, and that no fact other than such as were adduced at the trial was considered by the jury. This proof was furnished in the form of affidavits by nine of the jurors who participated in the verdict. It is insisted by the defendant's counsel that these facts were not satisfactorily established by this showing. Under the rule established in this state, these are matters resting in the sound discretion of the trial court. Upon all the evidence submitted at the hearing on the motion for a new trial, the court below failed to find sufficient evidence of misconduct or prejudice to warrant the granting of a new trial, and in this finding we fully concur. In an opinion written by Judge Good in the case of *Simmons v. State*, 111 Neb. 644, this court has announced the following rule:

"Whether a motion for a new trial in a criminal case, based on alleged misconduct of jurors, should be sustained rests in the sound discretion of the trial court, and its ruling on such motion will not be disturbed unless an abuse of discretion is shown."

By appropriate assignment of error, the defendant finally presents to this court the question of the sufficiency of the evidence to sustain this conviction. Viewing the testimony as a whole, we find it sufficient in every way to establish the guilt of the defendant beyond a reasonable doubt. In fact, the verdict of the jury in this case is the only verdict which

should have been returned on the evidence submitted. It is true that the state has relied to some extent upon circumstantial evidence in the proof of material facts necessary to sustain a conviction, but in every such instance the facts and circumstances tending to connect the accused with the crime charged are of such persuasive nature as to exclude, to a moral certainty, every hypothesis except that of his guilt. Reference has already been made to the testimony of the witnesses Kasbohm, Marnell, and Shane. The legal deductions warranted by this proof are too apparent to require extended discussion here. However, other facts and circumstances disclosed by the record point with unerring certainty to the defendant as the perpetrator of this crime. We shall make brief reference to some of these. It appears from the evidence that the defendant for a number of years was the president of the Dunbar State Bank and in active charge of its affairs, and that the complaining witness, Kasbohm, was a near-by farmer and customer of this bank; that for at least a year prior to the time this offense was committed his bank was in serious financial difficulty, and about March 14, 1927, he disappeared and was next heard from at Corpus Christi, Texas. From that point he wrote a letter to his cousin, living at or near Dunbar, under date March 24, 1927. It is hard to conceive of a letter more incriminating in its nature, when considered in its natural and proper relation to other facts established in this prosecution. The letter is too long to warrant its full reproduction here, but we feel that specific reference to certain parts of it is entirely justified and wholly pertinent. In this letter, the defendant gives his cousin a list of what he calls accommodation notes, among which are three notes of $5,000 each, purporting to be signed by Kasbohm. With reference to these he writes to his cousin as follows:

"I had to get this money to keep things going and if there is any way at all that you can get the two due this month renewed without letting Kasbohm or J. P. Baker know, wish you would. You will find the amount of the Kasbohm notes to my credit as Special and Trustee $10,000 and

$5,000. The others have the excess loans, etc., to take care of them."

Other important statements appearing in the letter follow:

"You will find everything in my box in an envelope addressed to you—which will explain everything. Believe if you could get Henry & Earl to put enough money into the bank to pay for my stock you could continue to charge off those from loans that we don't expect to get anything out of. Hope you can arrange it some way so you can continue. I have worried my head off for more than a year but looks like no other recourse now. Wish you would try and keep this to yourself as much as possible and see if you cannot arrange things so that the bank can run. I expect to go south somewhere for the present but some time you may hear from me. God knows how I have prayed that this might be averted but seems to no avail. As for my family it is worst of all but you can help Lou to dispose of the home and advise her to go out to her Uncle Jno. Barsley in Wash. as she has so often said she would like to go there. I don't remember anything else now but if I should will write you again. Try and keep this all to yourself if possible. I am going to say farewell wish you success. Don't know how far I will go south as I don't have much money, but am going to strike a job at something. I am lost for the present and keep it to yourself."

This letter was signed "Your Cousin Tom" and contains other statements fully as significant as those quoted. It will be remembered that Kasbohm in his testimony denied ever signing or authorizing any note such as those referred to in this letter, and an audit by an examiner for the guaranty fund commission reveals that the note register of the Dunbar State Bank shows no loan of $5,000 to Kasbohm and contains no record of any such note. The records of that bank do show that the defendant's bank received a credit from the Merchants National Bank of $5,000 on the alleged forged note.

To us, further discussion of the evidence in this case

seems unnecessary. The verdict of the jury is fully sustained by the evidence, and the trial court properly overruled defendant's motion for a new trial on this ground.

On a careful examination of the entire record in this case, we find no error prejudicial to the substantial rights of the defendant, and the judgment of conviction is accordingly

AFFIRMED.

Note—Jury, 16 R. C. L. 246; R. C. L. Perm. Supp. 4067; 35 C. J. sec. 209 n. 91.

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YELLOW CAB & BAGGAGE COMPANY, APPELLANT, V. COUNTY BOARD OF EQUALIZATION OF DOUGLAS COUNTY, APPELLEE.

FILED OCTOBER 11, 1929. No. 26796.

1. **Statutory Provision.** "All property in this state, not expressly exempt therefrom, shall be subject to taxation, and shall be valued and assessed at its actual value. 'Actual value,' as used in this act, shall mean its value in the market in the ordinary course of trade." Comp. St. 1922, sec. 5820.
2. **Evidence** examined, tangible values fixed at same amount as in the district court and judgment affirmed.

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

*John A. McKenzie,* for appellant.

*Henry J. Beal* and *W. W. Slabaugh, contra.*

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

GOSS, C. J.

For 1928 taxes, appellant listed its 107 cabs and 18 trucks with the county assessor at $45,299, and listed other tangible property at $3,279. On notice and hearing the board of equalization of Douglas county raised the total taxable value to $120,000. Plaintiff appealed and, after a hearing, the district court fixed the total valuation of the tangible property at $80,570.17. Plaintiff appealed to this court.

"All property in this state, not expressly exempt therefrom, shall be subject to taxation, and shall be valued and assessed at its actual value. 'Actual value,' as used in this act, shall mean its value in the market in the ordinary course of trade." Comp. St. 1922, sec. 5820.

Quite a substantial part of the items as fixed by the decree below are not attacked. For some of the cabs in controversy the evidence does not definitely show a market value in the ordinary course of trade because there was no real market for such cabs. It was therefore difficult for the trial court, and is likewise hard for us, to fix the actual value. We think, however, the fair deductions from the evidence, taking it from that received from both appellant and appellee, warrant the reduction made by the district court but do not require any lower valuations on this appeal. To enter into an extended discussion of the particular items of the evidence upon which we base our conclusion would unduly protract our opinion and would not be of value to the parties or to the profession.

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

AFFIRMED.

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OMAHA ARMORY BUILDING COMPANY, APPELLEE, V. LUCIUS B. JOHNSON, AUDITOR, ET AL., APPELLANTS.

FILED OCTOBER 11, 1929. No. 26872.

1. Militia: LEASE OF ARMORY. The legislature having appropriated funds for an armory for the national guard, it thereupon became the duty of the adjutant general to enter into such lease as was reasonably necessary to provide such armory.
2. States: APPROPRIATION: DUTY OF AUDITOR. Under section 3358, Comp. St. 1922, the auditor is authorized and required on presentation of proper vouchers to draw his warrant on the general fund and against the appropriation made by the legislature for the support and maintenance of the national guard.
3. Mandamus: PUBLIC OFFICERS. "When the law imposes a duty upon a public officer to do an official act at a particular time, the obligation is, ordinarily, a continuing one, and the courts will,

when it is practicable, coerce performance after the appointed time has gone by." *State v. Cornell*, 60 Neb. 694.

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

*C. A. Sorensen, Attorney General, George W. Ayres* and *John P. Breen*, for appellants.

*Hall, Cline & Williams, Brome, Thomas, Ramsey & McGuire* and *Richard F. Stout, contra.*

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

DEAN, J.

This appeal is brought to this court in behalf of the state, by the secretary of state and state auditor, defendants herein, to obtain a reversal of a judgment for $750 rendered against the state in the district court for Lancaster county, in favor of the Omaha Armory Building Company as lessor, a nonprofit organization, hereinafter called the armory, for armory rent alleged to be due from the state and wholly unpaid. The secretary of state and the state auditor, hereinafter referred to as the defendants, disallowed the claim and refused to pay the rent, but, on appeal to the district court, the claim was held to be a lawful charge against the state and was allowed in full for armory rent incurred in 1927 for the months of May and June. And it is from the judgment so rendered that the defendants have appealed.

Following are substantially the material facts: February 1, 1925, the plaintiff armory company entered into a written lease with H. J. Paul, as the adjutant general of Nebraska, on behalf of the state, wherein and whereby the occupancy of an armory at Omaha was provided for the use of the units of the Nebraska national guard to the end that provision might be made for the care and protection of the United States property furnished to the state for national guard equipment. By the terms of the lease, the armory building company rented the premises to the state at a yearly rental

of $4,500, payable at the rate of $375 a month on the 15th day of each month. It was agreed that on February 15, 1925, payments were to begin. The monthly rentals were paid as they became due each month prior to May and June of 1927, and on June 8 and July 1, 1927, vouchers for the payment of rentals for May and June were filed by the armory.

Section 3305, Comp. St. 1922, provides that the adjutant general shall be head of the military department, but subordinate to the governor, and that he shall perform the duties of chief of the quartermaster corps, which includes taking care of all public property belonging to his department.

Section 3334, Comp. St. 1922, provides that all such public property, except that in use in the performance of military duty, shall be kept in armories or other properly designated places of deposit. And the following provision is made in section 3359, Comp. St. 1922:

"The adjutant general shall report to the legislature on or before the first day of each biennial session thereof the amount of funds required for the pay of officers and enlisted men, armory rent, and transportation, care of clothing, arms, equipments, and tentage; and for the purpose of rations, fuel, forage, and stationery; and the legislature may provide by an appropriation out of the state general fund a sufficient sum to meet the requirements of this chapter."

Under section 3358, Comp. St. 1922, the auditor is authorized and required on presentation of proper vouchers to draw his warrant on the general fund and against the appropriation made by the legislature for the support and maintenance of the national guard. In *State v. Cornell,* 60 Neb. 694, in an opinion by Sullivan, J., we held to the following proposition:

"When the law imposes a duty upon a public officer to do an official act at a particular time, the obligation is, ordinarily, a continuing one, and the courts will, when it is practicable, coerce performance after the appointed time has gone by." See, also, *State v. Burch,* 119 Wash. 1.

Defendants contend that the building in question was donated by the city of Omaha to the plaintiff for use by the state. But, as the trial court found, large sums of money were expended for repairing the building and altering it to make it suitable for armory purposes. This money was advanced by private citizens who were to be reimbursed from the accumulated rentals to be obtained through releasing the premises. In addition, the heating, lighting, and maintenance of the armory in proper condition for use by the armory company involved expenses which were burdens the plaintiff was compelled to bear and the only possible reimbursement was to be derived from the rental contract with the state.

The record discloses that the rental contract was entered into by the parties in the utmost good faith and with due regard to the interests of the state, and the reasonableness of the rental charges, in view of the accommodations furnished, has not been successfully challenged.

It is not questioned in this record that the building equipped and maintained by the plaintiff armory company, as pointed out, was actually occupied by the units of the Nebraska national guard of Omaha pursuant to orders from competent authority.

The trial court decreed that the defendants recognize the validity of the lease in suit and ordered that proper warrants be issued upon the state treasury for all further rentals to become due under the terms of the lease in suit. In view of the facts and the law, the judgment of the district court, in the absence of a bill of exceptions, is fully sustained by the pleadings, and is in all things

AFFIRMED.

Note—Mandamus, 36 L. R. A. n. s. 1084; 18 R. C. L. 143; R. C. L. Perm. Supp. 4420; 38 C. J. sec. 26 n. 35.

J. H. HUMPE, APPELLEE, V. E. S. JOSEPHINE TAYLOR, APPELLANT.

FILED OCTOBER 11, 1929. No. 26785.

1. **Brokers:** DISQUALIFICATION. A broker will not be allowed to recover from a proposed vendor a commission for broker's services where, at the time of the alleged service, he was disqualified to act for the vendor.
2. ———: ———. A broker's commission cannot be recovered from a vendor where the evidence discloses that the only service rendered was for the vendee.

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

*R. C. Hunter,* for appellant.

*O. B. Clark, contra.*

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

GOOD, J.

In an action to recover a real estate broker's commission, plaintiff had verdict and judgment, and defendant appeals.

The action was founded upon a written contract, the material part of which is as follows:

"Know all Men by These Presents: That J. H. Humpe, agent, of the city of Lincoln, county of Lancaster, and state of Nebraska, for the consideration of the sum of one and no-100 dollars in hand paid, at or before the ensealing and delivery of these presents by E. S. Josephine Taylor, of the city of Lincoln, county of Lancaster, and state of Nebraska, have agreed and do hereby agree to hold until the 30th day of October, A. D. 1927, at 12 o'clock m., time being the essence and important part of this option, subject to the order of the said J. H. Humpe, or assign, the following described property, to wit: The one hundred ten (110) feet by one hundred ten (110) feet located at the Southwest corner of O street and Cotner boulevard.

"It is further agreed that purchaser shall have the privi-

lege of purchasing any amount from 110 feet to 125 feet square, or to transfer the said property at any time within the time above prescribed, to the said J. H. Humpe, or such person or persons as he or they may direct at and for the price of sixty-five hundred ($6,500) dollars good and lawful money of the United States of America, payable on the following terms: The entire amount of the purchase price to be cash, the understanding being that the price is to be $7,000 for 125 feet square or the proportion between $6,500 and $7,000 according to the number of feet required between 110 feet and 125 feet.

"It is also agreed that Mrs. Taylor will pay the regular commission of five per cent. on the first three thousand dollars and two and one-half per cent. on the balance. * * *

"Dated at Lincoln this 30th day of Sept., A. D. 1927.

"(Signed) E. S. Josephine Taylor.

"(Signed) J. H. Humpe."

In effect, the answer admitted the execution of the contract, and denied the other allegations of the petition.

At the close of all the testimony, defendant moved for an instructed verdict, and asserts that there was error in the overruling of the motion. Except the naked promise to pay a commission, nowhere in the contract is there found anything indicating that defendant was listing the property with the plaintiff as a broker; nor is there anything to indicate that the plaintiff undertook or agreed to sell, or attempted to sell, the property, or find a purchaser for the premises. Plaintiff's contention seems to be that, although the contract was in the form of an option, that was only a method by which he could effect a sale to a prospective purchaser. The record discloses, however, that for more than ten years a trust company, of which plaintiff was an employee, had acted as agent for the Standard Oil Company, in procuring sites for its oil stations in the vicinity of Lincoln, Nebraska; that some time prior to September, 1927, the Standard Oil Company had communicated with the trust company, expressing a desire for a location for an oil station at the corner of Cotner Boulevard and O street in

the city of Lincoln. Thereupon, the trust company sent its employee, the plaintiff, to ascertain who were the owners and whether the site at the location indicated could be had for the oil company. Plaintiff then went to the defendant and sought an option on the premises described. She refused to sign an option contract until plaintiff informed her that it was for the Standard Oil Company. Thereupon, the above contract was executed. A few days later plaintiff informed defendant that the oil company would avail itself of the option and take title to the property. The sale was never consummated; whether through the fault of defendant, we think it unnecessary to determine.

From the record it clearly appears that plaintiff was not acting as a broker to procure a purchaser for defendant's property, but, on the contrary, he was acting on behalf of his employer, the trust company, in procuring an option for the benefit of the Standard Oil Company. What he did was for and in the interest of the trust and oil companies. In fact, he was in no position to represent the defendant, because it was his obligation and duty, in representing the Standard Oil Company, to procure the site for it as cheaply as he could. Had he been acting solely for the defendant, it would have been his duty to find a purchaser for her on the best terms obtainable. We think the record clearly discloses that at that time he was not only disqualified to act as broker for defendant, but, in fact, he did not do so.

A broker will not be allowed to recover from a proposed vendor a commission for broker's services where, at the time of the alleged service, he was disqualified to act for the vendor. A broker's commission cannot be recovered from a vendor where the evidence discloses that the only service rendered was for the vendee. It necessarily follows that the judgment for plaintiff cannot be sustained.

Pursuant to the provisions of section 9126, Comp. St. 1922, plaintiff was awarded an attorney's fee. Since he was not entitled to recover on his cause of action, he was not entitled to any allowance for attorney's fees.

The judgment is reversed, with directions to dismiss plaintiff's cause of action.

REVERSED.

Note—Brokers, 45 L. R. A. 37; 4 R. C. L. 329; R. C. L. Perm. Supp. 1119.

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J. C. MESSING, APPELLEE, V. DWELLING HOUSE MUTUAL INSURANCE COMPANY, APPELLANT.

FILED OCTOBER 11, 1929. No. 27058.

1. **Insurance:** ATTORNEY'S FEES. Section 7810, Comp. St. 1922, which provides for taxing a reasonable attorney's fee in favor of a successful plaintiff as part of the costs in an action against an insurance company on a real estate fire insurance policy, is based on considerations of public policy.
2. ———: ———. Where plaintiff recovered judgment on a real estate fire insurance policy, and thereafter defendant, in the same case, sought to have such judgment vacated on the grounds of fraud and perjury, and vacation was denied, the court was clearly within its rights under section 7810, Comp. St. 1922, in taxing a reasonable attorney's fee as part of the costs in favor of plaintiff.
3. ———: ———. Further, in such a case, the proceeding to vacate the judgment is but a continuation of defendant's resistance to plaintiff's right of recovery on the policy.
4. **Judgment:** SETTING ASIDE. "It is in the highest degree essential to the welfare of the community, and to the respect which should be given to and the confidence which ought to exist in the judgments of a court, that they should not be set aside unless upon the strongest and most convincing grounds." *Scudder v. Evans*, 105 Neb. 292.
5. **Evidence** examined and found that the trial court was warranted in refusing to vacate the judgment.

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

*G. E. Hager*, for appellant.

*J. C. McReynolds, contra.*

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

THOMPSON, J.

The appellee recovered a judgment in the district court against appellant on a real estate fire insurance policy. Thereafter appellant filed a petition in the same case, under sections 9160 and 9167, Comp. St. 1922, seeking to have such judgment vacated, alleging as a basis therefor fraud and perjury on the part of this appellee (the then plaintiff) in the procurement thereof. Trial was had to the court and judgment rendered denying such vacation, and as a part of the costs there was taxed to appellant in favor of appellee as a reasonable attorney's fee the sum of $150 under section 7810 of the aforesaid statutes. In this section it is provided: "The court, upon rendering judgment against the insurance company upon any such policy of insurance mentioned in the next preceding section, shall allow the plaintiff a reasonable sum as an attorney's fee, to be taxed as part of the costs. If the cause is appealed, the appellate court shall in like manner allow the plaintiff a reasonable sum as an attorney's fee for the appellate proceedings." This section, as well as that "next preceding," is a part of our statutes relating to insurance, and the policy here involved is one designated in such "next preceding" section. The appellant concedes this conclusion; further, that if this were the original action on the policy an attorney's fee on recovery should have been ascertained and taxed in favor of such successful plaintiff. However, it urges that this is not an action on a policy of insurance, but one to set aside a judgment; and it interposes the further challenge that the judgment is against the weight of the evidence and is without support in the record. As to the latter contentions more need not be said than that we have carefully examined the bill of exceptions in connection with the pleadings, and also the authorities cited. The rule as to the evidence required in such a case is: "It is in the highest degree essential to the welfare of the community, and to the respect which should be given to and the confidence which ought to exist in the judgments of a court, that they should not be set aside unless upon the strongest and most convincing grounds."

*Scudder v. Evans,* 105 Neb. 292. It is our conclusion, as it must have been that of the trial court, that the appellant herein has not brought itself within the above rule. Hence, the prayer of its petition should be denied, and the judgment should include all taxable costs arising out of the controversy.

This leaves for our consideration the question of whether or not error was committed in taxing as a part of the costs an attorney's fee in favor of appellee. We held in *Lancashire Ins. Co. v. Bush,* 60 Neb. 116: "Permitting the taxation as costs of a reasonable attorney's fee upon rendering judgment against an insurance company on a contract insuring real estate is grounded on considerations of public policy and is constitutional." In the course of the opinion in this case, Judge Sullivan went deeply into the reasons prompting such an enactment, as well as the purpose thereof, all of which are as forceful today as they were at the time they were set forth in such opinion, and are applicable to the facts reflected by the record before us.

In our view, the action continues as one on the policy, where the proceeding to vacate the judgment is had in the same case, and the matters presented by the insurance company for the court's consideration would, if found to be true, require the vacation of such judgment and a retrial on the policy. The proceeding to vacate is but a continuation of the appellant's resistance to appellee's right of recovery on the policy. The trial court having found that the appellee had an enforceable judgment as against appellant, and that the latter without a justifiable reason therefor had compelled the additional costs and attorney's fee to be incurred by the appellee, such court was clearly within its rights, under the provisions of section 7810 hereinbefore quoted and the section "next preceding," in awarding a reasonable attorney's fee to appellee.

This conclusion commends itself to our sense of justice and equity, and, as we view these statutory provisions, it is not in conflict with our holding in *Branson v. Branson,* 84 Neb. 288, wherein we stated: "The power to award and

tax costs in legal proceedings being unknown at common law, statutes providing therefor are to be strictly construed."

The judgment of the trial court is affirmed, and an additional attorney's fee of $100 for services in this court is awarded to appellee to be taxed as part of the costs.

AFFIRMED.

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STATE, EX REL. O. S. SPILLMAN, ATTORNEY GENERAL, v. FIRST STATE BANK OF PAWNEE CITY, APPELLEE: A. M. HUSTON, TRUSTEE, ET AL., APPELLANTS.

FILED OCTOBER 11, 1929. No. 26919.

1. **Specific Performance.** Where both parties have treated a contract as abandoned and taken steps to restore the *status quo*, and one has altered his position to his detriment, relying upon such apparent abandonment, the latter, in equity, will not ordinarily be required to specifically perform the contract.
2. ———: CONTRACT WITH RECEIVER. A court of equity will not, ordinarily, require the specific performance of a contract entered into with its approval by a receiver, when serious doubt exists as to the power of the court to approve the contract, and the other party may be subjected to litigation and the hazard of being required to pay a sum in excess of the contract price.

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

*Dort & Witte*, for appellants.

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

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

REDICK, District Judge.

This is an appeal by the appellants from a decree of the district court dismissing their application to be relieved from the performance of a contract whereby they agreed to purchase the remaining assets of the First State Bank of Pawnee City. The facts are not in controversy and are substantially as follows: On May 22, 1928, the bank was in

the hands of a receiver, who entered into a contract with A. M. Huston as trustee for himself, Earl Ryerson, J. F. Halderman, D. W. Osborn, and F. L. Aikins, whereby all the remaining assets of the bank were sold to the trustee for the sum of $47,500 to be paid as specified. The assets consisted of a large number of notes and real estate in Nebraska and Kansas. The beneficiaries of the trust were stockholders in the bank, and it was a part of the agreement that each of them should confess judgment in favor of the bank for the par value of the stock held by him, being the full amount of their stockholders' liability, and that upon rendition of such judgments the receiver would assign them to Huston, trustee. Ida Halderman, at the time of her death, April 19, 1924, was the owner of 78 shares, and it was a part of the agreement that her heirs, to wit, Charles W. Halderman, Frank R. Halderman, Jacob F. Halderman, and William F. Halderman should confess judgments the same as other stockholders, which were to be assigned in like manner.

After the contract had been executed, application was made by the receiver, E. J. Dempster, to the district court for Pawnee county, praying that said contract be approved, and that he be authorized to carry out the same by a transfer of the assets, conveyance of the real estate of the bank to the trustee, and assignment of the judgments to be procured. Notice of the hearing of such application was duly published for two weeks and hearing had by the court on July 14, 1928. After having the matter under advisement for a short time, later in July the court announced his conclusion, approving the contract except in one particular, viz.: The court expressed serious doubt whether the court had jurisdiction to authorize that part of the contract providing for the confession of judgments and the assignment thereof, as it had the appearance of compromising the stockholders' liability, which he considered he had no right to do. Thereupon the court submitted to the parties an order approving the contract of sale with the following conditions or restrictions: "In so far as the power of the court extends at this time to the proposed assignment of the

judgment or judgments against the stockholders which may later be obtained by the receiver"—and authorized the receiver to perform the contract according to the terms thereof, "except it be hereafter held that the court is now without power or authority to authorize the receiver to assign any judgment or judgments he may recover against any or all the stockholders for less than the statutory liability, in which event the proposed assignment or settlement of such judgments shall be left to the further determination of the court to accept or reject."

The above quoted portions of the decree were objected to by the receiver and the trustee, and no further action was taken by either party to procure a satisfactory order, and both parties seem to have come to the conclusion that the contract would have to be abandoned. On August 31, 1928, C. M. Skiles, counsel for the receiver, wrote a letter to Honorable J. B. Raper, district judge, who heard the application, stating that the purchasers were unwilling to complete the deal considering the conditions and reservations suggested in the order of approval above quoted, and expressing the opinion that they would have to call the deal off, and asking what kind of an order would be necessary in order to clear the records so that the receiver could proceed to liquidate the bank and bring suit against the stockholders. No reply was received to this letter, but on September 6 following, without notice to either party or counsel, the district judge entered an order approving the contract in all respects, without the suggested exception and reservation.

September 13, 1928, Mr. Skiles learned of the entry of the order and wrote the trustee informing him of that fact, stating that the guaranty fund commission was now desirous of completing the contract. This the trustee refused to do, and on October 17, 1928, filed application to be relieved from the performance of the contract, setting forth the facts above detailed, upon the ground that the receiver was without authority to enter into that part of the contract providing for the assignment of the judgments, and

that the court was without jurisdiction to approve the same in so far as it affected the liability of the stockholders of said bank.

As a further ground for release from said contract, the trustee called attention to the fact that three of the Halderman heirs were not parties to it and had refused to confess judgment as required thereby. Numerous conversations were had with officers and representatives of the guaranty fund commission by the trustee and one of the beneficiaries, upon the assumption that the contract would not receive the court's approval for the reason that it amounted to a compromise of the stockholders' double liability, which, it was believed, would be contrary to the statute, and steps were taken to restore to the trustee the $5,000 paid upon the contract. And as a further ground, it was alleged that, by reason of the delay in procuring the order, the trustee was compelled to cancel certain contracts for the sale of some of the lands to be conveyed, whereby he had been subjected to loss and expense, and that because of the change in the situation it would be inequitable to now require performance of the contract.

An answer to said application was filed by the receiver, and reply to said answer by the trustee, the contents of which we do not deem it necessary to set out in detail. Evidence was taken and hearing had upon the application and other pleadings, and, as before stated, the application was dismissed.

As to the claim of the trustee that the court was without authority to approve the contract because it amounted to a compromise of the stockholders' liability, we think this question is not presented by the record before us. It does not appear what portion of the consideration to be paid by the trustee was represented by the judgments to be procured and assigned, and what portion by the assets of the bank. The total stockholders' liability of the trustee and his beneficiaries was the sum of $17,500. It is quite possible that the consideration to be paid represented the full amount of this liability, plus the remainder of the purchase

price, $30,000, for the other assets. We will, therefore, not discuss nor determine the question of the power of the court to authorize, under any circumstances, a compromise of the stock liability of stockholders in banks.

As to the objection that three of the heirs are not parties to the contract and cannot be compelled to confess judgment for the amount of their stockholders' liability, if any, we are unable to perceive how the trustee can make the point, because those provisions of the contract were for the benefit of the trustee and the parties he represented, and the acts to be performed were wholly within their control. If they wished to obtain the benefit of the contract, they could at any time confess judgment and demand an assignment.

The most serious question is whether or not, under the circumstances disclosed by the record, in equity and good conscience the contract should be specifically enforced over the objection of the trustee. It appears beyond question that upon the announced refusal of the court to approve the contract for want of jurisdiction, upon the theory that it amounted to a compromise of the stockholders' liability, both parties considered the contract at an end and so treated it. They discussed the matter and took steps to restore the part payment which had been made upon the contract, and to procure the proper order to clear the records so that the receiver might proceed with the closing of the bank as though no contract had been made. The trustee took no further steps toward the execution of the contract and canceled two contracts which he had made for the sale of part of the lands to be conveyed, upon the assumption that the contract would not be approved. In short, the parties treated the contract as abandoned. No further application was made to the court beyond the letter of Mr. Skiles asking the judge what kind of an order would be necessary to clear the records. The court then, upon its own motion and without notice to either party, entered the order of approval. We do not think, under these circumstances, that the trustee should be required to perform the contract. True, it does not appear from the record that

the trustee has suffered any definite loss by reason of the cancelation of the contracts referred to, nor that there has been any change in the value of the bank assets to be transferred, but we think the trustee was justified in considering the contract ended and taking no further steps toward its execution upon learning of the position of the court as to its authority to approve the contract. The change of opinion by the court upon this question did not resolve the serious doubt as to the validity of the contract. The trustee is in a position analogous to that of a purchaser at judicial sale and should not be compelled in equity to accept a doubtful title which may expose him to the hazard of further litigation with parties not before the court. Notwithstanding the holding of the district court and an affirmance by this court, upon a record which does not disclose that any compromise of stockholders' liability was attempted, that question would still be open and the trustee might be subjected to litigation and the hazard of being required to meet the stockholders' liability which it was the intention of the contract to extinguish, in addition to the cash required to be paid by the contract. Equity requires that, in doing justice to one party, injustice be not done to the other. *Cook v. Stafford,* 86 Mich. 163.

We conclude that in view of the conduct of the parties upon the assumption that the contract would not receive the approval of the court, and the serious question of the authority of the court to approve the contract as made, it would be inequitable and unjust to require specific performance. It follows that the order of the district court dismissing appellants' application to be relieved from the contract is erroneous and must be reversed, with instructions to the district court to enter an order sustaining such application, canceling the contract, and relieving the parties from all obligations thereon.

REVERSED.

FLORENCE STONE, APPELLEE, V. LLOYD STONE, APPELLANT.

FILED OCTOBER 11, 1929. No. 26702.

1. Adoption: DECREE: COLLATERAL ATTACK. Where the county court has jurisdiction of the subject-matter and of the parties to an adoption proceeding, the decree of adoption is not subject to collateral attack.
2. ———: ESTOPPEL. A parent who appears in open court, participates in, and consents to an adoption proceeding, and afterwards treats such proceeding as valid, is thereafter estopped to deny the validity of such adoption proceeding.

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

*Frampton & Polk*, for appellant.

*Cook & Cook, contra.*

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

RYAN, District Judge.

This is an appeal from a judgment of the district court for Dawson county, ordering the defendant to pay the sum of $20 a month for the support and maintenance of his minor son, William Bernard Stone, until further order of court, and $100 attorney's fee and costs of suit.

The plaintiff and the defendant were married on January 2, 1913. On April 13, 1921, the plaintiff commenced action for divorce in the district court for Dawson county. The minor child, William Bernard Stone, was at that time but eight months old. On the 11th day of June, 1921, the plaintiff and the defendant entered into a stipulation which provided in brief that no testimony should be taken as to the alimony and support of the child at this time, and, further, that in case the child should be adopted on or before the next term of court the defendant agreed that in that event, provided he was relieved from further responsibility for the care and maintenance of the child, he would pay the plaintiff the sum of $1,000 and an additional sum of $500 a year, to be paid on the first day of January each year for three

years; that this sum of $2,500 should be in full for alimony and for the support, maintenance and care of the child.

The parties further agreed in this stipulation that, in the event the child should not be adopted before the first day of the next term of court, then the court should take testimony and make such allowance as in his judgment would be just and equitable for the support and maintenance of the child and for such alimony as in the discretion of the court would be just and equitable.

In accordance with this stipulation the court on the same day entered a decree of divorce in favor of the plaintiff, which decree made no provision for the custody, support or maintenance of the child or alimony.

It further appears from the record that on the 27th day of June, 1921, the parents of the plaintiff, Andrew J. Hurd and Hettie Hurd, petitioned the county court of Gosper county, Nebraska, to adopt the said minor child, William Bernard Stone; that said petition asked for an unconditional adoption, and that the name of said child be changed to William Bernard Hurd; that on the same date the plaintiff and the defendant appeared in person in the county court of Gosper county and filed their written relinquishment and consent to the unconditional adoption of said child, and that on the same date the county court of Gosper county, Nebraska, entered an unconditional decree of adoption.

The record also shows that on the same date, to wit, June 27, 1921, exactly 30 minutes after the decree of adoption had been entered and filed by the court, the plaintiff in this action, Florence Stone, petitioned the county court of Gosper county to adopt William Bernard Hurd, and that his name be changed to William Bernard Stone, and that the adopting parents, Andrew J. Hurd and Hettie Hurd, filed their relinquishment, and the court entered an unconditional decree of adoption, decreeing that William Bernard Hurd be adopted by Florence Stone unconditionally, and that his name be changed to William Bernard Stone.

Thereafter, on the 11th day of July, 1921, the district

court entered a supplemental decree, in accordance with the stipulation of June 11, 1921, which was filed in the court under date of June 25, 1921, as follows:

"Now on this 11th day of July, 1921, this cause came on for hearing upon the stipulation on file under date of June 25, 1921.

"Court finds, that the child having been adopted by the father and mother of the plaintiff as per stipulation on file under date of June 11, 1921, and filed on June 25, 1921; that the defendant pay to the plaintiff as alimony the sum of $1,500, payable as follows, to wit: $500 on January 1, 1922, $500 on January 1, 1923, and $500 on January 1, 1924, with interest at 6 per cent. from date. The court further finds that the defendant has paid to the plaintiff the sum of $1,000 on the stipulation now on file, leaving the above sum of $1,500 yet unpaid.

"It is therefore ordered, adjudged and decreed that the plaintiff recover of and from the defendant the sum of $1,500 with interest at 6 per cent. from date payable, as follows: $500 on January 1, 1922, $500 on January 1, 1923, and $500 on January 1, 1924. It is further ordered, adjudged and decreed that the defendant pay the costs of this action."

It appears from the record that the $2,500 was duly paid according to the stipulation, and on February 1, 1928, the plaintiff filed a petition in the district court for Dawson county which relates the facts of the case practically as they have been detailed here. This petition further alleged that the adoption proceedings had in Gosper county on the 27th day of June, 1921, in which Andrew J. Hurd and Hettie Hurd purported to adopt said minor child were void for the reason that the same were not entered into in good faith by the parties or by the defendant, and that it was never the purpose or the intention of the said Hurds to take said child as their own and to care for said child, and that said proceedings were simply a pretense and a subterfuge whereby the defendant was attempting to escape liability for the support of his child; and that said proceedings were void

for the further reason that no notice of said proceedings was given as provided by statute, requiring 14 days to elapse between the filing of the petition and the hearing. Plaintiff further alleged that she had no property and no income or means of support other than such as she was able to earn by her own labor, and that her earnings were insufficient to properly maintain, support and educate said child; that the defendant is a strong, able-bodied man and the owner of considerable property and able to contribute to the support, maintenance and education of said child; and prayed that the decree of divorce entered on the 11th day of June, 1921, be modified, and that the defendant be ordered and adjudged to pay into court each month, until further order of court, such sum as shall to the court seem reasonable for the support and maintenance of said child.

The answer admits the marriage, but denies that the defendant is the father of said minor child, denies that there was any fraud in the adoption proceedings held in Gosper county, and alleges that the adoption proceedings were had in good faith, and that all parties were present in court, and further alleges that said adoption proceedings are not subject to collateral attack, and that the plaintiff is estopped from denying the validity of the same, and that under such adoption proceedings and the statutes relative thereto the defendant has been relieved from all liability for the support of said child, and prays that the petition may be dismissed.

Upon the trial of the case the court entered a supplemental decree, which, without making any mention of the adoption proceedings, found generally for the plaintiff and against the defendant, found that the child, William Bernard Stone, was born as the issue of the marriage of the plaintiff and defendant, and committed said child to the care and custody of the plaintiff, and decreed that the defendant should pay into court for the support and maintenance of the child the sum of $20 a month, commencing June 1, 1928, and continuing on the first of each and every month thereafter until said child arrived at the age of 18 years, and also

the further sum of $100 as attorney's fees, from which decree the defendant appeals to this court.

The counsel for the appellee seek to support this decree by the authority of *Connett v. Connett,* 81 Neb. 777, and *Chambers v. Chambers,* 75 Neb. 850, and this appears to have been the theory upon which the district court entered the decree complained of. In the case of *Connett v. Connett, supra,* this court laid down the rule: "Where, in a decree of divorce, the court includes an order concerning the custody or maintenance of minor children, those infants in a sense become wards of that court, and it has authority at any subsequent period of their minority, upon application of either parent and sufficient notice to the other, to revise and alter the decree so far as it relates to the care, custody or maintenance of the children." And further: "The parents cannot by contract between themselves, nor can the court by any order it may make in the divorce suit, irrevocably determine the amount of money the father shall contribute for the support and education of his children, so as to deprive that court of power, upon a proper showing and notice, to alter said decree in the interest of justice and for the benefit of said children." The rule announced in the *Chambers* case, *supra,* is substantially the same.

This court would have no difficulty in following these cases and affirming the decree of the trial court, were it not for the adoption proceedings had prior to the entry of the decree fixing the alimony payable to the plaintiff. The trial court made no finding whatever with reference to the decree of adoption. The stipulation of the parties, which was entered into prior to the hearing of the divorce case on July 11, 1921, it seems to us, was a perfectly fair one, and it contemplated the subsequent adoption proceedings. It further provided that, in case the child should not be adopted, then the amount of alimony and allowance for the support and maintenance of said child should be left to the judgment and discretion of the court. When the supplemental decree was entered on July 11, 1921, the adoption proceedings had been had, and the court found in that case

that said child had been adopted by the father and mother of the plaintiff in accordance with the stipulation on file under date of June 11, 1921, and entered a decree providing for the payments of alimony in accordance with that stipulation, and because of the adoption proceedings made no provision for the support of the minor child.

In view of the record, we do not see how the allegation of the plaintiff's petition that the adoption proceedings were not entered into in good faith can be sustained. If there was any lack of faith, it appears conclusively to this court that it was upon the part of the plaintiff in instituting the second adoption proceedings and in not informing the defendant and the court, at the time of the modification of the decree, of such second adoption proceedings.

In the case of *Milligan v. McLaughlin*, 94 Neb. 171, the adoption proceedings were very similar to those in this case, except that the husband of the adopting party did not sign the adoption petition. It also appears that the proceedings were not had in the county of which the adopting parents were resident. The court in that case, speaking through Letton, J., held that the collateral heirs of the adopting parent were estopped to deny the validity of the adoption proceedings.

In the case of *Ferguson v. Herr*, 64 Neb. 659, this court held that, in rendering the decree provided for in the adoption statutes of Nebraska, the county court acts judicially, and such decree has all the force and effect of a judgment, and is subject to collateral attack only for want of jurisdiction.

In the adoption proceedings had in Gosper county the jurisdiction of the county court cannot be questioned. The decree of adoption rendered by that court was not appealed from and is not subject to collateral attack in this proceeding. Moreover, plaintiff in this action has treated such adoption proceedings as valid. She appeared in the district court for Dawson county and represented to the court that the minor child had been adopted by her parents, and, on the strength of that representation and such adoption

proceedings, was granted an alimony judgment in the sum of $2,500 and she is now estopped to deny the validity of such proceedings.

We conclude, therefore, that the defendant by the adoption proceedings was relieved of all family duties toward and all responsibilities for said minor child and is not now liable for its maintenance and support.

The decree of the district court is reversed and the action dismissed.

REVERSED AND DISMISSED.

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CHARLES KAMRATH V. F. T. GILBERT ET AL.: HATTIE KLUG RAKOWSKY ET AL., APPELLANTS: STATE BANK OF MADISON, APPELLEE.

FILED OCTOBER 25, 1929. No. 26672.

1. **Estoppel:** LOAN TO AGENT HOLDING TITLE TO LAND OF PRINCIPAL. R. furnished money to an agent to purchase an undivided eight-ninths interest in real estate, in which his wife owned an undivided one-ninth interest. He permitted the agent to take title in his name, and in furtherance of the deal caused his wife to also deed her interest to the agent. The bank loaned money to the agent in good faith upon the strength of his title. *Held*, that, having placed his agent in a position enabling him to perpetrate the fraud, R. is estopped from setting up his ownership to the real estate against the claim of the bank.
2. **Banks and Banking:** FRAUD OF AGENT. In such a case, the bank upon discovery of the fraud, must apply any deposit the agent may have in the bank on its account for the protection of the one injured by the fraud.

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

*R. J. Shurtleff* and *O. S. Spillman*, for appellants.

*Dowling, Thielen & Dougherty*, for appellee.

*M. B. Foster*, for plaintiff, Kamrath.

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

PER CURIAM.

In the beginning this action was brought to foreclose a real estate mortgage relative to which there is now no controversy. The issue in this appeal is between the appellants, Gustave Rakowsky and Hattie Klug Rakowsky, and the appellee, State Bank of Madison. The trial court found that the real estate which stood in the name of one Gilbert was in fact the property of Gustave Rakowsky and Hattie Klug Rakowsky, but that the bank was entitled to a lien upon it to the extent that it had loaned money to Gilbert upon his representation of ownership, supported by the land records of Madison county. In this respect the court found that the appellants were estopped to assert or claim any interest in the real estate involved against the interest of the Madison bank.

Since this is a suit in equity and triable *de novo* in this court, it is well to set out a statement of facts as found from the record. This case was previously argued before the commission and an opinion filed herein. In the original briefs and the brief for rehearing, the appellants complain of the application of the law to the facts in the case. They seem not to realize that the trial court and the commission found against their contention upon the question of fact.

The facts in the case are not so complicated as they are awkward of statement. Mrs. Rakowsky was the devisee under the will of her father of an undivided one-ninth interest in certain real estate. It was the desire of her husband to purchase the other eight-ninths interest in the property. To attain this end, he employed one Gilbert, and gave him a power of attorney, because he apprehended some difficulty in negotiating this deal with the relatives of his wife. On the day that the contract and power of attorney were made and signed, Rakowsky gave to Gilbert the sum of $5,200 and later, about the 14th day of January, 1927, gave to Gilbert the sum of $3,750. Rakowsky desired some evidence of the payments, and Gilbert gave him his note for those amounts. Gilbert purchased the interest of each of the seven adult

heirs, and obtained deeds from them, the deeds running to Gilbert. About February, 1927, Gilbert told Rakowsky that he had made such arrangements that he would be able to purchase the minor's share in the estate, being one-ninth, and that it would be necessary for Rakowsky and wife to convey to him the interest that Mrs. Rakowsky had in the estate, which was done; Gilbert giving his note for the same, $950. All of the property stood in the name of Gilbert except the one-ninth interest of the minor. Gilbert leased the farm for one year to a brother-in-law of Rakowsky, and moved into the house in Madison. Everything was done to indicate to the public generally, and the relatives in particular, that Gilbert, and not Rakowsky, was the purchaser of this property. Rakowsky and his wife gave Gilbert a deed to their own interest in the property in order that he might show it to the mother of the minor as an inducement to her to consent to the sale of the minor's interest. We think it can fairly be deduced from the evidence that this was the real reason for the secrecy and the concealment involved in the transaction.

Finally, Rakowsky became apprehensive of Gilbert, and impatient to have this purchase completed and the land deeded to him. Gilbert was somewhat elusive, but on August 12, 1927, they entered into an escrow agreement, whereby Gilbert and his wife executed a warranty deed to Rakowsky and his wife, placed in the Nebraska State Bank at Norfolk, Nebraska, to be delivered to Rakowsky when the minor heir's interest was secured, and upon the payment by Rakowsky to Gilbert of the remainder due him on completion of title and return of Gilbert's promissory notes heretofore mentioned.

In the meantime, Gilbert being in possession of this real estate, with the title in him of an undivided eight-ninths interest, borrowed money from the appellee bank upon a series of notes. Gilbert represented to them that he was the owner of an undivided eight-ninths interest, and an inspection of the records by the bank in the office of the register of deeds for Madison county supported his representation.

Rakowsky contends that sometime after August 12, 1927, he notified the bank of his interest in this real estate. At that time all the loans had been made except the last one, which was made by the bank to supply money to purchase the one-ninth interest of the minor heir, and the bank held $946 of the $1,575 loan to pay for this minor's interest. This question as to whether Rakowsky gave the bank notice at this time that Gilbert was simply his trustee, and had no interest in the property except as said trustee, was resolved as a question of fact against the appellants. We make the same finding in this particular. It is apparent that Rakowsky was not at the bank to give information, but to acquire information. As a part of his distrust of Gilbert, he wanted to ascertain if he had mortgaged the land. The purpose of this trust had not yet been accomplished, that is, acquisition of the minor heir's interest. He was beset by two fears; on the one hand, that Gilbert might not handle the transaction well, and, on the other hand, that he might not make an advantageous purchase, as schemed, of the minor's one-ninth interest. He thought he had safe-guarded his rights by the escrow deed. It was not until October 13, 1927, that he proclaimed to the world the truth about the transaction by filing an affidavit with the register of deeds. The cashier of the bank denies that Rakowsky told him of the situation. We conclude that he did not give such notice that would put the bank upon inquiry. We find from a careful examination and consideration of the record that the bank did have notice on October 8, 1927, when, in a conference between Gilbert and the cashier of the bank and the attorney for the bank, the attorney, in the words of the cashier, "didn't mince words; he told Mr. Gilbert what he thought of him." That same date Gilbert confessed judgment in favor of the bank, and subsequently Rakowsky gave the notice by affidavit. At this time Gilbert had on deposit in said bank the sum of $436.52.

Certain propositions have been cited by counsel which are fundamental in their nature and need no discussion in this opinion. However, in the case of *Roy v. McPherson*, 11

Neb. 197, which is not only an early case but has been a ruling case in this state upon this character of trusts, it is held, in substance, that, where the title to real estate is placed in another who obtains credit on said apparent title, the real owner will be estopped from setting up his claim against one who has advanced money, in good faith, upon the strength of the apparent title. This is supported in the cases of *Early v. Wilson*, 31 Neb. 458, *Hoagland Bros. v. Wilson*, 15 Neb. 320, and *Laing v. Evans*, 64 Neb. 454.

The rule is well settled, in this and practically all other jurisdictions, to the effect that—"Where one of two innocent persons must suffer through the misfeasance of the agent of one, that one must suffer who has placed the agent in a position to perpetrate the fraud complained of." *Rehmeyer v. Lysinger*, 109 Neb. 805; *Bull v. Mitchell*, 47 Neb. 647. The *Rehmeyer* case was cited with approval in the case of *Taylor v. Flodman*, 109 Neb. 812. See, also, *Deleski v. Peters Trust Co.*, 115 Neb. 547, wherein it is stated: "Where one of two innocent parties must suffer a loss, he whose negligence caused the injury should bear the loss." This is well established and a universal rule.

The determination, then, must be upon the evidence. If the credit was given to Gilbert, who represented to the bank that he was the owner of these premises and other property, and the bank investigated and found his representations to be true, as shown by the record, and that Rakowsky knew at the time that Gilbert did have the record title to the premises, but no notice of Rakowsky's interest therein came to the knowledge of the bank until the loans had all been made, then the judgment against Gilbert would become a lien upon the premises.

On the other hand, the bank would not be entitled to a lien on the premises for any money loaned after the information had been received. If the testimony of Rakowsky be true, then there was enough in his notice to Taylor to put the bank upon inquiry, which, if pursued, would show who was the real owner of the premises. On the other hand, if the testimony of the cashier was true, Rakowsky

had no remedy and his interest in the premises would be subject to the lien of the bank.

The principles involved herein were thoroughly discussed in the opinion of *Hansen v. Berthelsen,* 19 Neb. 433, at page 438 of the opinion, and the court, in part, said: "As between Love and the plaintiff the latter was most to blame, as he had placed in the hands of another the means for perpetrating a fraud and permitted such means to remain in her hands after he knew, or had reason to know, that the power was liable to be abused, hence the equity of Love, for the money paid by him, is superior to that of the plaintiff." Several cases are cited in support of that proposition. Among others is the case of *Resor v. Ohio & M. R. Co.,* 17 Ohio St. 139. In the case last cited the vendor put the vendee in possession and placed in his hands a deed of the land sold, with an agreement that it should not be considered delivered or become effectual until the purchase money was paid. The vendee subsequently put the deed on record without paying the purchase price, and mortgaged the lands to *bona fide* mortgagees for value and without notice. The court held that as against the mortgagees the vendor could not assert a claim to the land.

In the instant case Rakowsky knew when his wife gave the deed in February, 1927, that Gilbert was taking title to the premises in his own name. He remains silent as to this until he gave what he claims was a notice to the bank in August, the exact date of which he is not certain. His testimony as to that transaction is vague, uncertain and indefinite. He went to the bank for the purpose of seeing about a lease of the premises. The evidence discloses that until that time Radowsky had made no effort to assert his title to the premises. He had allowed Gilbert to place the deed from the heirs upon record, in which Gilbert was grantee. He had been permitted by Rakowsky to lease the farm and to move with his family into the town home. It was not shown that the bank had any notice of any kind, actual or constructive, of the interest of Rakowsky, unless it was in August, 1927. The bank had taken all the necessary pre-

cautions possible in order to ascertain whether the title stood in Gilbert. It has been stated the bank should have taken a mortgage on this property to secure its claim. We are not concerned with that phase of the question. The bank did not take a mortgage and, under the law governing this class of cases, was not required to do so in order to acquire a priority over Rakowsky to the extent of the money which it innocently and in good faith loaned to Gilbert.

The trial court found by his findings and decree that the testimony of the cashier, Mr. Taylor, was true, and that there was no notice given, as related by Rakowsky, and contradicted by the cashier. And we believe the circumstances would bear out that conclusion, as the bank afterward loaned a large sum in addition to the indebtedness Gilbert had already incurred. While the conclusions of the trial court are not binding on this court and the cause should be tried *de novo* here, nevertheless, we are entitled to give some consideration to the court's findings of fact, as he was in a better position to determine the facts than are we. In the case of *Brown v. Stroud & Co.*, 112 Neb. 210, the court in the opinion, at page 216, say: "The findings of a trial judge, who made a thorough and painstaking original investigation, although no longer conclusive, are entitled to respectful consideration, if not to considerable evidential weight, in this court"—citing *Corn Exchange Nat. Bank v. Jansen*, 70 Neb. 579.

Counsel for appellants has cited the case of *Rihner v. Jacobs*, 79 Neb. 742, to support the contention that, where the acts were induced by fraud, no estoppel can arise. A careful reading of the cited case will disclose that the same condition did not exist in that case as in the instant case. In the *Rihner* case the deed was obtained by fraud; in the instant case Gilbert, while the power of attorney and contract did not authorize him to do so, took the title to the premises in his own name, but that proceeding was ratified by Rakowsky and this ratification and his remaining silent for several months thereafter was the potential cause of this litigation. Gilbert's fraud was not directed to Rakowsky but to

the bank; he committed no fraud by misrepresentation as against appellants in the purchase of the lands; he fulfilled his contract with his principal, except as modified by acquiesence of Rakowsky. The cases of *Mulligan v. Snavely*, 117 Neb. 763, and *Deleski v. Peters Trust Co., supra*, are contrary to counsel's reasoning.

When the appellee bank learned of the fraud of appellants' agent, it should not have allowed the agent to draw upon it further, but should have applied his remaining deposit to its judgment against him. A bank has authority to apply its debtor's deposit to the debt. *State v. Farmers & Merchants Bank*, 114 Neb. 378. And it is generally required to do so when it knows that such action is necessary for the protection of a third person. 3 R. C. L. 596; 7 C. J. 657. The appellee had the means of protecting itself to the extent of the wrongdoer's remaining deposit; it cannot claim to have incurred that part of the loss on account of reliance upon the agent's ownership of appellants' land. The deposit so available to the bank was $436.52. This amount should be deducted from the account as of October 8, 1927, with proper allowances for interest.

Coming to the conclusions that we do, the judgment of the trial court is affirmed as modified by the deduction of $436.52 from the account as of October 8, 1927.

AFFIRMED AS MODIFIED.

Note—Estoppel, 22 L. R. A. 257; 30 L. R. A n. s. 1; 46 L. R. A. n. s. 1097; 10 R. C. L. 788; R. C. L. Perm. Supp. 2754.

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WYLIE C. SPEAS, APPELLEE, V. BOONE COUNTY, APPELLANT.

FILED OCTOBER 25, 1929. No. 26928.

1. **Master and Servant: INJURY TO SERVANT.** Generally it may be said that an injury "arises out of" an employment when there is a reasonable causal connection between the conditions under which the work is, in all the circumstances, required to be performed and the injury received while the employee is thus engaged; and the injury is received "in the course of" the employment when, the time the injury is received, the work-

man is engaged at the work he is employed to perform or in some duty incidental to that work. If incidental, it must be incidental to the main character of the business on which the employee was engaged for the employer. It cannot occur independent of the relation of master and servant.

2. ———: ———. Where a servant, employed with his team for a definite sum per day in dragging roads for the county, engaged in dragging a road in front of his own farm, suspends his work of dragging when he reaches his home at the noon hour for the purpose of feeding his team and eating his dinner, and, after unhitching his horses, is kicked and injured by one of them, hitherto gentle, as he is putting them in their stalls to feed them, the accident arose out of and in the course of his employment, within the meaning of section 3024, Comp. St. 1922.

3. ———. ———: LIMITATIONS. The plea of the statute of limitations is not available under section 3061, Comp. St. 1922, to an employer who has agreed within the year after an accident to an employee, arising out of and in the course of his employment, to compensate the employee, and the employee, in reliance upon the agreement, waited more than a year, but a reasonable time in the circumstances, to file his petition for compensation after the employer had failed to pay.

4. ———: WORKMEN'S COMPENSATION ACT: CONSTRUCTION. "The workmen's compensation act 'is one of general interest, not only to the workman and his employer, but as well to the state, and it should be so construed that technical refinements of interpretation will not be permitted to defeat it.'" *Baade v. Omaha Flour Mills Co.*, 118 Neb. 445.

APPEAL from the district court for Boone county: FREDERICK L. SPEAR and LOUIS LIGHTNER, JUDGES. *Affirmed.*

*Holmes, Chambers & Holland*, for appellant.

*Vail & Flory, contra.*

*Hall, Cline & Williams, amici curiæ.*

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

GOSS, C. J.

This is an appeal by the county from a judgment in favor of Wylie C. Speas under the workmen's compensation act.

This is the second time this case has been argued before

us; an opinion affirming the judgment was filed June 4, 1929, but was not published; on June 29, 1929, a motion for rehearing was sustained and the judgment of affirmance was set aside; on October 5, 1929, upon suggestion of the death of Wylie C. Speas, the cause was revived in the name of John S. Speas, administrator; and on October 9, 1929, the case was reargued and was reassigned to the same member of the court for an opinion on the merits.

It was stipulated on the trial that the plaintiff was injured on the 4th of October, 1926, and by reason of the injury was unable to return to work until March 1, 1927; that the medical expenses were $139 for one doctor, $39.50 for another, and the hospital bill was $38.

The district court found that the injury arose out of and in the course of employment; that the employee was receiving wages of $3.50 a day or $21 a week and was entitled to compensation at the rate of $14 a week, or a total of $295 for himself, $178.50 for doctors, $38 for hospital, and $50 for attorney's fee.

The county claims (1) that the injury did not arise out of and in the course of the employment, and (2) that no petition was filed within a year after the accident occurred, by reason of which the statute of limitations had run.

The evidence shows that Speas had been employed on road work for the county for a considerable time. For straightaway dragging he received a definite sum per mile; for special work, such as dragging down and leveling newly prepared stretches of road, the pay was $3.50 a day for a man and $7.50 a day for a man and a team of four horses. The reason for the two classes of wage scales was that the straightaway mileage could readily be checked by well-known sectional subdivisions, while the dragging could not be definitely and easily measured; so the latter was paid for by the day. On the 4th of October, 1926, Speas was using a four-horse team furnished by him, dragging for the county on the road passing his farm. At about 11:30 he ceased dragging for the forenoon because he was then in front of his home. He drove the rig into the yard and unhitched

with the aid of his son who came from the house to help him. The horses went to the tank to drink and thence to the barn. Speas entered to tie them and, as he went past them for this purpose, one of them, theretofore gentle, kicked him, causing the injury complained of. Almost immediately the injury was reported to the county foreman under whom Speas worked. The county commissioners afterwards learned of the injury and expected to pay compensation to the injured employee. It was his duty to furnish feed and to care for the team. It was intended by both parties that Speas and the team should continue the road dragging that afternoon.

The county now claims that, the injury being caused by the kick of a horse furnished by the employee, happening at the noon hour and not while the employee was actually engaged in dragging the road, therefore the employer is not liable.

It is difficult to formulate a definition of the words "arising out of and in the course of his employment," as phrased by the statute (Comp. St. 1922, sec. 3024), so as to cover all cases of compensable injury to an employed workman or so as to exclude those that are not compensable. Generally it may be said that an injury "arises out of" an employment when there is a reasonable causal connection between the conditions under which the work is, in all the circumstances, required to be performed and the injury received while the employee is thus engaged; and that the injury is received "in the course of" the employment when, at the time the injury is received, the workman is engaged at the work he is employed to perform or in some duty incidental to that work. If incidental, it must be incidental to the main character of the business on which the employee was engaged for the employer. It cannot occur independent of the relation of master and servant. Even with such general principles in mind, it is sometimes a close question to discover whether an accident arises out of an employment and whether it occurred in the course of the employment. It may therefore be said of this element or phase of work-

men's compensation cases that, in a greater degree perhaps than in other cases, each individual case stands or falls on its own facts.

In his argument for affirmance, appellee cites *Tragas v. Cudahy Packing Co.*, 110 Neb. 329, as controlling in principle. In that case this court affirmed a judgment allowing compensation to Tragas, who, at the time of his injury, was engaged in sharpening a chisel for the purpose of cleaning some pans. It happened during the noon hour, and was done on claimant's own time, for which he was not paid. It was held that the work on which Tragas was engaged was incidental to his employment. When the injury occurred, the employee was grinding the chisel on one of the employer's grindstones, which was not equipped with a safety guard as provided by law. While the opinion does not so state, yet it may be inferred that the employee was using the employer's grindstone on the employer's premises. We do not discover that this case has been subsequently cited on the phase involved in the present case.

Appellee also cites *Punches v. American Box Board Co.*, 216 Mich. 342. In that case an employee, who was expected to care for and feed a team of horses he was hired to drive, was in the habit, with his foreman's knowledge, of driving them home at night for convenience and of keeping them in his own barn. In driving them to his employer's place of business to begin the day's work, he was injured. It was held that he was acting in the scope of his employment and was entitled to compensation.

Another case cited by appellee is *Brown v. Bristol Last Block Co.*, 94 Vt. 123, where a man employed with his team was killed by it about the noon hour, after he had eaten his dinner, while attempting to stop the team when it was running away. He was run over and killed. It was held that the accident arose out of and in the course of his employment. In the opinion it was said: "The horses were hired by the employer, and, for the time in which the accident happened, their services belonged to it, and the employer was materially interested in that service." The opinion

cites *Ingram's Admr'x v. Rutland R. Co.*, 89 Vt. 278, wherein allowance of compensation was upheld for the death of a fireman killed by a switch engine in the yards after he had left his locomotive to get a glass of milk at a milk station across the tracks. Many cases are cited in the *Ingram* opinion showing what are permissible digressions and interruptions without so disturbing the relation of master and servant as to do away with the liability to pay compensation.

The only other case cited by appellee in his argument for affirmance is *Derleth v. Roach & Seeber Co.*, 227 Mich. 258. The employee was killed by monoxide gas in his own garage while caring for his own automobile. He had gone home near the close of the day to prepare the car for a trip to be taken as a traveling salesman. The trip was usually taken by train, but whenever he used his car the employer made an allowance of 10 cents a mile for its use. The death occurred at 5:15 p. m., which was within the employee's usual hours of service. The injury was held compensable as "arising out of and in the course of his employment." The opinion cites *Punches v. American Box Board Co., supra;* quotes *Clifton v. Kroger Grocery & Baking Co.*, 217 Mich. 462, where the employee was injured while, as directed by his employer, taking home for safe-keeping a considerable amount of money collected at the employer's store; and cites *Matter of Kingsley v. Donovan*, 155 N. Y. Supp. 801, where the employee owned a motorcycle used in going to and from his work and between jobs, but received no pay for its use. While cleaning it after he had arrived for work he was injured. In each of the three cases last cited the injury was held to be compensable.

In its argument for reversal, appellant relies on a Vermont case, *Kneeland v. Parker*, 100 Vt. 92: "Where teamster, owning pair of horses, who had been engaged to draw logs of employer from wood lot for distance of four miles to employer's mill at specified rate per thousand feet, without agreement to haul any specific quantity or to work for any definite time, stopped at hotel midway between wood

lot and mill for his own convenience, and there received injuries, resulting in his death, while cleaning off one of the horses known by him to be vicious, preparatory to commencing his day's work, by being trampled upon by such animal, held that accident did not arise out of nor in course of his employment." The opinion distinguishes the case from *Brown v. Bristol Last Block Co.*, 94 Vt. 123, by quoting from the last-named case: "The horses were hired by the employer, and, for the time in which the accident happened, their services belonged to it, and the employer was materially interested in that service; while Kneeland was not hired by the day, but by the quantity hauled, could quit the job at any time, and the accident happened in the morning before he had even started upon the work of a day for the defendants."

Another case cited by appellant on this point is *Morey v. City of Battle Creek*, 229 Mich. 650. Keagle was a driver employed by one Avery, who contracted with the city to furnish it teams and drivers as needed at 85 cents an hour. Keagle was paid by Avery one-half of the amount Avery received. At 4:45 in the afternoon the officer in charge of city work told Keagle there was not sufficient time to get another load of dirt and he could go home. He at once left, and when about three-quarters of a mile from the work one of his horses was bitten by a dog, the team ran away, and Keagle was killed. His widow, Mrs. Morey (who had again married), was denied compensation in accordance with the general rule in Michigan construing the compensation law as not applying to accidents which befall employees in going to and leaving the place of employment. *Hills v. Blair*, 182 Mich. 20; *Hopkins v. Michigan Sugar Co.*, 184 Mich. 87.

In particular circumstances the Michigan court has made exceptions to the general rule stated above. In *Beaudry v. Watkins*, 191 Mich. 445, a boy was employed by a laundry as a delivery or errand boy, and, on returning from lunch at home, at noon, on his bicycle, caught on a motor truck, was thrown and was run over by another vehicle. He had received permission to go home to his lunch on this occasion,

getting a package on his way and returning with it afterwards. *Held,* that the accident arose out of and in the course of his employment. In *Kunze v. Detroit Shade Tree Co.,* 192 Mich. 435, Kunze was a foreman, tree trimmer, and planter, whose duty was to go from job to job in Detroit, and while presumably about to take a street car to proceed on his way from one job of inspection to another he was struck by an automobile and fatally injured. *Held* compensable. In *Clifton v. Kroger Grocery & Baking Co., supra,* plaintiff was instructed to take home at night for safe-keeping all money received after banking hours. Where, while so doing, he was struck by an automobile and injured, it was held that the accident arose out of and in the course of his employment.

Appellant relies particularly on three Minnesota cases, in which compensation was denied: *State v. District Court of Hennepin County,* 144 Minn. 259, where relator's husband, who furnished his services and his team and running gears of his wagon to Minneapolis for driving a sprinkling wagon from eight in the morning to five in the evening, and was killed by one of his horses while caring for it one evening in the stable; *Simonds v. Reigel,* 165 Minn. 458, where plaintiff's husband, a teamster in a gravel pit four miles from his home, leaving his team to be fed by another, at noon went on a truck of another loaded with gravel from the pit to his home, and was killed near his home while attempting to get off the truck before the driver had stopped it; and *Jotich v. Village of Chisholm,* 169 Minn. 428, where an employee with his own team, hauling dirt at a stated price per day or hour, drove at noon from the place of work, about a mile distant, to eat and feed his team, and while unhitching his team suffered an accidental injury. In all three of these cases compensation was denied.

It may be truly said that the ultimate judgments in these cases resulted from the court's interpretation and application of the Minnesota statutes by which the words "arising out of and in the course of employment" are further modified by statute denying compensation to employees "except

while engaged in, on, or about the premises where their services are being performed, or where their service requires their presence as a part of such service at the time of the injury, and during the hours of service of such workmen." Gen. St. Minn. 1913, sec. 8230 (i); Mason's Minn. St. 1927, sec. 4326 (j). Our statutes are almost identical with the Minnesota statute. By section 3075, Compiled Statutes of Nebraska 1922, defining the terms used, and by subdivision (c) thereunder, the term "personal injuries arising out of and in the course of employment" is declared "not to cover workmen except while engaged in, on, or about the premises where their duties are being performed, or where their service requires their presence as a part of such service at the time of the injury, and during the hours of service of such workmen."

Thus, it appears that the cases are not harmonious. The Minnesota cases, cited by appellant, to which we have referred are not reconcilable with the claims of the appellee. However, in view of our decision in *Tragas v. Cudahy Packing Co., supra,* we have committed ourselves rather definitely to the view that, if the work at which an employee is engaged when injured is incidental to his employment, his injury should come under the act. There, as here, the injury happened at the noon hour, and occurred on the workman's own time, for which he was not paid. There it occurred on the premises of the employer. Here, it is true, it did not occur at the place of work, but that was a mere incident due to the fact that the dragging on the county road, on that particular day, happened to be near the home of the employee, so that he ate at home and fed the team there for convenience. If the work had been a few miles or more distant, he would have taken his lunch and feed for the horses and would have fed them right at the place of employment. They could not have been fed on the road itself. At the home they were little more removed from the exact place of work than if on the roadside. The team was hired and paid for separately. The evidence shows that, while Speas furnished the team, yet it was owned by his son. We

state this as a fact and not for the purpose of basing any argument upon it. Speas was paid by the county for the use of the team. It was the duty of Speas to feed the team. It was implied in his contract of employment that he would feed them at noon. It was as important to feed them in preparation for the afternoon's work as it was necessary for Tragas to have a sharp chisel for the purpose of cleaning out the pans on which he was working during regular working hours. Tragas could have sharpened the chisel during the hours for which he was paid instead of taking a portion of his hour for rest or refreshment thus to further his employer's business. Speas could not both feed the team and eat his own lunch while the team was working. If, while working the team on the road, something had gone wrong with the harness and he had been kicked by the horse while adjusting the harness, or if, while unhitching or feeding the team right at the place of work, he had been so kicked, this would seem to be a stronger case than the *Tragas* case. The foreman, under whom Speas worked, and plaintiff also, testified that it was customary for Speas to take the horses home to feed them while on this job of dragging near his place. The work extended past his home on the day in question, and he stopped right there for the noon hour, drove into the yard, and unhitched. A moment afterward he was injured. To say that his employment ceased before all of the horses reached their stalls, or that it ceased during the usual hour for feeding, is to draw a very strict line against the employee. The compensation law is to be liberally interpreted in favor of the workman. The county commissioners and the foreman, as shown by the evidence, thought the employee was entitled to compensation and the county at all times expected to pay it. It seems to us that the logic of the situation requires that we either conclude that Speas was entitled to compensation or that we overrule the *Tragas* case. We are satisfied with the latter case, and therefore conclude that, on the merits, Speas was entitled to recover; that his feeding the team at the place of his injury was incidental to his employment and that his injury was received in the course thereof.

The only other question is the claim that the statute of limitations barred the suit. The county itself at all times recognized liability. Speas received hospital service and medical service, and it was expected that the bills would be paid by the county and that he would receive personal compensation. The county was covered by insurance and turned the matter over to the insurance company to pay. In the meantime, more than a year went by before a petition was filed. The injury occurred October 4, 1926. The petition was filed with the compensation commissioner January 9, 1928. The insurance company, defending for the county, claims that this came too late under the second clause of section 3061, Comp. St. 1922, requiring the petition to be filed "within one year after the accident." Speas pleaded that he filed his claim for compensation in December, 1926, and that it was agreed between plaintiff and defendant that plaintiff was entitled to compensation and that his medical expenses would be paid, but that the insurer fraudulently induced him not to file his petition and represented as late as September 16, 1927, that his claim was being taken care of and would soon be paid and never denied liability until after November 17, 1927.

Plaintiff introduced two letters written to him on the letter-heads of the insurance company by counsel for appellant who argued the case before us. One of these letters, dated September 2, 1927, asked why Speas went to two doctors, one at St. Edwards and one at Columbus, both of whose bills he had received; the other letter, dated September 16, 1927, said, quoting it in full: "I have your letter of recent date and I am about to close your claim. Will you kindly advise me by return mail the date upon which you were able to return to work after your accident?"

After hearing the evidence, the district court found that the county "had agreed to the payment of compensation to the plaintiff prior to the expiration of one year from the date of the injury and that this action is not barred."

The insurance company is not a party to the suit. If it were, and had a right to defend on the merits of the suit

as against it, we might consider whether, after its conduct and correspondence, it might equitably and justly assert the statute of limitations. It pretended to be about to close up plaintiff's claim and to pay his compensation when the year was expiring. It lulled him into inaction until a year from his injury had passed. To have filed a petition when the county had admitted liability, and when the insurer of the county had in turn in effect admitted its liability to the county and had declared its intention to pay, would have been to do a useless and annoying thing both against the county and its insurer. So we agree with the finding of the district court that the county had agreed to pay the compensation prior to the expiration of one year from the date of the accident, and therefore the plea of the statute of limitations is of no avail under the first clause of section 3061, Comp. St. 1922, which says: "Shall be forever barred unless, within one year after the accident, the parties shall have agreed upon the compensation payable under this act." To hold otherwise, in the circumstances of this case, would be to adopt a policy that would defeat the real purpose of the act. *Parson v. Murphy*, 101 Neb. 542; *Baade v. Omaha Flour Mills Co.*, 118 Neb. 445. This last case aptly says: "This jurisdiction has repeatedly held that the workmen's compensation act 'is one of general interest, not only to the workman and his employer, but as well to the state, and it should be so construed that technical refinements of interpretation will not be permitted to defeat it.' "

The plaintiff was allowed an attorney's fee of $50 in the district court. He ought to be allowed a fee of $100 in this court.

For the reasons stated, the judgment of the district court is affirmed, and the plaintiff is allowed an additional fee of $100 for services of his attorneys in this court, the same to be taxed as costs.

AFFIRMED.

REDICK, District Judge, dissenting.

I am compelled to dissent from the opinion in this case, and will briefly state my reasons therefor.

By our statute "personal injuries arising out of and in the course of employment" is declared "not to cover workmen except while engaged in, on or about the premises where their duties are being performed, or where their service requires their presence as a part of such service at the time of the injury, and during the hours of service of such workmen." Comp. St. 1922, sec. 3075. It seems to me that a proper construction of this provision precludes an allowance of compensation to plaintiff. It is evident, to my mind, that the words, "in some work for the employer," or others of like meaning, are understood after the word "engaged." It seems self-evident that the mere fact that he was in, on or about the employer's premises, but engaged in some act entirely disconnected with his service, would not entitle him to compensation for injuries received as the result of, or incident to, such act, as, for instance, cleaning his nails, a personal altercation with a visitor, or many other occurrences which will readily come to mind. The act which produced the injury must be one required to be done in performance of work for the master, and as a part of that service, not one which it was his duty or pleasure to perform regardless of his employment. The act being performed must be one required by the nature of the employment or so incident to it that it may reasonably be considered a part of the service; and there must be a causal connection between the services due the employer and the injury. There is no more causal connection between the work of dragging the roads and feeding the horses than there is between dragging the road and feeding the employee. It would seem that no one would claim as compensable an injury received by the employee while eating his lunch, occasioned by a fall of plaster from the ceiling, and yet it was just as essential to the performance of the employer's work that the employee be fed as that the horses be fed. To put it plainly, the horses were fed, not because the employee was engaged in dragging the roads for the county, but absolutely independent of that fact. They would have been required to be fed just the same if the plaintiff had been intending to

hitch them to a plow on his farm or for any other purpose for which their services were needed, or, in fact, if they were to remain in their stalls all day. The fact that the team and driver were employed for the purpose of dragging the roads does not convert the service of the driver in feeding and taking care of his team into a service for the master, for, as above suggested, such service was independent of the employment, and was required merely that the employee might fulfill his contract. He might as well have used other horses, oxen, or an auto-truck. He had no hours of service, but was paid by the mile. If it had rained before or after the injury, he could not have performed the work of dragging the roads. In short, it seems an unwarranted stretch of language to say that in feeding his own horses, which he would have been required to do in any event, he was engaged in the service of the master.

The strongest argument advanced for allowance of compensation is that, if the plaintiff had been several miles from home at the noon hour and had simply driven his team to the side of the road to feed them and partake of his own lunch, and had been kicked by one of the horses and received an injury, a compensable case would be presented. I recognize the force of the illustration; but, assuming the correctness of the conclusion stated, I apprehend that the situations may be distinguished as the supposed situation may come within that portion of the clause of the statute, "where their service requires their presence as a part of such service." In such case, the act of feeding the horses was so closely connected with the performance of the work that it might be considered as incident to and a part of it. Analogy is not always a dependable method of reasoning, and I think it is faulty here, for the reasons stated and because of the different circumstances of the situation.

I think the Michigan, Vermont and New York cases relied upon in the opinion are not controlling, for the reason that Michigan and New York, and, so far as I am able to discover, Vermont, have no statute limiting and defining the phrase "arising out of and in the course of employ-

ment." Moreover, many of those cases are distinguishable. In *Punches v. American Box Board Co.*, 216 Mich. 342, it was part of the servant's business to drive and care for the employer's horses. In *Derleth v. Roach & Seeber Co.*, 227 Mich. 258, stress is laid on the fact that the death occurred within the hours of service of the employee. In *Clifton v. Kroger Grocery & Baking Co.*, 217 Mich. 462, the employee was actually performing a service for the master at the time of his injury. In *Matter of Kingsley v. Donovan*, 155 N. Y. Supp. 801, the injury occurred during the hours of service, and while cleaning the motorcycle belonging to the employee, but used by him in the performance of his duties.

The case of *Brown v. Bristol Last Block Co.*, 94 Vt. 123, sustains the plaintiff's contention, but *Kneeland v. Parker*, 100 Vt. 92, in which compensation was refused, is not distinguishable in principle from the case at bar, though the facts are somewhat dissimilar.

Finally, it is suggested by the opinion that, in order to reverse this case, it will be necessary to overrule the case of *Tragas v. Cudahy Packing Co.*, 110 Neb. 329. I think that case is clearly distinguishable by the fact that Tragas was engaged in work solely attributable to the fact of his employment. The sharpening of the chisel would not have been undertaken by him but for the fact that it was to be used exclusively in the performance of the work for which he was employed. Furthermore, the chisel belonged to the employer and was an instrumentality specially supplied for the use of the servant. The feeding of the horses in the present case was an independent transaction, and was required to be done regardless of the service due his employer and not because of such employment.

For the above reasons, I respectfully dissent from the opinion of the court.

Note—Workmen's Compensation Acts, C. J. sec. 34 n. 95, sec. 63 n. 76, sec. 65 n. 86, sec. 72 n. 25, sec. 73 n. 43, sec. 103 n. 46; 28 R. C. L. 797; 5 R. C. L. Supp. 1568; 6 R. C. L. Supp. 1756; 7 R. C. L. Supp. 1005; 38 A. L. R.

1041; 48 A. L. R. 1400; 28 R. C. L. 804; 4 R. C. L. Supp. 1858; 7 R. C. L. Supp. 1007.

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IN RE ESTATE OF GEORGE FRED MARCONNIT.
ELIZABETH CLARKE, APPELLANT, V. FRED P. MARCONNIT, EXECUTOR, APPELLEE.

FILED OCTOBER 25, 1929. No. 26734.

1. **Executors and Administrators**: REMOVAL. Where an executor is personally interested in the administration of an estate and in the disposition of the property which is to be distributed under the terms of a will, and which is then presently in the course of litigation, and the circumstances disclose that the interests of the executor are clearly such as to prevent his performing the duties connected therewith in an impartial manner, such executor should be removed and another appointed in his stead.
2. ———: ———. Where an executor's personal interests conflict with or are antagonistic to his duties as executor, he is not a proper person to act as such, and on proper application should be removed.
3. ———. "An administrator is a quasi trustee, and should be a person who is not interested adversely to the estate in property which is the subject of administration, and who will, while carefully guarding the interests of the estate, stand at least indifferent between it and claimants of the property." *In re Estate of Mills*, 22 Or. 210.

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

*R. M. Switzler, Sterling F. Mutz* and *Edward C. Fisher*, for appellant.

*Benjamin S. Baker* and *Ralph P. Wilson, contra.*

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

DEAN, J.

George Fred Marconnit died in Omaha, October 8, 1924, leaving him surviving his widow, Mary Marconnit, a daughter, Elizabeth Clarke, plaintiff herein, and a son,

Fred P. Marconnit, defendant herein, as his sole surviving next of kin. It is alleged by plaintiff that her father left an estate consisting of land and personal property approximating $250,000 in value. By the terms of a will the defendant and his mother were jointly appointed executor and executrix, respectively, of the Marconnit estate. September 7, 1926, the decedent's wife died, and the defendant became, and was thereafter, the sole executor. Some time thereafter Elizabeth Clarke made application for the removal of her brother as executor and prayed that some disinterested person be appointed to take his place, but the court denied her plea. Thereupon plaintiff appealed from the court's decision in the premises and likewise from the court's approval of the executor's final report.

The plaintiff alleges that defendant has wholly failed to account for large sums of money arising, in part, from the proceeds of the rental of certain valuable tracts of land of which the testator died seised, and that he failed to include in his report of the estate's assets certain notes and mortgages in a sum approximating $40,000 which were owned by her father.

The will by its terms provides that plaintiff shall inherit the homestead, of the approximate value of $4,000, and that, upon attaining the age of 45, she should receive the sum of $12,000 from her father's estate. When the suit was tried plaintiff was then past 45 years of age, but she alleged that she never received any part of the above named $12,000 bequest. The will also provides that the defendant, Fred P. Marconnit, shall inherit the real estate, but that it shall be subject to the payment to plaintiff of the $12,000 which was bequeathed by her father to her, and which, as above noted, was made a specific charge against the real estate. The will plainly and in specific terms provides: "For the purpose of carrying out the terms of this bequest I hereby give, bequeath and devise unto my said executors hereinafter named (the testator's widow and his son Fred) the said sum of twelve thousand ($12,000) dollars upon the terms and conditions stated in this item of

my will * * * my said executors hereinafter named shall hold said twelve thousand ($12,000) dollars and invest the same as above provided until my said daughter Lizzie Clarke reaches the age of forty five (45) years."

Some time in July, 1919, the senior Marconnit purported to convey certain farms located in Nemaha and Otoe counties to his son Fred. This was five years before his death. The will was written in 1909, and was ratified and confirmed in a codicil which was executed ten years thereafter, namely, in 1919, that being the same year in which the deeds were executed. The defendant, however, testified that he did not have the above named deeds recorded until the year after the death of his father, namely, in 1925, nor did he tell his sister about the deeds until several weeks after his father passed away. On this feature of the case the defendant testified:

"I had a feeling that as far as the record title was concerned I would rather leave it in my father as long as he lived. * * * The joint account of my father—that my father and I kept up, or that I kept up for my father—father had to have money to live on and I always kept in this joint account $3,000 or over subject to his drawing, so that whenever he wanted money or should want for money or need money that he could go and get it."

He also testified that he did not account to his father for rents or profits in any way but had absolute control of the farms.

Where an executor is personally interested in the administration of an estate and in the disposition of the property which is to be distributed under the terms of a will, and which is then presently in the course of litigation, and the circumstances disclose that the interests of the executor are clearly such as to prevent his performing the duties connected therewith in an impartial manner, such executor should be removed and another appointed in his stead.

Where an executor's personal interests conflict with or are antagonistic to his duties as executor, he is not a proper person to act as such, and on proper application should

be removed. On this feature of the present case see 2 Woerner, Law of Administration (3d ed.) 875; *Justice v. Wilkins*, 251 Ill. 13.

The rule is well stated in the case entitled *In re Estate of Mills*, 22 Or. 210, wherein the court made this observation:

"An administrator is a quasi trustee, and should be a person who is not interested adversely to the estate in property which is the subject of administration, and who will, while carefully guarding the interests of the estate, stand at least indifferent between it and claimants of the property."

Sufficient cause appears in the present case for the removal of the defendant as executor, and we hereby direct that he be removed and that some suitable person be appointed in his stead as administrator. It follows that the estate must be held *in statu quo* until another administrator is appointed and qualifies.

The judgment must be and it hereby is reversed and the cause remanded for further proceedings in conformity with the views herein expressed.

REVERSED.

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CHARLES B. HARBIN, APPELLANT, V. DON L. LOVE, MAYOR, ET AL., APPELLEES.

FILED OCTOBER 25, 1929. No. 27143.

1. Injunction: TEMPORARY RESTRAINING ORDER: APPEAL: SUPERSEDEAS. In a case where a permanent injunction is denied by the trial court, a plaintiff is not entitled to a supersedeas as a matter of statutory right, unless at the time of the trial there is in effect a temporary injunction. A temporary restraining order cannot be continued in effect in such a case by supersedeas bond.
2. ———: ———. Whether the order in effect at the time of trial is a temporary restraining order or a temporary injunction is to be determined from the form and substance of the order, considered in connection with the entire record in the case.
3. ———: ———: CONTINUANCE. A continuance of the hearing

on a temporary injunction from the time provided in the restraining order is not sufficient, of itself, to convert a restraining order into an injunction. It is not a temporary injunction if it contemplates a hearing on the application as to whether a temporary injunction shall be allowed.

4. ———: ———: BOND. An order, which is a restraining order when granted, cannot in effect become an injunction without the giving of a new bond. The bond securing the restraining order does not give effect to the injunction and make it operative.
5. ———. The record in this case has been examined and the order in effect in this case at the time of trial *held* not to be a temporary injunction.
6. Appeal. This court will not consider the merits of the issue in a case, to be heard here *de novo*, upon a motion to fix supersedeas, where such consideration is neither necessary nor proper to a determination of said motion.

APPEAL from the district court for Lancaster county: FREDERICK E. SHEPHERD, JUDGE. Motion for allowance of supersedeas. *Motion overruled.*

*Sanden, Anderson, Laughlin & Gradwohl,* for appellant.

*Frank A. Peterson, Lloyd E. Chapman, Max G. Towle* and *Farley Young, contra.*

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

DAY, J.

This is a suit in equity brought originally in the district court for Lancaster county, Nebraska, for an injunction preventing the officials of the city of Lincoln and Lancaster county from seizing and confiscating certain vending machines and from interfering with the lawful operation of the same. The trial court found that the vending machines in question were gambling devices, and that an injunction should not be allowed, and dissolved the restraining order. The trial court denied plaintiff's application for a supersedeas bond.

Subsequently, the defendant filed a transcript in this court and a motion for supersedeas, supported by printed brief representing that the decree of the trial court dis-

solved a temporary injunction existing in favor of plaintiff. Relying upon this showing, an order of the court was entered sustaining motion for supersedeas and fixing the amount of the bond at $1,000. Upon a motion of defendants, this order was vacated, for the reason that the order entered in this court allowing a supersedeas was made upon motion without notice, which is contrary to the rules of the court. Thereupon the plaintiff filed a motion for a supersedeas and served notice on defendants. The defendants made a showing resisting the motion for the following reasons, which we will discuss in the order presented:

(1) That no temporary injunction was ever granted by the district court in this cause, but only a temporary restraining order, which was dissolved after a trial on the merits, and which restraining order cannot be superseded.

(2) That the slot machines which the appellant seeks to prevent the appellees from molesting are gambling devices and used for gambling purposes, and in which the appellant can have no property rights by law.

(3) That this court is without jurisdiction to grant a supersedeas herein for the reason that more than twenty days have elapsed since the entry of the final order in the cause in the district court.

As a matter of statutory right the plaintiff is entitled to a supersedeas bond upon the dissolution of a temporary injunction.

"In case of the dissolution or modification by any court, or any judge at chambers, of any temporary order of injunction which has been or may hereafter be granted, the court or judge so dissolving or modifying said order of injunction shall, at the same time, fix a reasonable sum as the amount of a supersedeas bond, which the person or persons applying for said injunction may give, and prevent the doing of the act or acts, the commission of which was, or may be sought to be restrained by the injunction so dissolved and modified." Comp. St. 1922, sec. 8751.

The force and effect of the supersedeas, if given, is defined by section 9141, Comp. St. 1922, as follows:

"No appeal in any case shall operate as a supersedeas, unless the appellant or appellants shall within twenty days next after the rendition of such judgment or decree, or the making of such final order, execute to the adverse party a bond with one or more sureties as follows: * * * When the judgment, decree or final order dissolves or modifies any order of injunction which has been or hereafter may be granted, the supersedeas bond shall be in such reasonable sum as the court or judge thereof in vacation shall prescribe, conditioned that the appellant or appellants will prosecute such appeal without delay, and will pay all costs which may be found against him or them, on the final determination of the cause in the supreme court; and such supersedeas bond shall stay the doing of the act or acts sought to be restrained by the suit, and continue such injunction in force until the case is heard and finally determined in the supreme court."

This court has held, under the provisions of these sections, that upon the dissolution of the temporary injunction at the trial plaintiff was entitled as a matter of statutory right to have the court fix the amount of a supersedeas bond. *State v. Baker*, 62 Neb. 840. At the time this court sustained the motion, *ex parte*, plaintiff contended, as he still contends, that a temporary injunction was in effect at the time of the hearing in the trial court. The court was then of the same impression, and if the record had sustained plaintiff's contention it would have entitled him to have a supersedeas bond fixed by this court. If, however, no temporary injunction was granted and if at the time of the trial a temporary restraining order was in effect, then the plaintiff is not entitled to a supersedeas. It is not the intention of the legislative act to give to a restraining order the force and effect which attaches to an injunction allowed upon a hearing in the case. The purpose of a restraining order is to suspend proceedings until the parties may be heard. *State v. Greene*, 48 Neb. 327.

It must therefore be determined, solely from the record, whether at the time the case was tried upon the merits in

the district court there was in force and effect a restraining order of a temporary injunction. A temporary restraining order is merely to preserve matters *in statu quo* until a hearing. *State v. Graves*, 82 Neb. 282. Such was the original order entered in this case. It provided for a bond, which was given until a hearing upon the temporary injunction.

The plaintiff contends that the temporary order granted in this case amounted to a temporary injunction. He contends that a temporary restraining order contemplates a hearing as to whether it will be supplanted by a temporary injunction. Upon the date set for the hearing in this case, upon the request of the defendants, the case was continued to be taken up "Friday, July 5, 1929, at which time case will be heard on its merits." Whether an order is a restraining order or a temporary injunction must be determined from its form and substance. 32 C. J. 28. Tested by this rule, the form and substance indicates that this was a temporary restraining order. If the order had restrained defendants absolutely without providing for a hearing upon the application, it would have been an injunction and not a temporary restraining order. *State v. Dungan*, 89 Neb. 738; *State v. Graves, supra.* The order in this case did provide for a hearing and did not operate as a temporary injunction unless perchance it was so converted by the order of the court continuing the hearing on said application until a day certain, and providing that on said day the case would also be heard on the merits. The record discloses that both parties asked for and secured continuances. In the stipulation between the parties, it was agreed by the parties that the whole case was to be decided, including the restraining order and interlocutory injunction. This, we submit, fairly indicates that it was the intention of the parties that the hearing on the application for a temporary injunction should be heard at that time. The attorneys for the plaintiff put this construction upon the record. In a motion for a continuance filed in the trial court on June 27, 1929, ten days after the

date set for hearing on the temporary injunction, they move the court that, "if this application be not granted, then only the matter of temporary injunction be considered and the matter of permanent injunction be not set for trial until at least Tuesday, July 2, 1929." If there were any ambiguities, which we think there are not, in the stipulation between the parties, the misunderstanding as to the condition of the record and the effect, on the part of plaintiff's attorney, arose at a later date.

Another reason occurs to us why the contention of the plaintiff is untenable. If, in this case, the trial judge, instead of continuing the hearing, had entered an order providing that this restraining order should become effective as an injunction, the statutes required a new bond to be given before it could be given effect. The bond given to secure the temporary restraining order would not give effect to the temporary injunction. *State v. Greene,* 48 Neb. 327. There is no contention that any new bond was given at the time plaintiff contends the restraining order became an injunction.

We are of the opinion that the order in effect at the time the case was heard by the trial court was a restraining order, and not a temporary injunction. Therefore the plaintiff was not and is not entitled to a supersedeas bond.

The second objection relates to the issue in this case. It is not a matter to be considered by the court upon this motion. The issue in this case is whether the vending machines in question are gambling devices. This case is to be heard *de novo* in this court, and to decide that question now would be to decide it without a hearing. It is not material, necessary, or proper to consider this question relative to the plaintiff's right to a supersedeas.

The question presented by the first objection having been decided in favor of defendants, it is not necessary for a disposition of this case to discuss the third objection. The plaintiff not having obtained a temporary injunction, and a permanent injunction having been denied by the trial court, his motion for a supersedeas bond is overruled.

SUPERSEDEAS DENIED.

# PETER MEHRENS, APPELLEE, V. SAMUEL GREENLEAF, COUNTY ASSESSOR OF DOUGLAS COUNTY, ET AL., APPELLANTS.

FILED NOVEMBER 2, 1929. No. 27124.

1. **Municipal Corporations.** "A municipal corporation is, so far as its purely municipal relations are concerned, simply an agency of the state for conducting the affairs of government, and as such it is subject to the control of the legislature." *Williams v. Eggleston*, 170 U. S. 304.
2. **Constitutional Law: INTANGIBLE TAX LAW: VALIDITY.** Chapter 168, Laws 1929, construed, and *held* not to contravene that part of section 14, art. III of our Constitution, which provides: "No bill shall contain more than one subject, and the same shall be clearly expressed in the title. And no law shall be amended unless the new act contain the section or sections as amended, and the section or sections so amended shall be repealed."
3. ———: ———: ———. Further, the 1929 act does not violate that part of section 7, art. VIII of the Constitution, providing: "The legislature shall not impose taxes upon municipal corporations, or the inhabitants or property thereof, for corporate purposes."
4. **Municipal Corporations: INTANGIBLE TAX LAW: "GENERAL FUND."** The words "general fund," as they appear in the act of 1929 referring to cities and villages, mean a fund which is set apart for the purpose of defraying the governmental expenses of the city or village, and not those expenses which are termed "corporate."

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

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

*Ziegler & Dunn, contra.*

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

THOMPSON, J.

The plaintiff, appellee herein, a resident taxpayer of Douglas county, sought to enjoin the defendants, appellants, from enforcing the provisions of chapter 168, Laws 1929, which provide for the classification and taxation of

intangible property and the distribution of the funds raised by such taxation. The trial court found that the above act contravened section 14, art. III, and section 7, art. VIII of our Constitution, and judgment was rendered in favor of plaintiff, to reverse which defendants appeal.

The first of the above findings, after quoting the title of the 1929 act, is as follows: "That section 5884, Compiled Statutes for 1922, to which House Roll 421 (chapter 168, Laws 1929), by its title, professes to be an amendment, was repealed by chapter 169, Laws 1927. That House Roll 421 does not purport to be an independent act, but its purpose, as expressed in the title to said act, is amendatory. That said House Roll 421 actually undertakes to amend chapter 169, Laws of 1927, and not being an independent act and not referring to chapter 169, Laws of 1927, except as an amendment to section 5884 of the Compiled Statutes of Nebraska for 1922, and not undertaking to repeal said chapter 169, Laws of 1927, by purporting to repeal said section 5884, of the Laws of 1922, it violates section 14, article III of the Constitution."

Section 14, art. III of our Constitution, so far as material here, reads as follows: "No bill shall contain more than one subject, and the same shall be clearly expressed in the title. And no law shall be amended unless the new act contain the section or sections as amended, and the section or sections so amended shall be repealed."

The original section 5884, Comp. St. 1922, was a part of a comprehensive act carried into such statutes as chapter 61 thereof, entitled "Revenue." This section 5884 was amended and the original section repealed by chapter 165, Laws 1925, and, as is customary, the section as amended carried the original number "5884," subdivided into parts "(a)" and "(b)." This 1925 act also repealed section 5887 of such Compiled Statutes of 1922.

By chapter 169, Laws 1927, we find the 1925 law repealed, and a new act, complete in itself, passed, with the following title: "An act to provide for the classification and taxation of intangible property; to provide for the

distribution of funds raised by such taxation; to repeal section 5884, Compiled Statutes of Nebraska for 1922, as amended by chapter 165, Session Laws of Nebraska for 1925, relating to the taxation of intangible property; and to declare an emergency." The repealing clause of such 1927 act provides: "That said original section 5884, Compiled Statutes of Nebraska for 1922, as amended by chapter 165, Session Laws of Nebraska for 1925, and all acts and parts of acts in conflict herewith, are hereby repealed." Section 5884, as used in the above quoted title and repealing clause, did not mean, nor could it by any reasonable hypothesis have been intended to mean, the original section 5884 of the Compiled Statutes of 1922, but plainly meant, and was intended to mean, section 5884 as it stood after being amended by the act of 1925.

The act of 1927 was in full force and effect, complete in itself, and a proper subject of repeal, at the time the 1929 act was introduced and being considered. In *Kelkenny Realty Co. v. Douglas County*, 116 Neb. 796, 800, we said: "This act (that of 1927) was not amendatory; it is complete in itself, and repealed all prior acts on the same subject." This statement is but a logical deduction from the title of the act itself, and is approved.

True, the title of the 1929 act provides: "An act to amend section 5884, Compiled Statutes of Nebraska for 1922, as amended by chapter 165, Laws of Nebraska for 1925, as amended by chapter 169, Laws of Nebraska for 1927, relating to revenue and taxation; to provide for the classification and taxation of intangible property, and for the distribution of the funds raised by such taxation; to provide penalties for the violation thereof; to repeal said original sections; and to declare an emergency." And the repealing clause of such act states: "That section 5884, Compiled Statutes of Nebraska for 1922, as amended by chapter 165, Laws of Nebraska for 1925, as amended by chapter 169, Laws of Nebraska for 1927, are hereby repealed." However, it certainly could not be said that the act of 1929 attempted to amend or repeal a section that

had been repealed by the act of 1925 (not by the act of 1927 as stated by the trial court), or to do other than to supplant, in an amendatory way, sections 1 and 2 of the act of 1927, which superseded section 5884 subdivided into parts "(a)" and "(b)" of the act of 1925.

Thus, we conclude that, considering the act of 1929, as outlined in its title, the intention of the legislature obviously was to amend the body of the act of 1927, as evidenced by sections 1 and 2 thereof, and to supplant the provisions of the act in question, and to repeal such original sections 1 and 2 of the 1927 act. Further, considering the act of 1929 in its entirety, it cannot reasonably be said that it contained more than one subject; nor that its title failed to clearly express such subject; nor that such title or act amended or repealed, or attempted to amend or repeal, the original section 5884 as it stood in the Compiled Statutes of 1922, or as it stood in the act of 1925; nor that it was not sufficiently indicative of that which was sought to be amended as well as that sought to be repealed; nor that any one was misled or in any manner deceived by the use of the words "as amended by chapter 169, Laws of Nebraska for 1927," in the title of the 1929 act, as well as in the repealing clause thereof, instead of the words "as changed and repealed by chapter 169, Laws of Nebraska for 1927;" nor that the act was in any manner inducive of surreptitious legislation. Hence, neither the title nor the body of the act in question contravene that part of section 14, art. III of our Constitution, hereinbefore quoted, either as found by the trial court or otherwise.

In thus concluding, we have but followed rules of general application, and especially the uniform holdings of this court. In *State v. Board of County Commissioners*, 109 Neb. 35, 38, we went so far as to state: "Though the 1921 act purports to amend chapter 66, Laws 1919, and ignores the amendatory act, chapter 67, Laws 1919, such mistaken reference to the former statute, without express mention of the subsequent amendatory act, does not invalidate the act, for there is sufficient identification of the previous

existing law sought to be amended to make certain the legislative intention. *State v. Babcock,* 23 Neb. 128; *Fenton v. Yule,* 27 Neb. 758; *Richards v. State,* 65 Neb. 808; notes, 5 A. L. R. 996, 1009." See, also, *Elliott v. Wille,* 112 Neb. 78; *In re Estate of Austin,* 116 Neb. 137; *State v. Farmers Irrigation District,* 116 Neb. 373; 25 R. C. L. 869, 870.

The second finding of the trial court, so far as material, is as follows: "Upon the filing by the taxpayer of the schedule required under said act, the tax is computed and levied without formal action by any assessment body, and is, therefore, levied by legislative decree.

"The act provides that the tax shall be apportioned to the general fund of the city. There is no 'general fund' to the city of Omaha, and if the phrase 'general fund,' as used in this act, has any special significance so far as metropolitan cities are concerned, the tax so collected should be credited to the 'miscellaneous expense fund' of the city. This fund is to pay expenses of the city, and, as thus used, would be for the payment of expenses incurred in its corporate capacity; otherwise, the tax so collected would become a part of the general fund of the city, and be distributed and apportioned by the city authorities the same as other revenue. In any event, the tax so collected would be used in part, at least, by the city for corporate purposes. To that extent, House Roll 421 (the act of 1929) violates section 7, article VIII of the Constitution."

The material parts of the 1929 act, pertinent here, are, in substance: Section 1 defines intangible property and divides the same into classes A and B, and then provides: "All intangible property as defined in Class A shall be taxed where said intangible property is assessed at two and one-half mills on the dollar of the actual value thereof. * * * Class B shall include all other kinds of intangible property named in this section which is not included in Class A. All intangible property in Class B shall be taxed where said intangible property is assessed at the rate of eight mills on the dollar of the actual value thereof, the

same to be assessed and collected where the owner resides:" That the aforesaid mill levies shall be in lieu of all other taxes upon such intangible property, and shall be due, delinquent and collectable at the same time as personal taxes, "and the amount collected in the various taxing districts of the state shall be apportioned, one-sixth to the state general fund, one-sixth to the county general fund, one-third to the general fund of the city or village, one-third to the general fund of the school district in which the property is assessed."

That part of section 7, art. VIII of our Constitution, here involved, is: "The legislature shall not impose taxes upon municipal corporations, or the inhabitants or property thereof, for corporate purposes."

In *Williams v. Eggleston,* 170 U. S. 304, it was state: "A municipal corporation is, so far as its purely municipal relations are concerned, simply an agency of the state for conducting the affairs of government, and as such it is subject to the control of the legislature."

Considering the first paragraph of the second finding: As we construe the law, the return is made by the owner, or his agent, and filed with the county assessor, who either accepts the listed statement of the property and its asserted value as designated in such return, or on investigation, by and with the consent of the owner, changes it, and in any event transmits the true situation as found by him, as a part of his completed work, to the county board sitting as a board of equalization, for such board's consideration; the value and amount of both the tangible and intangible property being open to correction if the board, under the rules governing its deliberation, should find it necessary. Thus, the legislature does no more than provide the way or manner of such taxation, the per dollar mill levy, and the distribution of the tax when once collected. It is therefore apparent that the tax is "computed and levied" by the formal action of an "assessment body."

As to the second paragraph of such finding: The words "general fund," as used in that part of the 1929 act re-

ferring to cities and villages, mean a fund which is set apart for the purpose of defraying the governmental expenses of the city or village, and not those expenses which are termed "corporate." The legislature, having designated the fund into which these taxes should go, must have had this construction in mind, as it certainly could not be presumed that the legislature was attempting to contravene the provisions of the Constitution heretofore quoted; neither could it be presumed that the city or village authorities would place these taxes in a fund other than that designated by the act, nor that in making appropriations they would provide that this fund be used for a different purpose than that plainly specified in such act. Therefore, it would be immaterial whether the authorities of the city or village actually named the fund "general" or "miscellaneous expense," as either thereof would refer to the same moneys.

In further support of the conclusions hereinbefore reached as to the constitutionality of the act in question, we might add that a legislative act is always presumed to be within constitutional limitations unless the contrary is clearly apparent—a rule consistently followed by this court. However, the people, ever alert, and jealous of their vested rights, in 1920 adopted as an amendment to the Constitution of our state, as an additional safeguard, the following provision: "No legislative act shall be held unconstitutional except by the concurrence of five judges"—five-sevenths of the membership of the court as then and now composed.

The judgment of the trial court is reversed, and the action dismissed.

REVERSED AND DISMISSED.

Note—Municipal Corporations, 43 C. J. sec. 288 n. 9, sec. 306 n. 46—Statutes, 36 Cyc. 1026 n. 17, 1044 n. 99, 1060 n. 76; 25 R. C. L. 869; 5 A. L. R. 997 et seq.; 25 R. C. L. 907.

STATE, EX REL. C. A. SORENSEN, ATTORNEY GENERAL, APPELLANT, V. GEORGE A. KISTLER, APPELLEE.

FILED NOVEMBER 2, 1929. No. 26954.

1. Trial: EVIDENCE: COMPILATION OF RECORDS: ADMISSIBILITY. Where the original books and records are in court subject to inspection of counsel, a compilation of their contents, made by a witness competent to do so, is competent evidence as against an objection as "incompetent and no foundation laid," there being no specific objection that the records themselves were not offered in evidence.
2. Animals: INSPECTION: SUFFICIENCY OF EVIDENCE. Evidence examined, and *held* to show a "systematic inspection, examination and testing of cattle," within the meaning of those terms in section 10, art. II, ch. 12, Laws 1927.

APPEAL from the district court for Adams county: J. W. JAMES, JUDGE. *Reversed, with directions.*

*C. A. Sorensen, Attorney General,* and *Peterson & Devoe,* for appellant.

*Bernard McNeny* and *Raymond M. Tibbets, contra.*

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

REDICK, District Judge.

This is an action brought by the state of Nebraska, on the relation of the attorney general, against the defendant, to enjoin the latter from obstructing or preventing the agents of the state from applying the tuberculin test to defendant's cattle. The petition alleged that prior to the enactment of chapter 12, Laws 1927, a systematic inspection, examination and testing of cattle for tuberculosis was undertaken in Adams county, Nebraska, on a cooperative basis by the United States bureau of animal industry and the Nebraska department of agriculture, and more than 5,000 cattle were thereby tested in Adams county; that on January 6, 1928, said department duly declared Adams county to be an area for inspection of breeding cattle for tuberculosis, pursuant to the said chapter 12, and partic-

ularly section 10 thereof, the order of declaration reciting that prior to the passage of said act a systematic inspection and testing of said cattle for tuberculosis was undertaken in said county on a cooperative basis by the United States bureau of animal industry and the Nebraska department of agriculture, and that more than 5,000 cattle were tuberculin tested; that defendant refused to submit the cattle owned and kept by him in Adams county to the test, and prevented the agents of the state from carrying on the same; that since said enactment 13,763 cattle have been tuberculin tested in said county. The answer of the defendant denies generally and specifically each allegation of the petition, and a general denial was filed in reply.

The case was tried to the court, and upon the conclusion of plaintiff's testimony the relief was denied the plaintiff by the court, and the action dismissed. Plaintiff appeals.

The sole question for our determination is the construction of section 10, art. II, ch. 12, Laws 1927, which is as follows:

"Where any county has been declared an area for the inspection, examination and testing of cattle for tuberculosis under the provisions of any preexisting legislation of this state, or where, prior to the passage of this act, a systematic inspection, examination and testing of cattle for tuberculosis has been undertaken in any county on a cooperative basis by the United States bureau of animal industry and the Nebraska department of agriculture, and more than five thousand cattle have been tested in such county prior to the passage of this act, the inspection, examination and testing of cattle for tuberculosis in such county or counties may be continued by the department under the provisions of this act without petition or hearing in all respects as if such petition had been filed and hearing had and the county declared an area hereunder."

A brief review of the legislation on this subject may aid in construing this section and thereby determining the legislative intent. By section 6, art. XX, ch. 190, Laws 1919, authority was given the department of agriculture to

quarantine or destroy all live stock found in the state and having an infectious or contagious disease. It was not until chapter 7, Laws 1925, that provision was made for the establishment of areas of inspection and systematic inspection of cattle for tuberculosis was provided for by legislative act. That act, though less complete, was quite similar to the act of 1927, providing for the establishment of county areas of inspection upon petition of 60 per cent. or more of the owners representing 51 per cent. of breeding cattle as disclosed by the last assessment rolls; and by section 9 it was attempted to provide for the establishment of such area without petition where the area plan of tuberculosis eradication had been theretofore adopted by the department of agriculture. Section 9, however, was declared unconstitutional, as not within the title of the act, in *State v. Heldt,* 115 Neb. 435, and, apparently to meet the views expressed by the court in that case, the act of 1927 was passed; section 10 covering substantially the same ground as section 9 in the previous act. No question of the constitutionality of the present act is presented.

From an examination of the act of 1927, it is clear that the jurisdiction of the department was intended to be based upon either of two situations—(1) where an area had been established by petition as provided by section 1, art II, of the act, and (2) where, prior to the passage of the act, a systematic inspection, examination and testing of cattle for tuberculosis has been undertaken in any county on a cooperative basis by the United States bureau of animal industry and the Nebraska department of agriculture, and more than 5,000 cattle have been thereby tested, in which case no petition was required.

It is established by the evidence beyond dispute that in the years 1921 and 1922 the United States bureau of animal industry and the state department of agriculture, cooperating, conducted a tuberculin inspection and examination of 8,772 cattle in Adams county, of which 6,543 were tested in 1922, and this is the inspection and examination referred to in the recital of the order of January 6, 1928, above referred to.

It is therefore apparent that, if the recitals of the order are true, the department of agriculture was fully justified in demanding an inspection of defendant's cattle, but the defendant contends that the evidence fails to show a "systematic inspection and examination" within the terms of the statute, and quotes Webster's definition of systematic as "of, pertaining to, or consisting in, system," etc. We think, however, that we will get a better idea of the meaning of the adjective from the definition of the noun. System is defined in the Standard Dictionary as "orderly combination or arrangement, as of particulars, parts, or elements, into a whole, especially, such combination according to some rational principle; * * * any methodic arrangement of parts." In common parlance, to do a thing systematically is to do it by a certain method previously adopted as tending to accomplish the desired result. It is distinguished from sporadic, haphazard, and disconnected acts having no tendency to constitute a complete and homogeneous whole.

The evidence shows that the inspection of 1921 and 1922 was carried on by the agents of the state and federal government. The method of operation was stated by witness Hayes, under whose supervision it was, to be as follows: "The arrangement of doing it in a systematic way was to go into the county, into the different precincts, and test in all of those precincts, completing the work in the different precincts as we went along." The results covered the number of herds, the number of cattle tested, the result of the test, the percentage of herds infected, and the percentage of cattle infected. The records of the department introduced in evidence show that such inspection was carried on for the purpose of covering the entire county, and according to a system or method adopted by the department. It was not a mere sporadic or occasional inspection of any particular "critter" or group of cattle suspected of or charged with being afflicted with tuberculosis, but was in pursuance of a general scheme to discover and eradicate that disease in a definite area—Adams county. We

are of the opinion that the inspection and examination referred to was a systematic one within the meaning of that term in the statute.

Objection was made to exhibit 2 as incompetent and no foundation laid. This was a compilation from the official records of the department of agriculture, made by the witness Hayes from original records which were present in court, and was competent; no objection being made that the records themselves were not introduced.

Defendant contends further that, because of the lapse of time from the inspection in 1922 to the passage of the act, the legislature could not have had in mind such an inspection. There is, however, no limitation in the act, and the only limitation which the court would be authorized to adopt regarding the time would be that it must be a reasonable time. It will be noted that, before an area for inspection may be considered established without petition, it must have been so declared under the provisions of preexisting legislation, but no such requirement exists under the second basis of jurisdiction, the language of the act being simply "where, prior to the passage of this act, a systematic inspection, examination and testing of cattle for tuberculosis has been undertaken," etc. We are not prepared to say that the period of time referred to is unreasonable, but think it quite probable that the legislature in enacting the section in question had in mind the organized efforts of the department, without specific legislation on the subject, to discover and eradicate the disease of tuberculosis among cattle, and in proper cases to eliminate the necessity of the somewhat cumbrous method by petition. The act of 1927, by section 10, was intended to preserve to the state and cattle-owners the benefit of such inspection as had been theretofore carried on in the manner required by the then act, and operated to constitute the counties so inspected protected areas, or put them in the same position as if the area had been created by petition under former legislation. Had there been such legislation in 1922 and Adams county had been created an area thereunder, there

could be no question of jurisdiction on account of the lapse of time. We think there is none here. Counsel for defendant argues that, because a new examination of the entire area is required owing to the lapse of time since the examination in 1922, petitions should have been obtained, which, he says, could easily have been done. But this is beside the point. If a systematic examination was made of the area in 1922, as we have attempted to show, a petition was not necessary, the area having been already established.

Defendant cites rule 5, paragraph 22, of the rules adopted for the assessment and maintenance of tuberculosis-free accredited herds of cattle, as establishing a limitation of three years beyond which no inspection of cattle may be considered of any effect. The material part of the rule is as follows:

"If as the result of one complete tuberculin test within the designated area, the total number of reactors is less than one-half of one per cent. of all the cattle within the area, the area shall then be declared an official modified tuberculosis-free accredited area for a period of three years by the cooperating federal and state authorities."

We can discover no relation between the rule and the legislation. The rule merely fixes the time under the conditions stated during which a retest may not be required. If the inspection of 1922 had been within three years of the present demand, it is possible the rule might have had some application, but we do not decide the point.

It is further argued that, by the use of the language "examination and testing of cattle for tuberculosis in any such county or counties *may be continued* by the department," the legislature referred to an action in progress, that "it is clear that it would be only an operation that was still in progress, that can be continued. It is only an examination begun and not completed to which the phrase 'may be continued' can be applied." We look upon this suggestion as rather technical. We think the power conferred upon the department of agriculture is a continuing

one, and that after having completed the inspection and examination of a certain area it might continue to inspect it as time goes on and conditions in the area require it; and this is the sense in which the word was used by the legislature.

We conclude that the learned district court was in error when it denied relief and dismissed the plaintiff's action, and its decree is reversed, with instructions to enter a decree for the plaintiff as prayed.

REVERSED.

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## CHARLES PENN V. STATE OF NEBRASKA.

FILED NOVEMBER 8, 1929. No. 26977.

1. **Homicide:** EVIDENCE: DYING DECLARATIONS: ADMISSIBILITY. "The admission of a dying declaration is, primarily, a question to be determined by the nature of each case." *Edwards v. State*, 113 Neb. 698.
2. ———: ———: ———: FORM. "The law looks to the substance rather than to the form, and it does not require that dying declarations must be made in any prescribed form or manner." *Edwards v. State*, 113 Neb. 698.
3. ———: ———: ———: WEIGHT AND CREDIBILITY FOR JURY. "Where dying declarations have been admitted in evidence, their weight and credibility are for the determination of the jury." *Edwards v. State*, 113 Neb. 698.
4. ———: ———: ———: ADMISSIBILITY. "In a prosecution for murder, the admissibility of a statement by the victim of the homicide that he was shot by defendant is a question of law for the court." *Johnson v. State*, 112 Neb. 530.
5. ———: ———: ———: ———. "In a prosecution for murder, a statement by the victim of the homicide that he was shot by defendant may be admitted in evidence, if made under a sense of impending death, and the foundation for its admission may be shown by circumstances." *Johnson v. State*, 112 Neb. 530.
6. ———: ———: ———: ———. "The time elapsing between the making of a dying declaration and dissolution is not necessarily a factor in determining the admissibility of the declaration as evidence." *Johnson v. State*, 112 Neb. 530.
7. **Criminal Law:** CHANGE OF VENUE. The matter of granting a

change of venue in a criminal case rests in the sound discretion of the trial court.

8. ———: ADJOURNMENT OF TRIAL. After the evidence was completed in a prosecution for murder in the first degree, a juror became too ill to continue the case and, upon the jury being properly admonished as to its duties, the trial was adjourned until the juryman should recover. The court reconvened and resumed the trial 26 days later and both the state and defendant were asked to examine the jurors to discover if any prejudice had resulted or would result by reason of the postponement. Defendant's counsel declined to examine the jurors but objected on his behalf to proceeding with the trial. *Held*, that the order overruling the objections was not an abuse of discretion or reversible error, where the record failed to show misconduct on the part of any juror or prejudice to defendant.

9. **Indictment and Information:** ELECTION. A defendant may be charged in one count with murder while attempting to perpetrate a burglary and in another count with murder, where both are parts of the same transaction. In such a case, the state is not required to elect to proceed to trial upon one of the counts but the defendant may be tried upon both.

ERROR to the district court for Merrick county: LOUIS LIGHTNER, JUDGE. *Affirmed.*

*J. H. Grosvenor, E. J. Patterson* and *P. S. Heaton*, for plaintiff in error.

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

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

GOSS, C. J.

The defendant, Charles Penn (often called Pete), was convicted of murder in the first degree and the verdict of the jury fixed the penalty at life imprisonment. From a judgment thereon the defendant comes here on proceedings in error.

Charles Johnson died at a hospital in Columbus about 4:30 o'clock on the morning of October 4, 1928, as a result of a pistol shot or shots received by him about 11 o'clock on the night of October 2, 1928, at his blacksmith shop and public garage at Clarks. The defendant made his

home with his widowed mother, who lived in the same block in which Johnson conducted his business. Johnson and his blacksmith, Fred Hanson, lived in quarters on the second floor of Johnson's place of business, directly over the office. Penn and Johnson were friendly and Penn had long frequented Johnson's place and had opportunity to know that Johnson at times kept considerable sums of money about his office. In 1925 Penn had been convicted of breaking and entering and had served for a time in the penitentiary but had been paroled in October, 1927, to a farmer named Gerber, living near Clarks, and had been finally discharged in May, 1928. Mr. Gerber having died, the defendant continued to work for Mrs. Gerber. However, for the last six weeks he had not worked much, having had influenza.

Johnson was about his place of business on the afternoon involved and traded his used car for another and $25 in cash, with a customer, late in the afternoon. They celebrated the trade with a drink or two of liquor. He took his supper at Mrs. Penn's with Charles and others and later at night he and others went to this home and partook of an oyster stew. There was some drinking there in which Johnson and Penn probably participated. The testimony does not seem to show that either was intoxicated. Penn had no money and was given money by his mother to procure crackers for the feast. The defendant and his brother-in-law left the Penn home after the oyster supper at some indefinite time before 11 o'clock and Johnson left soon thereafter. At about 11 o'clock Johnson was wounded in his place of business. He received from a direction in front of him two shots from a 32-calibre pistol in his left arm and from the rear a shot entering on the left side of the spine and taking a course inward and upward through the abdomen but not leaving the body. Under the direction of Dr. R. R. Douglas of Clarks he was taken to a hospital at Columbus, where he arrived about midnight of the night of the shooting, and died about 4:30 in the morning of October 4, 1928.

The evidence shows that Johnson died from the effect of the bullet wound in the abdomen and that no pistol was found. As to the shooting, there is no direct evidence against Penn by any eye-witness, except as found in the statements of Johnson made, as argued by the state, under the sense of impending death. Plaintiff in error complains that these declarations were erroneously admitted in evidence.

Between 8 and 9 o'clock of the evening of October 3, 1928, being seven or eight hours before his death, Johnson signed in pencil a dying declaration, written in ink on two sheets of paper of letter size, in the handwriting of Emil F. Luckey, the county attorney of Platte county. Mr. Luckey testified that he had heard Dr. Morrow of Columbus, who attended Johnson at the hospital, inform Johnson that he could not survive and heard Johnson answer, "I am sorry but I guess you have done all you can for me." Mr. Luckey further testified:

"A. Well, I then asked Mr. Johnson if he had understood what Dr. Morrow had told him and he said he did, and then I asked him 'You realize that you are not going to live?' and he stated he did, and I told him, 'I have a statement here, Mr. Johnson, of the facts as they occurred last night of the shooting, given to me by Mr. Hawkins, and I would like to have you read them and, if they are correct, sign them.' And I then further told him, 'Would you rather have me read it for you and if there are any corrections you can give them to me?' and he stated that he would rather have me read the statement to him. I then proceeded to read the statement and I read it to him sentence by sentence and stopped at the end of each sentence and asked him if it was correct, and I don't recall, he made one or two corrections or changes in the statement and at the end of the statement I asked him, 'Is the statement, as you have corrected it, a correct statement now? and he said it was. And I asked him to sign it and he did. Dr. Morrow and myself signed the statement.

"Q. During this time, what did you observe as to Mr. Johnson's mental condition?

"A. Well, his mental condition seemed to be good. He was responsive to all questions. He was very responsive to the questions."

The written statement, being state's exhibit 1, follows:

"I Charles H. Johnson, having been advised by Dr. Frank Morrow that I will not recover from the bullet wounds I received Tuesday night, October 2, 1928, when I was shot by Charles Penn and myself fully realizing that death is at hand do hereby make this the following as a true statement of the facts concerning the shooting and my death:

"About 8:30 Tuesday evening October 2, 1928, I went over to the Penn home and was invited to partake of an oyster stew. Mollie Penn, Hiram Jones, Mark Lamb, Virgil Bane and Charles Penn were present at the oyster stew. Later Charles Penn, Virgil Bane and Mark Lamb left the house, leaving myself, Mollie Penn and Hiram Jones in the house. Soon following this I left and went to my garage and as I approached I saw Charles Penn's face through the window very clearly by the light of the office which I had turned on, searching through my office. I said to him, 'What are you doing there?' but he did not respond but ducked behind a brick flu located in the center of my office room. I pondered for a moment and thought that he might have got out the back way. Then I proceeded to unlock the front door, having been on the outside thus far, went in and proceeded to the corner of the flu when Charles stepped out with a revolver in his hand and I said to him again, 'What are you doing here, Pete? and no answer but he fired two shots in succession which struck me in the arm. I immediately turned to go out the door and upon turning another shot was fired which struck me in the back. I kept going the best possible and I heard another shot fired which did not hit me. I got to the corner of the Farmers Union Oil Station and Charles Penn was in my doorway and called to me, 'Come back here Charlie,' and I said, 'No; you will shoot me again,'

and he said, 'No; I wont.' I went back and he said, 'Charlie dont send me to the penitentiary,' and I said, 'No,' thinking he would shoot me again. He went to the telephone and called Dr. Douglas. When Charles fired the first two shots at me which struck my left arm I was standing only a few feet away from him and the lights were on and I could see him very plainly.

"(Signed) C. H. Johnson.
"(Signed) Emil F. Luckey.
"(Signed) F. H. Morrow."

The only changes Johnson caused to be made in the paper as first written by Mr. Luckey were three: First, they struck out the words "his own flash light" and interlined in lieu thereof the words "the office which I had turned on" after the words, still appearing, in the text "clearly by the light of." Second, they struck out the words "and turned on the light" after the words "went in" so that the text now reads "went in and proceeded to the corner of the flu(e) when Charles stepped out with a revolver in his hand." Third, there was another change by striking out five words, but it is inconsequential as they were an obvious repetition of five identical words, as often happens in writing by hand, as it often happens in using the typewriter, or occasionally may be seen in the use of the linotype.

Dr. Morrow testified that, in his opinion, at the time the document was read to the patient, his mind was clear. At other places in the record he expressed the opinion that Johnson was "perfectly rational," that he was not delirious although he had at that time a temperature of "101 and a fraction," that he was not suffering much pain at the time the statement was read to him, and that, while he was weak, the doctor did not think that "signing the statement made him very much more fatigued."

Plaintiff in error criticizes the admission in evidence of the written declaration because it was first reduced to writing on information furnished to the scrivener by another than the declarant and because of the effect of the

changes made and the consequent alleged inconsistencies in relation to the lights by which Johnson first identified his assailant at the office. These matters went to the weight and value of the evidence and were arguable to the jury with more force than to us. The chief purpose of the declaration was to identify the defendant. Quite independent of these items the statement contains evidence of identity to be considered by a jury along with other evidence. There is some corroboration of a portion of the declaration by a neighbor who was wakened by the shots on the fatal night. Henry A. Daniels, who lived across the street, heard the last two shots, listened and looked, finally saw two men, one of whom was Johnson and whose voice he recognized, walking toward the office, saw them go in and saw Johnson sit down in the chair with his left arm held out.

While sitting in the car, waiting to start from Clarks to Columbus, Johnson told Dr. Douglas and Kenneth L. Howe, the town marshal, who shot him. On the trial an objection to the doctor stating what Johnson said was sustained. When Howe was on the stand a like objection was sustained. But Howe gave without objection the following testimony as to what occurred about an hour after the shooting and shortly after Sheriff Curry had put the defendant under arrest: "Q. What did you say to the defendant at that time? A. I said to him, 'Mr. Johnson told me you shot him.' Q. And did the defendant say anything? A. Yes, sir. Q. What did he say? A. He said: 'That is it, Ex-convict. Take it all.'"

In *Edwards v. State,* 113 Neb. 698, the dying declaration was prepared in narrative form, read to the victim of an illegal operation and signed by her. We affirmed the action of the district court in receiving it in evidence over objections similar to those involved here. In that case we held:

"The admission of a dying declaration is, primarily, a question to be determined by the nature of each case.

"The law looks to the substance rather than to the form,

and it does not require that dying declarations must be made in any prescribed form or manner.

"Where dying declarations have been admitted in evidence, their weight and credibility are for the determination of the jury."

Substantially of the same nature and effect, in a case where a short written statement was prepared for another and signed by her, is *Mathews v. State,* 111 Neb. 593.

In a murder case, resulting in a conviction of manslaughter, we held: "In a prosecution for murder, the admissibility of a statement by the victim of the homicide that he was shot by defendant is a question of law for the court;" that the statement "may be admitted in evidence, if made under a sense of impending death, and the foundation for its admission may be shown by circumstances;" and "the time elapsing between the making of a dying declaration and dissolution is not necessarily a factor in determining the admissibility of the declaration as evidence." *Johnson v. State,* 112 Neb. 530.

It is needless to cite further authorities. These are recent and controlling. So, on this phase of the record, which is the chief point argued by the defendant, we hold that there was a proper foundation for the dying declaration, and its effect was for the jury to determine.

Complaint is made because the defendant was refused a change of venue. In the argument he relies upon *Olsen v. State,* 114 Neb. 112, wherein we reversed the judgment, with directions to grant a change of venue. There the record that the public sentiment of the community was aroused and that a general feeling of hostility against the defendant existed. We have examined the record and find that it shows no such condition here. The matter of granting a change of venue came under the well-established rule that it rested in the sound discretion of the trial court. We do not find that this discretion was abused.

The trial began on December 3, 1928. On December 7, 1928, as shown by the journal (on December 6 as indicated by a parenthetical note made by the reporter at a later

time in the bill of exceptions), it appeared that one of the jurors was ill. At the suggestion of the court the personal physician of the juror and the county physician examined him and reported him to be "on the edge of pneumonia and cannot possibly serve today and may not be able to serve for a week or ten days." Thereupon, under section 10150, Comp. St. 1922, the court carefully admonished "the jury as to its duties and the trial is adjourned to such time as the juryman recovers." The recovery of the juror took longer than had been anticipated, but on January 2, 1929, the juror had recovered and all parties reconvened to continue the trial. The court gave each party an opportunity to examine the jury. Thereupon let the record show what took place:

"Court: Does the defendant care to further examine the jury?

"Mr. Grosvenor: The defendant, Charles Penn, here objects to the resumption of argument and trial of this case at this date, to wit, January 2, 1929, for the reason that an unreasonable adjournment and delay has been occasioned during which time the jurors and each and all of them have been at large and outside the supervision and control of the court and in contact with the public generally, and have had means of and have acquired knowledge, information and other evidence of public opinion and expressions of other persons with reference to the status of the trial and the probable outcome thereof, all of which is highly prejudicial to the defendant and is calculated to deprive him of a fair and impartial trial such as is guaranteed by the Constitution and laws of the state of Nebraska.

"Court: Unless the defendant should examine the jury and it should appear that some prejudice has or would result, why, the motion will be overruled.

"Mr. Grosvenor: We don't care to examine.

"Court: The motion is overruled."

We have found no case identical with this, but *Ossenkop v. State,* 86 Neb. 539, is analogous in principle. This was

a manslaughter case. The point is well stated by the syllabus, as follows: "After the state had made its case in chief in a prosecution for murder in the second degree, an order permitting the jury, upon being admonished, to separate for the period of 21 days during a postponement allowed on the ground that four of defendant's witnesses had been quarantined on account of smallpox, *held* not an abuse of discretion or reversible error, where the record failed to show misconduct on the part of any juror or prejudice to defendant."

The record fails to show prejudice in this aspect of the case, and that portion of it which we have quoted shows no attempt on behalf of defendant to ascertain whether any juror had been contaminated during the recess. To reverse the judgment of a trial court on such a point would be destructive of the exercise of that independent discretion of the trial judges which seems to have been used with fairness in this instance.

The information contained two counts. The first charged murder in the first degree while attempting to perpetrate a burglary and the second charged conventional murder in the first degree. Error is asserted because the court refused to require the state to elect to proceed on one or the other count, and because in the first instruction given to the jury he submitted both counts to the jury. The overt acts necessary to prove ordinary murder and to prove the felony while attempting to commit burglary were the same up to the point of the said intent. Where different criminal acts constitute parts of the same transaction, they may be joined in the same indictment or count thereof. *Aiken v. State,* 41 Neb. 263; *Blodgett v. State,* 50 Neb. 121; *Zediker v. State,* 114 Neb. 292.

The defendant has set out a large number of assignments of error. We have treated those which seem to merit discussion. We have examined the others and do not deem them of sufficient importance to the parties involved nor to the profession to warrant so prolonged an opinion as would be required in their discussion. We do not find them meritorious.

On the whole we are of the opinion that the defendant had a fair trial and that the record is without prejudicial error. The judgment of the district court is right and is

AFFIRMED.

Note—Homicide, 30 C. J. sec. 497 n. 20, sec. 500 n. 52, sec. 504 n. 42, sec. 507 n. 78, 84—Dying Declarations, 25 L. R. A. 445; 52 L. R. A. n. s. 152; 56 L. R. A. 382; 1 R. C. L. 539; R. C. L. Perm. Supp. 150.

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WILLIAM S. MCCULLEY, APPELLANT, V. ANDREW ANDERSON, APPELLEE.

FILED NOVEMBER 8, 1929. No. 26791.

1. Highways: ARTERIAL HIGHWAYS: RIGHTS OF MOTORISTS. A motorist on a nonfavored street, having stopped as required by ordinance, and having looked to the right and left before entering an arterial highway and found the intersection clear of traffic, has a right, in proceeding to cross it, to assume that motorists on the arterial highway will likewise obey traffic regulations, exercise due care and, if necessary to prevent a collision, slacken their speed.
2. Negligence: BURDEN OF PROOF. Where plaintiff in an action for negligence resulting in personal injuries makes a *prima facie* case without disclosing any negligence on his part, the burden is on defendant to prove that the proximate cause of the injuries was the negligence or contributory negligence of plaintiff, if that is the defense pleaded.
3. ———: CONTRIBUTORY NEGLIGENCE. Contributory negligence as a defense must be proximate to plaintiff's injury in the same sense in which defendant's negligence must have been proximate to the injury giving rise to the cause of action.
4. ———: ———: INSTRUCTIONS. Where plaintiff has made a *prima facie* case in an action for negligence resulting in personal injuries without disclosing any negligence on his part, the failure to instruct the jury that contributory negligence as a defense must have been the proximate contributing cause of the injuries may be prejudicially erroneous even in absence of a request for such an instruction.
5. Highways: ARTERIAL HIGHWAYS: RIGHTS OF MOTORISTS. With the exception of a required stop at an arterial highway, the principles of law applicable to traffic thereon as to right of way

privileges are the same as upon nonfavored streets, modified, however, by the conditions arising out of the stop requirement.

6. ———: ———: ———. The right of a motorist on an arterial highway to assume that a motor-cycle on a nonfavored intersecting street will be brought to a stop before entering the intersection does not permit him to exceed the speed limit or to disregard other traffic regulations or to claim the right of way when too far from the intersection to be entitled thereto.

7. ———: ———: ———. An ordinance designating a street as an arterial highway and requiring motorists to stop before entering it from intersecting thoroughfares does not grant an exclusive privilege to drivers on the favored artery or require those crossing it to do so at their peril regardless of the duty of motorists on all highways to obey traffic regulations and to exercise due care to protect the rights and property of others.

8. Negligence: ARTERIAL HIGHWAYS. Where a motorist on a nonfavored street stops at an intersecting arterial highway when the intersection is clear of traffic, looks to the right and left for approaching vehicles, acting as a reasonably prudent person in the exercise of due care would act in the belief that he has time and opportunity to safely cross, he is not liable for negligence merely because he attempts to do so.

9. ———: ———: COLLISION: INSTRUCTION. In the trial of a cause of action arising from a collision of motor vehicles at the intersection of an arterial highway and a nonfavored street, where the issues of negligence and contributory negligence are involved, the jury should not be allowed to put their own interpretation on the ordinance designating the arterial highway and requiring motorists to stop before entering it, but should be instructed as to the relative or reciprocal rights and duties of motorists in entering and using the intersection.

10. Trial: IMPROPER COMMENTS BY COURT. In the trial of a cause before a jury, improper comments of the trial judge from the bench may be prejudicially erroneous where they tend to discredit a witness and his testimony.

11. Evidence: INTOXICATION: NONEXPERT WITNESSES. Testimony tending to prove that a defendant was under the influence of liquor while operating an automobile in a public street may be given by a nonexpert witness.

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

*Shotwell & Ready*, for appellant.

*Wear, Moriarty, Garrotto & Boland, contra.*

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

ROSE, J.

This is an action to recover $40,000 in damages for personal injuries alleged to have been negligently inflicted by defendant while driving his automobile at an unlawful rate of speed into plaintiff's motor-cycle at the intersection of Forty-second and Leavenworth streets in Omaha—paved highways that cross each other at right angles. Leavenworth street between curbs is 40 feet wide and runs east and west. The width of Forty-second street between curbs is 25 feet and it runs north and south. Lengthwise on Leavenworth street there is a street car track on each side of the center. That street is a public thoroughfare designated by city ordinance as an "arterial highway" and drivers entering it from nonfavored cross streets are required, before doing so, to stop near the intersection at places indicated by stop signs.

The petition contains pleas that plaintiff, on a motor-cycle, approached Leavenworth street from the north on Forty-second street, came to a stop before entering it, observed it was free from traffic and carefully proceeded south on the right side of Forty-second street until his motor-cycle passed over the first street car track beyond the center of the intersection, when defendant, driving an automobile westward on the wrong side of Leavenworth street at an unlawful and dangerous speed collided with plaintiff, thus permanently injuring him and demolishing his motor-cycle.

In the answer to the petition defendant alleged the collision was not due to any negligence on his part. The answer also contained the defense that plaintiff's injuries and damages, if any, were "due entirely to his own gross negligence, carelessness and recklessness which caused and directly contributed" to the accident.

The reply contained a denial of unadmitted facts pleaded in the answer.

From judgment on a verdict in favor of defendant, plaintiff has appealed.

The failure of the trial court to instruct the jury that negligence of plaintiff, if any, would not prevent a verdict in his favor unless it contributed to or caused the collision is assigned as error and presented on appeal as a ground for reversal. The principle of law invoked was stated in a former opinion as follows:

"The plaintiff's negligence will not defeat a recovery unless it was the sole cause of the plaintiff's injury, or concurred or co-operated with the defendant's negligence as a proximate cause of the accident." *McGahey v. Citizens R. Co.*, 88 Neb. 218.

The trial court did not give an instruction on this feature of the case. Was the omission erroneous? The solution of the question requires an examination of the evidence. Eye-witnesses called by plaintiff testified positively that he stopped on Forty-second street at the place indicated by the stop sign and started directly south across the west side of the intersection when clear of traffic and when defendant was east of it on Leavenworth street; that plaintiff, after stopping, was first to enter the intersection, but did not proceed faster than five miles an hour; that he went south on the west side of Forty-second street; that defendant was east of Forty-second street when plaintiff entered the intersection. One witness testified in substance that she was driving west on Leavenworth street at the rate of 25 miles an hour; that defendant drove up behind her when she was nearing the intersection at Forty-second street, turned south to pass her, touched the fender of her automobile while going 35 or 40 miles an hour, went south of the center of Leavenworth street, turned north in front of her, zigzagged and ran into plaintiff's motor-cycle west of the intersection near the center of it; that she stopped her car and accosted defendant where his car stopped perhaps 60 feet from the point of impact, noticed the odor

of liquor on his breath, and told him the accident would not have happened if he had not been drinking. She said he admitted going too fast and she expressed the opinion that he was under the influence of liquor. The estimates of all eye-witnesses except defendant himself indicate that he exceeded a speed of 20 miles an hour in the intersection and some were of the opinion that his speed was as high as 35 or 40 miles an hour. There is evidence tending to show that defendant violated an ordinance forbidding him from driving an automobile while under the influence of liquor; an ordinance limiting speed to 20 miles an hour in the intersection; an ordinance against driving on the wrong side of the street; a law requiring the driver of a motor vehicle in a public street to exercise reasonable care to protect the rights of others in the lawful use of the same street. The evidence is clear that defendant's automobile, after the impact, ran toward the southwest, struck the curb on the south side of Leavenworth street west of Forty-second street, smashed a wheel when it struck the curb and stopped at a brick pillar approximately 60 feet from the point of collision. The violence of the impact and the distance the automobile traveled before coming to rest at the pillar tend to prove excessive speed. Plaintiff was thrown a considerable distance and fell on the pavement southwest of the center of the intersection. The circumstances generally tend to strengthen the testimony of plaintiff's eye-witnesses and to prove that the automobile struck the motor-cycle. It may fairly be inferred from the evidence adduced by plaintiff that the accident would not have happened if defendant had slackened his speed or had kept a direct course west on the north side of Leavenworth street instead of zigzagging across the intersection. Plaintiff made a *prima facie* case without disclosing any negligence on his part.

If plaintiff, after stopping as required by ordinance, entered the intersection and proceeded lawfully when it was clear of traffic, he had a legal right to assume that defendant, while approaching from the east, would likewise take

the precautions required by ordinance for the protection of others. Without warning or knowledge plaintiff was not bound to anticipate negligence on the part of defendant. 45 C. J. 954, sec. 512.

On the issue that plaintiff's injuries and damages, if any, were "due entirely to his own gross negligence, carelessness and recklessness which caused and directly contributed" to the accident, the burden of proof was on defendant. The law on this point, in connection with the *prima facie* case made by plaintiff, has been stated in the following language:

"If the defendant pleads that the plaintiff was guilty of contributory negligence, or that the accident resulted solely from his negligence, the burden is upon the defendant to prove those defenses, and does not shift during the trial of the case." *McGahey v. Citizens R. Co.*, 88 Neb. 218. To the same effect: *New Omaha Thompson-Houston Electric Light Co. v. Dent*, 68 Neb. 668; *Western R. Co. v. Williamson*, 114 Ala. 131; *Gordon v. City of Richmond*, 83 Va. 436; *Interstate R. Co. v. Tyree*, 110 Va. 38; *Punkowski v. New Castle Leather Co.*, 4 Penn. (Del.) 544; *Mac Feat v. Philadelphia, W. & B. R. Co.*, 5 Penn. (Del.) 52; *Texas & P. R. Co. v. Mayfield*, 23 Tex. Civ. App. 415; *Schmidt v. St. Louis R. Co.*, 149 Mo. 269.

Defendant assumed the burden of proving contributory negligence and testified in his own behalf, stating in substance that his rate of speed was 18 or 20 miles an hour; that he was first to enter the intersection; that plaintiff did not stop at the stop sign but shot out in front of defendant; that defendant's automobile did not run into the motor-cycle; that the motor-cycle ran into the automobile; that defendant turned toward the center of the street to avoid a collision. This version of the accident stands alone and is at variance with the testimony of five eye-witnesses.

Plaintiff did not request an instruction that his negligence, if any, would not defeat a recovery unless it contributed to or caused the collision but, in view of the *prima facie* case made by him, it was the duty of the trial court

to so instruct without such a request. *Clark v. Monroe County Fair Ass'n,* 203 Ia. 1107. Defendant was not entitled to a verdict unless negligence of plaintiff contributed to or caused his injuries. In a recent law text it was said:

"In order to be contributory negligence, such negligence must be a proximate cause of the injury. It must be proximate to the injury in the same sense in which defendant's negligent act or omission must have been proximate to the injury in order to give a right of action." 45 C. J. 972, sec. 528.

The failure to instruct the jury that contributory negligence as a defense must have contributed to or caused the injury was an error prejudicial to plaintiff.

There was also a failure to instruct the jury as to the relative or reciprocal rights and duties of plaintiff and defendant at the intersection of the arterial highway and the nonfavored street. Such rights and duties affect the question of proximate cause and the law applicable thereto should have been stated to the jury. Plaintiff entered the intersection on a nonfavored street on which the drivers of motor vehicles thereon had the same rights and duties. Defendant entered the same intersection on an arterial or favored highway created by ordinance. Defendant offered and the trial court admitted the ordinance in evidence. It provides that all vehicles approaching such arteries "shall come to a stop before entering the same." The abuse of the privilege extended to drivers on arterial highways and favored streets has resulted in an alarming harvest of injuries and death as shown by the reports of adjudicated cases. The rule in Louisiana has been stated in this form:

"The right of way established by municipal ordinance in favor of vehicles using certain streets is not an exclusive privilege, and it must be exercised with due regard to the right of other vehicles to use the intersecting streets." *Vance v. Poree,* 5 La. App. 109.

The supreme court of Alabama ruled:

"A city ordinance providing that vehicles going in cer-

tain directions should have the right of way over vehicles going in other directions does not mean that a vehicle not having the right of way at a crossing must at its peril avoid collision with a vehicle having a right of way, irrespective of care or negligence by either party." *Ray v. Brannan,* 196 Ala. 113.

The federal court for the sixth circuit ruled as follows:

"Provision of a city ordinance that vehicles on main thoroughfares going in a general east and west direction shall have the right of way, as applied to automobiles, means only that, when two cars are approaching a street intersection, one on the main thoroughfare and the other on a crossing street, the latter shall give way to the other; but if there is no car on the main thoroughfare when one approaches it on an intersecting street, sufficiently near to demand this right of way, such provision has no application. It does not authorize reckless or careless driving on the main thoroughfares, without regard to the safety of crossing cars, and the driver of a car on an intersecting street has a right to assume that cars on the main thoroughfare will be operated in a lawful manner, at lawful speed, and with due care." *Bramley v. Dilworth,* 274 Fed. 267.

In Michigan the law is the same:

"If the circumstances are such as to induce in the mind of a driver of an automobile approaching a state trunk line highway intersection, acting as a reasonably prudent man, the belief that he had time and opportunity to cross before a vehicle approaching on said trunk line would reach the intersection, he cannot be said to be negligent because he makes the attempt to cross." *Pline v. Parsons,* 231 Mich. 466.

In Kentucky there is a similar rule or law:

"Driver of automobile traveling on servient highway need not yield to traveler on dominant highway except when two vehicles arrive at intersection at same time, even though lack of yielding may serve in some measure to interfere with the passage of a machine traveling on the dom-

inant highway." *Bradley v. Schmidt,* 223 Ky. 784.

With the exception of a required stop at an arterial highway, the principles of law applicable thereto as to right of way privileges are the same as those which apply to other streets.

"Right of one driving automobile on arterial street to assume that motor-cycle would be brought to stop before entering it did not give him right to travel in excess of established speed limits and without regard to rights of persons first reaching intersection to enter or cross such street." *Thompson v. Fitzgerald,* (205 Cal. 563) 271 Pac. 1072.

On authority and reason an ordinance designating a street as an arterial highway and requiring drivers of motor vehicles to stop before entering it from intersecting thoroughfares does not grant an exclusive privilege to drivers on the favored artery or require those crossing it to do so at their peril regardless of the duty of motorists on all public highways to obey traffic regulations and exercise due care to protect the rights of others. Where a motorist on a nonfavored street stops at an intersecting arterial highway when the intersection is clear of traffic, looks to the right and left for approaching vehicles, acting as a reasonably prudent person in the exercise of due care would act in the belief that he has time and opportunity to safely cross, he is not liable for negligence merely because he attempts to do so.

On the issues of proximate cause, an inherent element in both the cause of action and the defense, the jury should not have been allowed to put their own interpretation on the ordinance designating Leavenworth street as an arterial highway and requiring motorists to stop before crossing it from intersecting streets.

Other assignments of error challenge the conduct of the trial judge in making comments from the bench in the presence of the jury. The comments relate to witnesses and testimony. It is argued by plaintiff that witnesses called by him and testimony in his behalf were thus dis-

credited. The witness Francis Baust, 15 years of age, testified that he saw the accident from the northwest corner of the intersection. After describing at considerable length how the accident occurred, as he saw it, and the facts relating thereto, he said in substance that he was within two feet of defendant in front of him before either left the scene of the collision and that "his face was red and his eyes were drooping." Answering the question, "And did you observe the odor of liquor upon his breath?" the witness said, without objection, "Yes, sir." On cross-examination he was asked: "Where did you smell this liquor that you were talking about?" The answer was: "Well, from his breath." The witness was then asked: "I mean where else, where had you ever smelled any liquor before?" After an objection by plaintiff the court said to counsel for defendant:

"Why did not you object to it at the time that it was admitted? The court would not have allowed this boy to testify on that subject if there had been any objection made."

There was nothing in the testimony of the witness or in the record to disqualify him as such. Testimony tending to prove that a person is under the influence of liquor may come from a nonexpert witness. The credibility of a witness and the weight of his testimony are questions for the jury and not for the court. The remarks quoted were erroneous and the record contains other errors of a similar nature. *In re Estate of Strelow,* 117 Neb. 168.

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

REVERSED.

Note—Motor Vehicles, 42 C. J. sec. 701 n. 59, sec. 705 n. 33, 40, 47, sec. 707 n. 84, sec. 1136 n. 63—Negligence, 45 C. J. sec. 528 n. 91, sec. 755 n. 57, sec. 932 n. 16.

HENRY A. DAWSON, APPELLEE, V. STOCKMEN'S NATIONAL BANK OF RUSHVILLE, APPELLANT.

FILED NOVEMBER 8, 1929. No. 27108.

Appeal: BILL OF EXCEPTIONS. A bill of exceptions showing on its face that material evidence has been omitted will not be considered on appeal in determining issues of fact or the sufficiency of the evidence to sustain a finding below, though certified by the trial judge as a bill of exceptions containing all the evidence.

APPEAL from the district court for Sheridan county: EARL L. MEYER, JUDGE. Motion to quash bill of exceptions. *Motion sustained.*

*Irving R. Butler* and *C. C. Flansburg,* for appellant.

*Allen G. Fisher* and *Charles A. Fisher, contra.*

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

ROSE, J.

This is a motion by appellee to quash the bill of exceptions on the ground that it does not contain all material evidence offered and admitted at the trial in the district court. In resisting the motion appellant contends that there is an authentic and conclusive certificate of the trial judge allowing the bill of exceptions and stating that it contains all the evidence.

The bill of exceptions shows on its face that it does not contain testimony admitted at a former trial and again offered in evidence and again admitted at the trial resulting in the judgment of which appellant now complains. In an early case the following rule was announced:

"Where from an inspection of a bill of exceptions it is apparent that material evidence has been omitted, the certificate that it contains all that was used on the trial will not be taken as conclusive on that point." *Missouri P. R. Co. v. Hays,* 15 Neb. 224.

In a later case the supreme court held:

"The certificate of the trial judge attached to a bill of

exceptions, reciting that 'the bill contains all the evidence offered or adduced by either party,' is unavailing, and will not control, where the bill on its face reveals the fact that important and material evidence has been omitted therefrom; and in such case the verdict will not be set aside as contrary to the evidence." *Nelson v. Jenkins*, 42 Neb. 133.

The rules stated have been consistently applied where the same questions were involved. *Oberfelder & Co. v. Kavanaugh*, 29 Neb. 427; *Schneider v. Tombling*, 34 Neb. 661; *Dawson v. Williams*, 37 Neb. 1; *Omaha Fire Ins. Co. v. Berg*, 44 Neb. 522; *Conger v. Dodd*, 45 Neb. 36; *Storz v. Finklestein*, 48 Neb. 27; *Greene v. Greene*, 49 Neb. 546; *Alling v. Fisher*, 55 Neb. 239; *Girard Trust Co. v. Paddock*, 88 Neb. 359; *Card v. Mix*, 88 Neb. 741.

It follows that in determining issues of fact or the sufficiency of the evidence to sustain a finding below the bill of exceptions cannot be considered on appeal. For those purposes, therefore, the motion to quash is sustained.

MOTION SUSTAINED.

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## FRED ROEDER V. STATE OF NEBRASKA.

FILED NOVEMBER 14, 1929. No. 26939.

1. **Evidence** examined and outlined in the opinion *held* sufficient to sustain the verdict.
2. **Criminal Law**: INSTRUCTIONS. Error cannot be predicated on refusal to give instructions to the jury, where those given contain the substance of the ones requested.
3. ———: ———: MOTIVE. In a criminal prosecution, where there is evidence tending to prove a motive, the court is justified in refusing to give an instruction that lack of motive is a circumstance, in favor of defendant, to be considered by the jury.
4. **Evidence.** When one part of a conversation is given in evidence by one party, the whole on the same subject may be inquired into by the other. Comp. St. 1922, sec. 8849.

ERROR to the district court for Adams county: J. W. JAMES, JUDGE. *Affirmed.*

*James E. Addie*, for plaintiff in error.

*C. A. Sorensen, Attorney General,* and *Clifford L. Rein, 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 convicted on an information charging him with malicious destruction of personal property of the value of more than $35, and was sentenced to imprisonment in the penitentiary for a period of 18 months. He prosecutes error to review the record of his conviction.

Several of the assigned errors relate to the sufficiency of the evidence to sustain the verdict. From the record the following pertinent facts appear:

The defendant and one Albright each owned and operated threshing machines and were competitors in business. Defendant lived in the city of Hastings. On October 24, 1928, after completing a job of threshing, Albright's machine was moved to the premises of one Hollister and was set in a stubble field, preparatory to engaging in another job of threshing on the following day. After the machine was so placed, Albright cleaned the separator before leaving it for the evening. That night, shortly after 12 o'clock, the separator was discovered to be on fire. It was wholly consumed by the flames. There had been no electrical storm that day or evening, and it was apparent that someone must have set fire to the separator. An examination of the premises about the machine the following morning disclosed foot-prints leading to and from the scene of the fire. These tracks were traced and they came from and returned to a nearby corn-field into which an automobile had been driven and turned around. These foot-prints were carefully examined and disclosed certain peculiarities. The tracks made by the tires of the automobile were also examined, from which it was discovered that a different character of tire was upon each one of the wheels; one being a smooth tire; another with a patch upon it which made a

mark at each revolution of the wheel, and the others bearing peculiar marks showing a different kind of tire upon each of the wheels.

For some years previous defendant had done the threshing for Mr. Hollister and others in the neighborhood, and had solicited their threshing jobs for the season of 1928, but had been informed that the jobs had been given to Albright. Suspicion was directed to the defendant, and on the morning of August 25 a deputy sheriff went to defendant's home and found him working upon his threshing machine. The deputy informed him that he was suspected or accused of burning Albright's separator, and requested defendant to go with him to the courthouse, to submit to an examination by the county attorney. Defendant consented and went with the deputy sheriff to the county attorney's office. The county attorney being at the time engaged in his private room, defendant was seated in the outer office, where the deputy left him while he went into the sheriff's office. In a few moments it was discovered that the defendant had left the courthouse, without waiting to be questioned by the county attorney. Search was made for him and he was not found in his room or about the city of Hastings.

It appears that defendant left the city that day, about noon, and drove to the home of one Carl Brucker, some seven or eight miles in the country. He tried to induce Brucker to go with him to North Dakota, to there engage in threshing. Brucker's working engagements would not permit him to go at that time. That night Brucker and his mother drove into the city of Hastings. Defendant accompanied them in their car, stating to Brucker that he did not want to bring his own car into Hastings. While in Hastings that evening he obtained his clothing and returned with Brucker and his mother to their home. The next morning he told Brucker that he was going to North Dakota and gave him an address, with the request that Brucker write him and send any clippings, relative to the fire, which might appear in the newspapers. He also

told Brucker that the officers were after him but that they would not "get him" in Nebraska.

The premises of defendant were searched and under his bed were found a pair of shoes. These were taken and fitted into the tracks found in the corn-field and leading to and from the location of the burned separator. The shoes not only fitted the tracks made, but certain peculiarities of the heels and sides of the shoes were observed in the tracks, which were such as these particular shoes would make. Also, one witness, who had worked for the defendant, testified that he had seen him wear shoes of this particular type. A pair of defendant's shoes were placed in evidence, and, although evidently of a different type, the shoes are the same size as those found under his bed. Later the defendant was arrested in North Dakota, and he and his automobile were brought back to Hastings. The tires, taken from his car, were introduced in evidence. It appears that one of the tires has a smooth tread, another a large patch upon it, which corresponds to the mark of the car track found in the field. Each of the other tires is of a distinctive and different type, and the markings of these tires also correspond very closely to the several markings of the tire tracks in the field.

While returning from North Dakota defendant denied burning the separator, but told the deputy sheriff that he would like to have Mr. Albright come to the jail to see him, and indicated a willingness to pay him for the loss of his machine. It also appears that one witness, who had formerly worked for defendant, and who was seeking employment for the season of 1928, was told by defendant that Albright had secured a number of the threshing jobs which defendant formerly had, and that he believed Albright was cutting prices, and defendant stated that he would "get even" with him. There were other circumstances proved pointing toward defendant's guilt.

While the evidence of defendant's guilt is circumstantial, from a consideration of the entire record we are

constrained to hold that the jury, if they believed the state's witnesses, were warranted in the verdict which they returned. It is true that defendant and his brother testified that on the night in question defendant was at his home; that they slept in the same bed; and that defendant had nothing to do with the burning of the separator; and it is also true that a large number of reputable citizens testified to defendant's previous good character as a law-abiding citizen; but this presented merely a question for the jury. It was for them to determine whom they would believe.

Complaint is made of nearly all of the instructions given by the court, but only one or two are discussed in the briefs. After a careful examination of the entire charge, we find no misstatement of the law, or anything that was prejudicial to the rights of defendant.

We have carefully examined all of the requested instructions, and find that most of them are covered in those given by the court.

Particular complaint is made of the failure of the court to instruct the jury that lack of motive was a circumstance to be considered in defendant's favor, in determining his guilt or innocence. We think there was sufficient evidence to indicate that there was a motive, and the court was, therefore, justified in refusing to give an instruction of the character requested.

Complaint is made because the county attorney was permitted to ask leading questions of several of the witnesses. In a number of instances leading questions, suggesting the answers, were propounded and answered, but in nearly every instance no objection to the question was interposed. In one or two instances there was an objection lodged. The rule is that it is within the sound discretion of the trial court to determine whether leading questions shall be permitted, and error cannot be predicated upon the ruling of the court in permitting leading questions, unless there is an abuse of discretion. The answers to the questions, to which objection was interposed and over-

ruled, were not prejudicial to the defendant, and we do not find that there was any abuse of the court's discretion.

Serious complaint is made because the deputy sheriff was permitted, while on the witness-stand, to detail, on his redirect examination, a conversation had with one Dohman, in North Dakota, where defendant was arrested, and which conversation was not had in the presence of defendant. This testimony was quite damaging to the defendant. The record discloses that counsel for defendant first went into the conversation had with Dohman and brought out a part of it, and, upon redirect examination, the trial court permitted the whole of the conversation to be detailed.

Section 8849, Comp St. 1922, *inter alia,* provides: "When part of an act, declaration, conversation or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other." Since the defendant, himself, first introduced evidence of a part of the conversation in question, the court properly ruled that the state was entitled to give the whole of the conversation on the same subject-matter.

The record discloses no error prejudicial to the rights of the defendant. The judgment is

AFFIRMED.

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TRAVELERS INSURANCE COMPANY ET AL., APPELLEES, V. HARRY C. OHLER, APPELLANT.

FILED NOVEMBER 14, 1929. No. 27177.

1. **Master and Servant:** COMPENSATION CASES: APPEAL. The rule established in compensation cases, that the finding of the trial court, based on conflicting evidence, will not, on appeal, be disturbed if supported by sufficient competent evidence, is applicable to compensation cases where the judgment of the district court was rendered before the taking effect of chapter 81, Laws 1929.
2. **Constitutional Law:** STATUTES: WHEN MAY NOT OPERATE RETROACTIVELY. A legislative act will not be permitted, even if an attempt so to do is disclosed, to operate retrospectively where it

will have the effect to invalidate or impair the obligation of contracts or interfere with vested rights.

3. **Master and Servant: INJURY TO SERVANT: SUFFICIENCY OF EVIDENCE.** The record examined, and *held* that the finding of the trial court as to the cause of appellant's disability is not sustained by sufficient competent evidence.

4. ———: ———: **NOTICE.** An employee, sustaining an accidental injury arising out of and in the course of his employment, will not be denied compensation for failure to give notice of claim within six months or to commence his action within one year from the date of the accident, when it appears from the evidence that the injury was latent and did not result in compensable disability until after the expiration of the time for giving notice of claim and commencing action, provided notice is given and action commenced within the statutory period after the employee has knowledge that the accident has caused a compensable disability.

APPEAL from the district court for Lancaster county: ELWOOD B. CHAPPEL, JUDGE. *Reversed, with directions.*

*Kinsinger & Ogden,* for appellant.

*Hall, Cline & Williams, contra.*

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

GOOD, J.

This action arises under the workmen's compensation law. Appellant Ohler was an employee of the Patriot Manufacturing Company. The Travelers Insurance Company was the compensation insurance carrier for the employer.

To defeat the claim for compensation it was alleged in the district court: (1) That the disabilities of appellant were not caused nor contributed to by the accident; (2) that no notice of claim for compensation was given within six months from the date of injury; and (3) that no action was commenced by filing a claim before the compensation commissioner until more than a year had elapsed from the date of the accident. The district court sustained the contentions of appellees and denied compensation. Ohler has appealed.

On October 3, 1926, while appellant was in the performance of his duties as an employee of the Patriot Manufacturing Company, he received an electric shock. He received treatment on two occasions shortly thereafter from his employer's physician, the bill for which was paid by the employer or the insurance company. Apparently, appellant did not consider the injury very serious at the time, but continued his work, with slight interruptions, until October 29, 1927, when he voluntarily quit work because of his alleged incapacity to perform his duties.

Very shortly after the accident appellant suffered a loss of appetite, loss in weight, and severe and continuous headaches; later suffered from sleeplessness; was nervous and incapable of concentrating his mind upon his work or upon any given subject; lost interest in his work; became irritable, at times dizzy, and it was this condition which caused him to cease work on the 29th of October, 1927. It is his contention that this condition was the direct result of the electric shock.

The evidence, as to whether his condition was caused by the electric shock or from some other unknown cause, is in direct conflict. A number of eminent physicians, skilled in nervous and mental disorders, were called to testify for each of the parties. Those called by appellant included physicians who had treated him from time to time from the date of the accident up to the trial, a period of more than two and one-half years; while the two physicians called by the appellees had never treated him, and their opinions were based upon an examination made only a few days before the trial of the cause in June, 1929. One of these two physicians unqualifiedly stated that the injury or the accident was not the cause of his present disability. This physician, as a witness, however, evinced a very strong partisanship, and was evasive in his cross-examination to such an extent that the weight of his testimony is very greatly affected. The other of the two physicians called by appellees expressed the opinion that appellant was suffering from a nervous breakdown, and

that the cause of it was overwork, but on cross-examination admitted that the electric shock had aggravated and accelerated the nervous breakdown; while the testimony of the several doctors, four or five in number, who had treated and examined appellant and had a more intimate knowledge of his condition over a greatly extended period of observation gave it as their unqualified opinion that his present disability was the direct result of the electric shock. It is true that the physicians testifying for appellant do not agree as to the exact nature or name of his injury. Some diagnose it as cerebral edema and others as multiple sclerosis, but, in any event, all of them agree that he is, practically, totally disabled from performing his accustomed duties, and that his condition was caused by the electric shock.

The rule has obtained in this jurisdiction that the findings of the trial court will not be disturbed in compensation cases if supported by competent evidence. *City of Fremont v. Lea*, 115 Neb. 565; *Bauer v. Anderson*, 114 Neb. 326; *Young v. Johnson & Blind*, 113 Neb. 149. Counsel for appellant, however, call attention to section 3060, Comp. St. 1922, as amended by chapter 81, Laws 1929, which, in part, provides: "If either party at interest is dissatisfied with the award of the compensation commissioner, then the matter may be submitted to the district court, * * * which court shall have authority to hear and determine the cause as in equity when the same for all purposes shall be tried as one in equity, and if an appeal is had to the supreme court, the same shall be considered *de novo*." Counsel contend that this statute is applicable to the case here.

The record discloses that the judgment in this case was rendered on the 11th of July, 1929, while chapter 81, Laws 1929, did not become a law until the 24th day of July, 1929. It is a general rule that statutes will act prospectively and not retrospectively unless a contrary intention is clearly disclosed. *State v. Federated Merchants Mutual Ins. Co.*, 117 Neb. 98, and cases there cited. It may be observed

that there is nothing in said chapter 81 indicating an intent that it should operate other than prospectively. Counsel for appellant, however, seem to contend that, if the appeal is taken subsequent to the time when the act becomes a law, it is applicable thereto. We do not think that this contention can be sustained, as applied to the instant case and under the particular statute, for the following reasons:

A legislative act will not be permitted, even if an attempt so to do is disclosed, to operate retrospectively where it will have the effect to invalidate or impair the obligation of contracts or interfere with vested rights. 2 Lewis' Sutherland, Statutory Construction (2d ed.) sec. 642; *United States v. Jackson,* 143 Fed. 783; *Hoyt Metal Co. v. Atwood,* 289 Fed. 453; *Spitzer v. Healy,* 218 N. Y. 737.

In *Davis v. Robinson,* 200 Ia. 840, it was said: "The courts of this country with practical unanimity have always held that the time allowed for an appeal cannot be reduced by legislative enactment after judgment." In *Wilcox v. Saunders,* 4 Neb. 569, 573, relating to the right of appeal by statute, it was said: "In the interpretation of statutes, it is a familiar doctrine that they can have no retrospective operation beyond the time of their commencement, unless so declared by express words or positive enactment, and in such case they will be considered as inoperative and void, if they affect or change vested rights." In 6 R. C. L. 319, sec. 307, it is said: "A judgment is such a vested right of property that the legislature cannot, by a retroactive law, either destroy or diminish its value in any respect." The rule above quoted was announced in *Hoyt Metal Co. v. Atwood, supra,* and numerous cases are therein cited as holding to the same effect.

It may be conceded that, ordinarily, the rules of court procedure alone may at any time be changed by legislative enactment, but if a legislative enactment does, in fact, impair or affect a vested right it is unenforceable or inapplicable as against the enforcement of rights so impaired. What belongs merely to the remedy may be altered,

provided that the alteration does not impair the obligation of the contract or interfere with the vested right. If it does the latter, then it is invalid and contrary to the Fourteenth Amendment of the federal Constitution. *Hoyt Metal Co. v. Atwood, supra; Tennessee v. Sneed,* 96 U S. 69, 24 L. Ed. 610; *McGahey v. Virginia,* 135 U. S. 662, 34 L. Ed. 304.

When the judgment was entered in the district court the parties had vested rights, and one of these rights was that this judgment could only be overturned, on appeal, on a question of fact by the rule then applicable thereto. We are constrained to hold that section 3060, Comp. St. 1922, as amended, does not require the trial of compensation cases in this court *de novo,* except in cases where the judgment was rendered after chapter 81, Laws 1929, became a law.

We are required, therefore, to determine whether the finding of the trial court is supported by sufficient competent testimony, or whether it is clearly wrong. There is no conflict in the record that appellant suffered an electric shock, nor of the fact that thereafter he became afflicted in the manner above indicated, and that he is now practically disabled from performing his ordinary duties. The only conflict is as to whether that condition is the result of the electric shock. Upon a consideration of the entire record, we think that the great weight of the testimony indicates very clearly that appellant's disability is a result of the electric shock which he received in October, 1926. Indeed, one of the experts called by appellees admitted that his condition was in part due to the electric shock. An examination of the entire record convinces us that the finding of the trial court is not sustained by sufficient evidence and is so contrary to the weight of evidence as to be clearly wrong.

Having determined that appellant has sustained a compensable injury, we are now required to determine whether he shall be deprived of compensation because of his failure to give notice of claim and commence his action within the time prescribed by statute.

This court has recognized that the workmen's compensation law was framed for the purpose of requiring industries to bear a part of the loss occasioned to workmen, engaged therein, becoming disabled while employed in the industry, when such disability arises out of and in the course of employment. It has been the declared policy of this court not to deny its benefit by resorting to strained or technical construction, but to give to its provisions a liberal construction so as to effectuate its general purpose. *Parson v. Murphy,* 101 Neb. 542; *Selders v. Cornhusker Oil Co.,* 111 Neb. 300. Applying these principles in the case last cited, this court held: "A latent accidental injury to a workman, seeming at first to be trifling, but subsequently resulting in disability, may be found to occur when discovered by means of X-rays, within the meaning of the workmen's compensation law, providing that no proceeding for compensation shall be maintained unless the claim therefor is made within six months from the occurrence of the injury." In that case the injury was latent, the claim was not filed within six months, and it was held that the injured employee was not thereby denied compensation.

Again, in *McGuire v. Phelan-Shirley Co.,* 111 Neb. 609, the same rule was applied, and it was therein determined that an injured workman, who had not given notice of his claim within six months and had not filed his claim within the one year prescribed by the statute, was not thereby deprived of the right to receive compensation. In *City of Hastings v. Saunders,* 114 Neb. 475, it was held: "Where an employee is accidentally injured, and such injury is latent and of a progressive nature, and subsequently culminates in a compensatory disability, a claim for such injury under our employers' liability act may be filed with the compensation commissioner at any time within one year after the culmination thereof."

The record in the present case discloses that the injury received by appellant was of a latent character and did not develop, so that he was aware of the fact that he had a compensable injury, until long after the time for filing

claim and commencing action, by the strict letter of the statute, had expired. We think the facts presented in this case bring it within the rule announced in the authorities just cited, and that the defense that notice of claim was not given, or the action commenced within the statutory period, is not available to the appellees in this case.

The record shows that at the time of his injury appellant was earning $75 a week. His earning at the present time and since the date is and has been negligible. Under the statute applicable, he is entitled to compensation at the rate of $15 a week for a period of 300 weeks, dating from the 29th day of October, 1927, and $12 a week for the remainder of his life, subject, however, to a modification in the event his disability ceases or is lessened so as to affect the amount of his recovery, as provided by statute.

Appellant is also, as disclosed by the record, entitled to recover for medical care and services the sum of $126, and to an allowance for attorney's fees in the sum of $200.

The judgment of the district court is reversed, and the cause remanded, with directions to enter judgment for appellant in conformity with this opinion.

REVERSED.

Workmen's Compensation Acts, C. J. sec. 103 n. 43; sec. 134 n. 82, sec. 139 n. 95, sec. 144 n. 29, L. R. A. 1917D, 138; L. R. A. 1918E, 559; 16 A. L. R. 462; 28 R. C. L. 825; 4 R. C. L. Supp. 1869; 5 R. C. L. Supp. 1579; 6 R. C. L. Supp. 1764; 7 R. C. L. Supp. 1010.

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## SIDNEY A. TROBOUGH V. STATE OF NEBRASKA.

FILED NOVEMBER 14, 1929. No. 26967.

1. Jury: CHALLENGE FOR CAUSE. In the impaneling of a jury in criminal cases, all challenges for cause shall be tried by the court, on the oath of the person challenged, or on other evidence, and, as of right, shall be made before the jury is sworn and not afterward.

2. ———: ———: TRIAL OF ISSUE. Likewise, after a party's peremptory challenges are exhausted, if a cause of challenge is then denied by a proposed juror on his *voir dire*, such party has the right to have, on his application, the issue tried by the court, for which purpose witnesses on either side may be summoned and examined as on the trial of other issues of fact.

ERROR to the district for Adams county: J. W. JAMES, JUDGE. *Reversed.*

*F. L. Carrico*, for plaintiff in error.

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

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

EBERLY, J.

In a prosecution by the state, in the district court for Adams county, Sidney A. Trobough was convicted of murder in the second degree, and, as a penalty therefor, was sentenced to serve a term of 18 years in the penitentiary. His wife, Sarina Trobough, was the victim of the homicide. As plaintiff in error, the defendant presents for review the record of his conviction.

The first error assigned is the refusal of the court to permit the introduction of evidence in contradiction of the statements of the *voir dire* of, and overruling defendant's challenge for cause to, juror James Knudson. It appears from the record that, after the regular panel had been exhausted, the court ordered the sheriff to summon twelve men from the body of the county; the sheriff proceeded to summon the twelve men, two of these being excused for cause; a further order was made by the court to call additional talesmen. Examination and challenge having exhausted the talesmen so ordered by the court, a further and additional order was made by the district court directing the sheriff to bring in two more men from the body of the county. At this time the defendant had exhausted the last of his peremptory challenges. The juror James Knudson, who had been summoned as a talesman, was

then called by the clerk and examined by the county attorney, and upon such examination by the county attorney he in substance testified that he did not know Sidney A. Trobough, nor any of the members of his family, and that he had heard nothing about the case, only what he had read in the paper; that he had never talked to any one about the case, save and except members of his family; that he did not think he had any opinion as to the guilt or innocence of the defendant. Thereupon the defendant's attorney propounded the following interrogatories, to which the following answers were returned: "Q. Were you at the Brandes Hall some time since the happening of this affair in which you expressed yourself about this matter? A. I might have been there. Q. Do you recall at any time at a dance at the Brandes Hall that you talked about this matter? A. Well, I don't seem to remember that I did, but it may be that I did. Q. And you don't remember at that time of expressing an opinion about the guilt or the innocence of this defendant? A. No. Q. You have talked, though, to other persons outside of the members of your family about it haven't you? A. Well, I may possibly have, I don't recollect of it, though. Q. You don't recollect, of talking to anybody else, only the members of your family? A. I don't seem to. Q. Now, calling your attention to the time that you had this talk in the Brandes Hall, it was right after this trouble happened out here; do you recall now of talking to Mr. Kockrow up there about this matter and expressing yourself about it? A. I remember—I believe that was a night or so afterwards. Q. And you did express yourself at that time, didn't you? A. I don't remember that I did. Q. You had rather a heated argument, didn't you? A. No; I don't think that. I remember we talked about it now with Mr. Kockrow and somebody else. Q. And you at that time expressed your opinion about it, didn't you? A. I can't seem to think that I did. I don't remember it. Mr. Carrico: Well, that is true. I can't go any further. I want to challenge him for cause, and will introduce further evidence to show that he did talk and express his opinion. The Court: You can ask the

juror anything you want to. Mr. Carrico: I have asked all that I can ask him. I challenge the juror on that ground, and offer to introduce other evidence to show that he did form and express an opinion. Mr. Crow: We resist the challenge. The Court: Q. Have you any opinion at this time as to the guilt or innocence of the defendant? A. No. Q. Have you ever had? A. No; not that I know of. I don't think I do. Q. You feel at this time that you can enter upon the trial of this case and render a verdict as between the state and the defendant upon the evidence as given by the sworn testimony of the witnesses and the law as given you by the court, and lay everything else aside except that? A. Yes. Q. You think you can? A. I believe I could."

And thereafter the defendant, prior to the commencement of the trial and introduction of evidence, further objected to the juror James Knudson as follows:

"Mr. Carrico: Now the defendant further objects to James Knudson for the reason that said James Knudson has formed and expressed an opinion, and denied the same on his examination; and, further, that at the time the said James Knudson was called to qualify as a juror the defendant had already exhausted all of his peremptory challenges and that he had no opportunity then save and except the opportunity of showing by extrinsic evidence or other witnesses that the said James Knudson had so formed and expressed such opinion.

"This defendant offers to show that the said James Knudson not only expressed an opinion, but declared the defendant to be guilty, and that he would like to have an opportunity to so declare; that he expressed some desires of wanting to be on the jury for that purpose. And defendant offers to show all the said facts from other witnesses who were present at the time and heard the said James Knudson make said declarations."

These objections were carried over in the motion for new trial, and the four affidavits in support thereof are to the effect that on the night of the 29th of November, 1928, the juror James Knudson was in attendance at a

dance at Brandes Hall in the city of Hastings, Nebraska; that James Knudson was then talking to other persons about the case of State of Nebraska v. Sidney A. Trobough, and that at said time the said Knudson stated that defendant Trobough was no doubt guilty; that there was not any doubt about his guilt; that the electric chair was too good for him, and that, if he was on the jury, he would send him there; that he voiced his sentiment as to guilt of defendant in very strong, loud and vehement terms, and that at said time said Knudson was talking in the presence of and with persons who were and appeared as witnesses in the case of State v. Trobough.

The court ignored the issue of fact thus tendered by the defendant; denied him permission to introduce extrinsic evidence to establish the true facts and the true attitude of mind of the juror James Knudson, and overruled all challenges to the competency of that juror, who thereafter participated in the trial as a member of the jury.

One of the rights secured by our Constitution to the accused is that of a speedy public trial by a fair and impartial jury of the county or district in which the offense is alleged to have been committed. Has such a trial been accorded the accused in the present case?

The enforcement of this right is committed, in the first instance, to the trial court. As a device provided to secure this end, we have our system of examination and impaneling of the jury. Ordinarily, incompetency of jurors is disclosed by their *voir dire* examination, but this is not necessarily always true. A cause for challenge or the matters of fact constituting the grounds sustaining such challenge may be denied by the proposed juror when in truth they exist. Such a situation calls for the application of the rule that—"If the cause of challenge is denied, a party has the right to have the issue tried and witnesses on either side may be summoned and examined as on the trial of other issues." 35 C. J. 401. "The tendency of the modern practice, however, to submit the whole question of the qualifications or compentency of the proposed jurors to the court * * * so that, while the juror may himself be

sworn as a witness to prove the cause of challenge, and may be asked any questions not tending to degrade or incriminate him, the cause of challenge may be established by any other competent testimony, * * * and the parties have a right to contradict the testimony of the juror by that of other witnesses. On a challenge to the favor any fact or circumstance from which bias or prejudice may justly be inferred is admissible as evidence. The matter is regulated by statute in some states." 35 C. J. 400.

Section 10135, Comp. St. 1922, provides as follows: "All challenges for cause shall be tried by the court, on the oath of the person challenged, or on other evidence, and such challenge shall be made before the jury is sworn, and not afterward." In view of the terms of the above pronouncement it would seem the right to introduce extrinsic evidence to show the actual attitude of mind of a person tendered as a juror should be granted. The statute quoted is in fact a legislative recognition of the rule announced in 35 C. J. 400, 401.

The danger to be apprehended, and which the above statutory provision was evidently intended to guard against, has been recognized by our court, as may be seen in the language of Reese, C. J., in *Thurman v. State*, 27 Neb. 628, as follows: "No provision is made by law or the Constitution for any other challenges or objections to the jurors than those named. Jurors might then be called who, to the knowledge of the accused, were prejudiced against him and even might deny prejudice or bias or the formation of opinion (as the writer has seen done) for the express purpose of being retained upon the jury in order that a conviction might be secured. Could it be said that the constitutional provisions, that an accused should have a fair and impartial trial, had been complied with? Most certainly not." This conclusion is borne out by the pronouncements of other jurisdictions. In *People v. Evans* (72 Mich. 367) 40 N. W. 473, the rule is laid down: "After a juror has denied on his *voir dire* that he has said he believed respondent to be guilty, it may be shown by other witnesses that the juror had made such statement."

See, also, in support of this principle *State v. Cleary*, 40 Kan. 287; *United States v. Christensen*, 7 Utah, 26.

On this issue of fact the defendant was entitled to introduce and have received extrinsic evidence which, had it been received, would plainly have disclosed the incompetency of the juror in question. It follows, therefore, that the court erred in denying the right to the defendant to produce extrinsic evidence to sustain the challenge and support the issue of fact created thereby. In this connection it is to be noted that the issue of fact presented is the competency of the witness, and that the impeachment of the witness is not necessarily involved, and therefore the limitations imposed on impeaching questions as to foundation as to time, place, presence and substance of statement have no application.

Exceptions are also presented by the defendant to the failure of the court to instruct on the subject of "motive," an instruction covering that subject having been tendered by the defendant. It cannot be gainsaid that in the prosecution of crime evidence to establish a motive is competent, and if otherwise unobjectionable will be received for the consideration of the jury. It must also be conceded that evidence tending to establish the nonexistence of motive is likewise competent and is proper for the consideration of the jury. Indeed, the question of presence or absence of motive is often one of the most important factors in proceedings involving the prosecution of crime where the state is seeking to convict by circumstantial evidence. The importance of motive, therefore, suggests the necessity of proper instructions to the jury concerning the same, and while absence of all evidence of motive in a case may be conceded to be circumstances favorable to the defendant, still it is not the province of the court to instruct the jury of the weight or bearing to be given to any particular circumstance; yet this court is committed to the doctrine that the defendant is entitled to an instruction on the subject of motive, at least to the extent that the absence of all evidence of motive is a circumstance that should be considered by the jury in connection with all

other facts and circumstances in determining the guilt or innocence of the accused. It is thought an instruction on the subject of motive should have been given by the district court in the present case.

Prejudicial error appearing in the record, the conviction cannot be permitted to stand. The judgment is reversed and the cause remanded for further proceedings.

REVERSED.

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SPLITTGERBER BROTHERS ET AL., APPELLEES, V. SKINNER PACKING COMPANY ET AL., DEFENDANTS: RALPH L. PETERSON, INTERVENER, APPELLANT.

FILED NOVEMBER 14, 1929. No. 26715.

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

*Congdon, Finlayson & Burke,* for appellant.

*North & O'Reilly,* for appellees.

*Ritchie, Chase, Canaday & Swenson,* for defendants.

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

RAPER, District Judge.

In a cause brought by Splittgerber Brothers against Skinner Packing Company, the appellant, Ralph L. Peterson, filed a petition in intervention. The suit by Splittgerber Brothers was an action to rescind sale of stock in the Skinner Packing Company on the ground of false representations and to recover the sale price. Ralph L. Peterson claimed right to intervene as stockholder in another corporation which he alleged had agreed to assume the liabilities of the Skinner Packing Company and therefore he had such interest as gave him right to intervene in the suit against the Skinner Packing Company.

On the 9th day of January, 1928, the district court sustained a demurrer to the petition of intervention and dismissed it. January 31, 1928, the intervener filed motion

for new trial on the order dismissing his petition in intervention. That motion for new trial was overruled on May 4, 1928, and thereafter, on August 4, 1928, the intervener filed his appeal in this court. The plaintiff, Splittgerber Brothers, presented a motion in this court to dismiss the appeal of intervener because the motion for new trial was not filed in time fixed by law, and that the appeal was not perfected as required by the statutes.

If a motion for new trial was a necessary step in order to obtain a review in this court, it was not filed within the time fixed by law and was therefore of no effect. If, however, the presenting and overruling of a motion for new trial was not a necessary proceeding, then the appeal, having been lodged more than three months after the dismissal of intervener's petition, did not give this court jurisdiction of the appeal. Without determining whether, in an action at law, motion for new trial and overruling of same, on an order sustaining a demurrer and dismissing a petition in intervention, is a necessary prerequisite to effect an appeal to this court, it follows that in either event, as above stated, the appeal of intervener should be dismissed.

Appeal of Ralph L. Peterson, intervener, is dismissed at his costs.

APPEAL DISMISSED.

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## STANTON COUNTY ET AL. V. STATE BOARD OF EQUALIZATION AND ASSESSMENT.

FILED NOVEMBER 16, 1929. No. 27178.

For syllabus, see *Northwestern Bell Telephone Co. v. State Board of Equalization and Assessment*, p. 138, *post*.

ERROR to the State Board of Equalization and Assessment. *Increase of assessment vacated.*

*Fay H. Pollock*, for plaintiffs in error.

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

*C. H. Hendrickson, amicus curiæ.*

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

DEAN, J.

The board of equalization and assessment, without notice, entered an order August 2, 1929, increasing the assessed valuation of the various grades of cattle in all counties throughout the state in the amount of 10 per cent. This action was begun by petition in error by Louis Smithberger and Theodor Lammli, taxpayers and citizens of the county of Stanton, in behalf of themselves and others similarly situated whose cattle assessments have been likewise increased in the same amount.

The questions of law and procedure herein are the same as in the case entitled *Northwestern Bell Telephone Co. v. State Board of Equalization and Assessment,* p. 138, *post,* and our decision is governed by the rule therein announced.

It follows that the order of the board of equalization increasing the assessed valuation of the various grades of cattle 10 per cent. must be and it hereby is vacated and held for naught.

JUDGMENT ACCORDINGLY.

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## LINCOLN TELEPHONE & TELEGRAPH COMPANY V. STATE BOARD OF EQUALIZATION AND ASSESSMENT.

FILED NOVEMBER 16, 1929. No. 27180.

For syllabus, see *Northwestern Bell Telephone Co. v. State Board of Equalization and Assessment,* p. 138, *post.*

ERROR to the State Board of Equalization and Assessment. *Increase of assessment vacated.*

*Woods, Woods & Aitken,* for plaintiff in error.

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

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

DEAN, J.

In view of the fact that the questions of law and of procedure involved in this action are practically identical with those involved in and decided in the case entitled *Northwestern Bell Telephone Co. v. State Board of Equalization and Assessment,* p. 138, *post,* we do not therefore find it necessary to extend this opinion by further discussion.

It follows that the order of the board of equalization increasing the assessed valuation of the telephone properties 20 per cent. must be and it hereby is vacated and held for naught.

JUDGMENT ACCORDINGLY.

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## NORTHWESTERN BELL TELEPHONE COMPANY V. STATE BOARD OF EQUALIZATION AND ASSESSMENT.

FILED NOVEMBER 16, 1929. No. 27181.

**Constitutional Law: TAXATION: INCREASE OF ASSESSMENT.** Where an increase in the assessed valuation of any class or classes of property, as returned by any county or counties, is made by the state board of equalization and assessment without notice to such county or counties, and without affording sufficient opportunity to be heard, such increase is in violation of section 5901, Comp. St. 1922, and amounts to confiscation of property without due process and is therefore a void increase of assessment.

ERROR to the State Board of Equalization and Assessment. *Increase of assessment vacated.*

*F. E. Randall, A. G. McBean* and *K. F. Oehler,* for plaintiff in error.

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

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

DEAN, J.

The state board of equalization and assessment, hereinafter called the board, was created under section 5898, Comp. St. 1922, and consists, *ex officio*, of four elective state officers, namely, the governer, the secretary of state, the state auditor, and the state treasurer, and also the tax commissioner. August 2, 1929, at a meeting of the board, an order was executed increasing the assessed valuation of all telephone properties throughout the state, in the sum of 20 per cent., as stated, for the year 1929, as reported by the abstracts of assessed property in the several counties. Thereupon, in due course, the board ordered that the 20 per cent. increase be duly certified to all county clerks to the end that such required increase might be regularly carried on the tax rolls. It clearly appears that the order complained of was entered by the board without notice to the counties making the return and without affording sufficient opportunity to be heard by the board. And it also appears that the board did not call any witnesses nor was any testimony whatever considered in respect of the increased valuation of the telephone property in question.

When the order which purports to increase the assessed valuation was published, plaintiff, under authority of section 5901, Comp. St. 1922, filed a petition for a writ of error wherein the assignments of alleged error were set out. And, pursuant to an order issued by this court, the writ was allowed and the subject-matter of the controversy is now before us for final decision on the merits.

Section 5901, above cited, provides that the board shall issue a notice to the counties which it deems under-valued or over-valued on the tax list, as the facts may appear to warrant, and it is also provided in the same section that the board thereupon "shall set a date for hearing at least five days following the mailing of such notice. At such hearing legal representatives of the counties may appear and show cause why the valuation or valuations of their county should not be increased or decreased by the state board, and after a full hearing, the state board shall enter

its order and certify the same to the county clerks of the proper counties as hereinbefore set forth in this section."

Plaintiff, as herein noted, contends and it is not denied, that no notice was given by the board that a hearing would be held in respect of the proposition to raise the assessed valuation, and that no opportunity was given to the company to submit evidence thereon. In 3 Cooley, Taxation (4th ed.) sec. 1123, the learned author says:

"But as an increase in an assessment is not frequent, and will seldom be anticipated by the taxpayer, who will not be likely to attend upon the review except to seek a reduction, it seems safer and more just to hold, as has generally been done, that the taxpayer should have personal notice of any purpose to increase the assessment made against him."

In *Bankers Life Ins. Co. v. County Board of Equalization*, 89 Neb. 469, we adopted the following rule, and it is, in principle, plainly in point here:

"The taxpayer has a right to rely upon his sworn return made to the assessor, unless notice is given him of an intention to increase the amount thereof. A change of schedule without notice should be treated as a complaint made by the assessor to the board of equalization, and notice should be given of such complaint and an opportunity for a hearing should be afforded. Any substantial increase of the schedule without notice and an opportunity for a hearing amounts to the taking of the property of a citizen without due process of law, and is void."

Substantially a like rule prevails in many of our sister states. The rule in New York follows:

"A law imposing an assessment for a local improvement without notice to, and a hearing, or an opportunity to be heard, on the part of the owner of the property to be assessed, has the effect to deprive him of his property without 'due process of law,' and is unconstitutional. * * * So, also, it is immaterial that the assessment has been in fact fairly apportioned, the constitutional validity of the act is to be tested, not by what has been, but by what may be done under it." *Stuart v. Palmer*, 74 N. Y. 183.

In *Dahnke-Walker Co. v. Bondurant*, 257 U. S. 282, 289,

the court said: "A statute may be invalid as applied to one state of facts and yet valid as applied to another. * * * Besides, a litigant can be heard to question a statute's validity only when and so far as it is being or is about to be applied to his disadvantage."

In Michigan this rule was announced: "A taxpayer's assessment cannot be raised by a city board of review without such notice to him as will enable him to appear and object to the valuation on which it rests; if raised without such notice he is only liable upon the former assessment, and if he pays the whole under protest he can recover back the excess in an action against the city therefor." *Avery v. East Saginaw,* 44 Mich. 587.

The supreme court of Kansas held: "Before the county commissioners have power to raise the valuation of personalty, notice must be given the taxpayer, and he have an opportunity to show that the valuation returned is correct." *Kansas Pacific R. Co. v. Russell,* 8 Kan. 558. See, also, *McConkey v. Smith,* 73 Ill. 313; *County Commissioners of Alleghany County v. New York Mining Co.,* 76 Md. 549.

*South Platte Land Co. v. Buffalo County,* 7 Neb. 253, is an early case wherein this rule was announced:

"The county commissioners, acting as a board of equalization, cannot raise the assessment on property without giving notice to the owner; and if they do so increase the assessment of property without notice, they act without jurisdiction of the person or subject-matter, and their proceedings are void, and of no effect."

The great weight of authority, as disclosed by text-writers and adjudicated cases, clearly holds to the proposition that an assessed valuation of property cannot be increased without due notice to the owner of such property, and this to the end that he may first be heard. Where an increase in the assessed valuation of any class or classes of property, as returned by any county or counties, is made by the state board of equalization and assessment without notice to such county or counties, and without affording sufficient opportunity to be heard, such increase is in vio-

lation of section 5901, Comp. St. 1922, and amounts to confiscation of property without due process and is therefore a void increase of assessment.

It follows that the order of the board of equalization complained of herein which, in express terms, increases the assessed valuation of the property in suit 20 per cent. must be, and it hereby is, vacated and held for naught.

JUDGMENT ACCORDINGLY.

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AMERICAN TELEPHONE & TELEGRAPH COMPANY V. STATE BOARD OF EQUALIZATION AND ASSESSMENT.

FILED NOVEMBER 16, 1929. No. 27184.

For syllabus, see *Northwestern Bell Telephone Co. v. State Board of Equalization and Assessment, ante*, p. 138.

ERROR to the State Board of Equalization and Assessment. *Increase of assessment vacated.*

*Morsman & Maxwell,* for plaintiff in error.

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

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

DEAN, J.

In view of the fact that the questions of law and of procedure involved in this action are practically identical with those involved in and decided in the case entitled *Northwestern Bell Telephone Co. v. State Board of Equalization and Assessment, ante*, p. 138, we do not therefore find it necessary to extend this opinion by further discussion.

It follows that the order of the board of equalization increasing the assessed valuation of the telephone properties 20 per cent. must be and it hereby is vacated and held for naught.

JUDGMENT ACCORDINGLY.

FRANK E. FOLTS ET AL., APPELLEES, V. GLOBE LIFE INSURANCE COMPANY ET AL., APPELLEES: SOVEREIGN CAMP, WOODMEN OF THE WORLD, APPELLANT.

FILED NOVEMBER 22, 1929. No. 27128.

1. **Costs:** ATTORNEY'S FEES. In a proceeding instituted by members of a fraternal insurance association, in its behalf, to recover personal property belonging to such association which has been wrongfully and unlawfully transferred to another company, and where in such proceeding such members are successful, they are entitled to have taxed as costs a reasonable sum for their attorney's fees, to be paid by the fraternal insurance association.
2. **Stipulations:** AFFIDAVITS AS EVIDENCE. Error may not be predicated on the ruling of the trial court in overruling an objection to introduction in evidence of affidavits, where it appears that, previous to the trial, in open court the parties had agreed to the use of affidavits as evidence.

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

*Gaines, McGilton, Van Orsdel & Gaines, Brogan, Ellick & Raymond, D. E. Bradshaw* and *Hainer, Flansburg & Lee,* for appellant.

*John M. Stewart, C. J. Campbell, William B. Price, Don W. Stewart, John P. Breen, G. E. Hager, M. L. Donovan* and *W. H. Hatteroth, contra.*

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

PER CURIAM.

This is the second appeal to this court in this cause. The opinion on the first appeal is reported in *Folts v. Globe Life Ins. Co.,* 117 Neb. 723. Thereafter a supplemental issue was presented in the district court, asking for an allowance of attorney's fees for plaintiffs and intervener, and on this issue judgment was rendered in their favor in the sum of $60,000. From this judgment Sovereign Camp, Woodmen of the World, appeals, and plaintiffs and intervener cross-appeal.

By reference to the opinion of this court on the former appeal, it will be seen that the main action was brought by members of Sovereign Camp, Woodmen of the World, hereinafter referred to as W. O. W., a fraternal insurance association, on its behalf, and to recover from the Globe Life Insurance Company, hereinafter referred to as defendant, cash and bonds, the property of W. O. W., which its officers had wrongfully and unlawfully transferred to defendant for the latter's capital stock, and for other relief. In the main proceeding the relief sought by plaintiffs and intervener was granted, and there were recovered cash and bonds, of the approximate value of $1,700,000, which were returned to the treasury of W. O. W.

Counsel for W. O. W. argue that the action is not one wherein an attorney's fee should be allowed. With this contention we are unable to agree. The main action was brought by individual members of a fraternal society, on its behalf, to recover property belonging to it which its officers had wrongfully transferred to defendant. By their efforts W. O. W. profited in the return of its cash and bonds, and also profited in other ways pointed out on the first appeal. Under such circumstances the plaintiffs were entitled to be reimbursed for the reasonable costs of attorney's fees incurred in behalf of the fraternal order. *Stone v. Omaha Fire Ins. Co.*, 61 Neb. 834; *In re Estate of Creighton*, 93 Neb. 90.

Counsel for W. O. W. complain because the district court allowed affidavits, as to the value of services of attorneys, to be received in evidence. The record discloses that when both parties to the appeal were represented in the trial court an agreement was entered into which fairly and reasonably contemplated that either party might file affidavits in support of his contention. Under the circumstances, the trial court did not err in permitting affidavits to be used. It may be remarked that W. O. W. was not limited to the filing of affidavits, but was permitted to call and examine witnesses orally as to the value of the services rendered.

It is next contended that the evidence does not warrant

the allowance of so large a sum as $60,000. The evidence is in conflict. The testimony of many eminent, well-informed attorneys as to the value of legal services was taken, and their estimates varied from as low as $20,000, on behalf of W. O. W., to as high as $140,000, on behalf of the plaintiffs. From the record it appears that much effort and time were spent in taking evidence upon an issue not involved in the present case, but which belonged in another case having no connection with the present action.

After a careful consideration of the record, we are of the opinion that the allowance is somewhat more liberal than justice requires. In our opinion, based upon the entire record, $50,000 is a fair and reasonable compensation to be paid to the attorneys for plaintiffs and intervener in the present action, in full for their services in both the district and supreme court.

The cross-appeal of plaintiffs and intervener goes to the question of the amount allowed, and they contend that a greater sum than $60,000 should have been allowed. The observations heretofore made dispose of the cross-appeal.

The judgment of the district court is therefore modified so as to allow plaintiffs and intervener, as counsel fees, the sum of $50,000, and, as modified, the judgment is affirmed.

AFFIRMED AS MODIFIED.

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STATE, EX REL. WILLIAM W. LANHAM, APPELLEE, V. CHARLES H. SHEETS, APPELLANT.

FILED NOVEMBER 22, 1929. No. 26806.

1. Elections: MARKING BALLOTS: DIRECTORY PROVISIONS. That part of section 1969, Comp. St. 1922, as amended by chapter 115, Laws 1925, requiring the voter to "make a cross in the square to the left of every candidate for whom he desires to vote," is directory merely, and a substantial compliance therewith whereby the intention of the voter is clearly indicated entitles the vote to be counted.
2. ———: ———: ———. Paragraph 4, Schedule B, sec. 1951, Comp. St. 1922, as amended and reenacted by chapter 116, Laws 1925, requiring the voter to make a cross in the

square opposite the written name on the ballot, construed with sections 1979 and 2028 and *held* to be directory.

3. ———: ———: WRITING IN NAMES. The writing in, at the proper place on a ballot, of the name of a person is a sufficient indication of the intention of the elector to vote for such person, so as to entitle such ballot to be counted, though no cross is made opposite such written name.
4. Appeal: BILL OF EXCEPTIONS. Affidavits in support of a motion for new trial not embodied in a bill of exceptions will not be considered on appeal.
5. Decisions Disapproved. *Martin v. Miles*, 46 Neb. 772, and *Mauck v. Brown*, 59 Neb. 382, disapproved in part.

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

*W. A. Stewart*, for appellant.

*N. M. York, contra.*

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

REDICK, District Judge.

This is a proceeding in *quo warranto* to test the respective rights of the relator, William W. Lanham, and the respondent, Charles H. Sheets, to the elective office of member of the board of education of school district No. 11 in Dawson county. The matter was tried to the court and resulted in a judgment declaring the relator duly elected to said office and that respondent be ousted from the same, and the latter appeals.

The facts are undisputed, and the controversy arises over the legality of certain ballots, 37 in number, cast for the relator. Without counting these disputed ballots the respondent received 274 votes and the relator 252; but, if the disputed ballots are to be counted, the relator received 289 votes, and upon a recount 291 votes, thereby giving him the majority entitling him to the office.

The names of only two candidates were printed on the ballot, "B. G. Richey, Peoples Ticket," and "C. H. Sheets, by Petition, and Citizens Ticket." All the votes for relator were written on the ballot in the place provided for that

purpose, and a cross placed by the voter in the square to the left of the written name, in every case except in the 37 disputed ballots. The respondent claims that these latter ballots are invalid and should not be counted because of the failure of the voter to place a cross opposite the written name; the relator *contra*. The solution of the problem depends upon the proper construction of certain sections of the Australian ballot law and whether or not the provisions thereof material to the inquiry are mandatory or directory.

The Australian ballot law in this state was first enacted in 1891 (Laws 1891, ch. 24) and contained, among others, the following provisions concerning the manner of voting; only such parts being quoted as are material to our inquiry:

"Section 13. Nothing in this act contained shall prevent any voter from writing on his ballot the name of any person for whom he desires to vote, for any office, and such vote shall be counted the same as if printed upon the ballot and marked by the voter."

"Section 20. The elector shall then forthwith proceed alone into a compartment, if one be then unoccupied, and shall prepare his ballot by marking in the appropriate margin or place a cross (X) with ink opposite the name of the candidate of his choice for each office to be filled, or by filling in with ink the name of the candidate of his choice in the blank space provided therefor, and marking a cross (X) with ink opposite thereto."

Cards of instruction for the voters were provided by Schedule B of the act, and contained the following:

"7. If you wish to vote for any person whose name does not appear upon the ballot, write or insert his full name in the blank space on the ballot under the proper office you wish him to hold, and make a cross mark in the proper margin opposite the same."

These provisions, in substantially the same language, remained in force until 1917 (Laws 1917, ch. 33) when the section providing for the manner of marking the ballots was amended by omitting that portion of section 20 of

the act of 1891, quoted above, and subsequent acts amendatory thereto, providing for writing in the name of the person for whom the voter desired to vote (whose name was not printed on the ballot) and marking a cross opposite. But this last act contained the following:

"If the voter does not wish to vote a straight ticket he shall make a cross in the square to the left of every candidate for whom he desires to vote." Laws 1917, ch. 33, sec. 3.

With the exception of the provision quoted from section 20, ch. 24, Laws 1891, the excerpts contained in the above quotations are the law at this time. See Comp. St. 1922, secs. 2028, 1979, and section 1969, as amended by chapter 115, Laws 1925, and section 1951, as amended by chapter 116, Laws 1925. It will be noted that prior to the act of 1917 the special requirement that a cross be placed opposite a name written in the ballot was contained in the main body of the act as well as in the instructions to voters in Schedule B, whereas since such amendment it appears only in the schedule. Is the requirement mandatory so that a failure to comply with it invalidates the ballot, or is it merely directory so that the ballot may be received and counted if the intention of the voter may be clearly determined therefrom?

In support of his contention that the requirement in question is mandatory, appellant cites *Mauck v. Brown*, 59 Neb. 382, and *State v. Hogeboom*, 103 Neb. 603, but neither of these cases involved the precise point under discussion. Neither of them involved ballots in which the name of a candidate was written in and no cross placed opposite such name. In the latter case the name was written in but a cross placed opposite. Appellant also cites *Martin v. Miles*, 46 Neb. 772, holding:

"The provision of section 20, act of 1891 ('Australian Ballot Law'), for the expressing of the voter's intention by a mark opposite the name of the candidate of his choice, is mandatory, and the manner thus prescribed is exclusive of all others; and such is the rule whether the names of candidates be printed on the ballot or written thereon by the voter."

The questioned ballots in that case were marked precisely the same as in this—the names were written in but no cross placed opposite. The case is therefore squarely in point, and, if adhered to, would require a reversal of the judgment. We are not, however, entirely satisfied with that decision. The learned judge who wrote that opinion does not refer to section 25 of that act, which reads as follows:

"In the canvass of the votes any ballot which is not indorsed, as provided in this act, by the signature of two (2) judges upon the back thereof, shall be void and shall not be counted, and any ballot or parts of a ballot from which it is impossible to determine the elector's choice shall be void and shall not be counted: *Provided,* that when a ballot is sufficiently plain to gather therefrom a part of the voter's intention, it shall be the duty of the judges of election to count such part."

Of course, the object of the election is to determine the will of the majority of the electors as to whom they desire to fill the offices, and it seems to us that, by the provision just quoted, the legislature intended to insure the counting of all ballots from which the intention of the voter could be clearly gathered, regardless of the particular manner in which such intention was evinced. There should be no need for discussion of what the voter meant by writing in the name of a party in the proper place upon the ballot. He was authorized so to do only for the specific purpose of indicating the candidate for whom he desired to vote. We can conceive of no other purpose he could have, and certainly he could accomplish none other. An intention to vote for the party whose name is written in is the only logical conclusion to be drawn from the fact, in view of the declared purpose for which it was authorized. The statute declares a simple manner in which the voter may indicate his intention, by placing an X opposite the name, and then declares that the vote shall be counted if the ballot is sufficiently plain to gather the voter's intention. This latter provision was evidently inserted to prevent the disfranchisement of the voter by reason of

his failure to technically comply with every requirement of a somewhat complicated law. It may further be noted that that decision was based in part upon the provision of section 20, requiring a mark opposite the written name, whereas such provision, though continued in subsequent statutes, was eliminated by the amendment of 1917 (Laws 1917, ch. 33, sec. 3) which did not deal with the question of writing in the names of candidates, but merely provided that the voter "shall make a cross in the square to the left of every candidate for whom he desires to vote." We think that the application of this requirement should be confined to the ballot as printed, especially in view of section 13, above quoted, which requires the counting of ballots for candidates whose names are written in, without reference to any other marking. True, the amendment of 1917 did not disturb paragraph 7 of the schedule, but it did eliminate such requirement from the body of the act. The legislature must have had some purpose in adopting the amendment; but if the law was to remain the same notwithstanding such adoption the amendment would be of no effect.

Section 13 and paragraph 7 of the schedule are in apparent contradiction, one requiring the vote to be counted when the name is written in, and the other requiring something further to be done. If we were required to choose between the two provisions, we would unhesitatingly select section 13 as being more favorable to an untrammeled expression of the will of the voter. We prefer, however, to hold the provision of paragraph 7 to be merely directory as indicating the method by which the voter may express his choice. We are sustained in this by a number of decisions of this court. In *State v. Russell*, 34 Neb. 116, at a time when the statute required that the marking be done in ink, it was held that a pencil marking was a substantial compliance. To the same effect, *Spurgin v. Thompson*, 37 Neb. 39. In *Bingham v. Broadwell*, 73 Neb. 605, ballots were counted where the mark was an "H," or a wheel, or a star-like mark, and a number of other irregularities were shown, but the intention of

the voter was clear. In *Griffith v. Bonawitz,* 73 Neb. 622, a number of irregular marks were held not to invalidate the ballot. There were also some ballots where a name was written in and no mark placed opposite it. Whether or not these last ballots were counted is not clear, but the court, after referring to that fact, said that only one class of ballots called for special discussion, to wit, those indorsed by one judge of election and by the initials of another. It was further held in that case: "On the trial of a contested election ballots will not be treated as void simply because of irregular or unauthorized markings or mutilations which appear to have been innocently made as the result of awkwardness, inattention, mistake, or ignorance, if the lawful intent of the voter can be ascertained therefrom." In *White v. Slama,* 89 Neb. 65, ballots marked by drawing a straight line through the party circle, instead of marking a cross therein, were held valid In *Shaw v. Stewart,* 115 Neb. 315, a controlling number of ballots had the name of one of the candidates written in and a cross placed opposite, although the name of such candidate was printed upon the ballot, and while the statute only authorized writing the name in cases where it was not so printed, the ballots were held valid. Such provisions, as well as that requiring the making of a cross in the square opposite the written name, were said to be directory only. In that case we cited *Gauvreau v. Van Patten,* 83 Neb. 64, which quoted with approval the following from 2 Wigmore, Australian Ballot System, 193 (Appendix):

"Wherever our statutes do not expressly declare that particular informalities avoid the ballot, it would seem best to consider their requirements as directory only. The whole purpose of the ballot as an institution is to obtain a correct expression of intention; and if in a given case the intention is clear, it is an entire misconception of the purpose of the requirements to treat them as essentials, that is, as objects in themselves, and not merely as means."

In *State v. Russell,* 34 Neb. 116, *supra,* after stating the

two principles governing the construction of statutes of this character to be: (1) The supremacy of the legislative will; and (2) to give effect to the expressed will of the majority, it was said:

"Recognizing the principle first stated the courts have uniformly held that when the statute expressly or by fair implication declares any act to be essential to a valid election, or that an act shall be performed in a given manner and no other, such provisions are mandatory and exclusive. By an application of the second principle, the courts, in order to give effect to the will of the majority and to prevent the disfranchising of legal voters, have quite as uniformly held those provisions to be formal and directory merely, which are not essential to a fair election, unless such provisions are declared to be essential by the statute itself."

Sections 2025 to 2030, Comp. St. 1922, define the causes for which a ballot may be rejected, but do not include a failure of the voter to comply strictly with directions as to marking. It seems perfectly clear that a precise method of marking the ballot is not essential to a fair election, where the method selected clearly indicates the voter's choice, and no question of fraud, or violation of statutes essentially mandatory, is involved. To hold otherwise might result in a defeat of the very object sought by the election, by placing in office a candidate not desired by a majority of the voters.

All of the cases above cited, beginning with *State v. Russell,* in effect hold that the provisions as to the manner of marking the ballot are merely directory, and that where the intention of the voter is clearly apparent, though not expressed in the precise manner of the statute, the ballot should be counted. We consider this a correct expression of the law. Upon a careful consideration of the provisions of the statute, the purpose of the law, and our previous decisions thereon, we are of the opinion that the provisions of paragraph 7, above quoted, now, substantially, paragraph 4 of Schedule B, section 1951, Comp. St. 1922, as amended by chapter 116, Laws 1925, and sec-

tion 1969, as amended by chapter 115, Laws of 1925, requiring the placing of a cross in the square to the left of every candidate for whom it is desired to vote, must be considered merely directory, and that the disputed ballots were properly counted.

In so far as the cases of *Martin v. Miles*, 46 Neb. 772, and *Mauck v. Brown*, 59 Neb. 382, conflict with the opinions herein expressed, they are disapproved. It is not necessary to discuss other questions presented by the briefs.

A motion for a new trial was filed by the appellant in the court below, on the ground of newly discovered evidence, and was overruled, upon which ruling the appellant assigns error. We are unable to review the action of the court in that regard because the affidavits upon which such ruling was based have not been preserved by proper bill of exceptions, and we cannot consider them. *Omaha Fire Ins. Co. v. Dierks & White*, 43 Neb. 473. Moreover, by stipulation of the parties in this record, appellant received 274 votes and appellee 252 votes about which there is no controversy. The additional votes, if counted, gave the appellee a majority.

Finding no error in the record, the judgment of the district court is

AFFIRMED.

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ABIE STATE BANK ET AL., APPELLEES, V. ARTHUR J. WEAVER, GOVERNOR, ET AL., APPELLANTS.

FILED DECEMBER 7, 1929. No. 27070.

1. **Banks and Banking: REGULATION.** "The banking business, carried on pursuant to a state charter, is quasi-public and, for protection of the public and in its interests, is subject to reasonable regulation by the state." *Citizens State Bank v. Strayer*, 114 Neb. 567.
2. **Constitutional Law: STATUTES: CONSTRUCTION.** It is elementary that it is not within the province of the courts to annul a legislative act unless its provisions so clearly contravene a provision of the fundamental law, or it is so clearly against public policy, that no other resort remains.

3. **Banks and Banking**: GUARANTY FUND: LEVIES: ESTOPPEL. Where a state bank has accepted the benefits arising from the deposits of money pursuant to the terms of the bank depositors' guaranty law, such bank should not be heard, in a proper case, to make complaint of a special assessment upon such deposits which has been levied for the benefit of the depositors' guaranty fund.

4. ———: ———: ———: CONSTITUTIONAL LAW. Where a special assessment has been levied upon the state banks pursuant to the provisions of section 8028, Comp. St. 1922, as amended by section 26, ch. 191, Laws of 1923, such assessment does not constitute the taking of private property without due process.

APPEAL from the district court for Lancaster county: LINCOLN FROST, JUDGE. *Reversed and dismissed.*

*C. A. Sorensen, Attorney General, Charles E. Abbott, Edgar Ferneau, L. Ross Newkirk* and *Roy M. Harrop*, for appellants, Weaver and others.

*William J. Hotz, Clinton J. Campbell, Frank A. Hebenstreit, Ralph G. Coad* and *Robert Hotz*, for intervening appellants.

*Gaines, McGilton, Van Orsdel & Gaines, Courtright, Sidner, Lee & Gunderson* and *Hainer, Flansburg & Lee, contra.*

*Albert S. Johnston, amicus curiæ.*

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

DEAN, J.

This is an injunction suit begun in the district court for Lancaster county by the Abie State Bank, plaintiff, on its own behalf, and in which plaintiff is joined by 558 other Nebraska state banks. The suit was brought to enjoin the collection of a special assessment of one-fourth of one per cent. of the average daily deposits from the state banks for 1928. It is alleged by plaintiff that the special assessment complained of was made December 15, 1928, by the department of trade and commerce, for the benefit of the

depositors' guaranty fund, pursuant to authority conferred by section 8028, Comp. St. 1922, as amended by section 26, ch. 191, Laws of 1923. The act, as amended, follows:

"If the depositors' guaranty fund shall, from any cause, be depleted or reduced to any amount less than one per cent. of the average daily deposits as shown by the last semi-annual assessment statement thereof filed, the department of trade and commerce shall levy a special assessment against the capital stock of the corporations governed by the provisions of this article, to cover such deficiency, which special assessment shall be based on the said average daily deposits, and, when required for the purpose of immediate payment to depositors, said special assessment may be for any amount not exceeding one per cent. of said average daily deposits for the year 1923 and thereafter not exceeding one-half of one per cent. of said average daily deposits in any one year."

The governor of Nebraska and the secretary of the department of trade and commerce are both made parties defendant in official capacity. The state treasurer and a number of individual bank depositors intervened in the action adversely to the plaintiff's contention. The court, however, found generally in favor of the plaintiff bank and against the defendants and interveners. Thereupon defendants were ordered to pay all costs of the action, except those incurred by the interveners, and the cross-petitions of the interveners were dismissed and interveners ordered to pay their own costs. Defendants and a number of the interveners have appealed.

The secretary of the guaranty fund commission, hereinafter called the secretary, testified that up to and including December 31, 1928, 269 state banks were closed by the state and placed in the hands of the commission, and that the total amount of the adjudicated claims was then $10,536,518.59, exclusive of interest; and that in 72 state banks, then being operated as going concerns, the amount due depositors was $13,726,441.26, and the total amount due depositors in banks which were in receivership, but whose claims were not yet adjudicated, was $2,133,627.54.

It also appears from the secretary's evidence that the total amount, including claims adjudicated, and claims not adjudicated, or present liabilities against the guaranty fund, was $26,400,282.76, and that the total sum of assets to be realized would be $10,451,932.65, leaving $15,948,350.11 as a deficit. The secretary also testified that the majority of the losses sustained by the banks resulted from loans made prior to 1923 during the deflation period.

From the evidence of Clarence G. Bliss, secretary of the department of trade and commerce, it appears that since 1919 the total amount of bank assessments was $14,609,576.65, and that these assessments, in the above sum, were paid over and became a part of the guaranty fund.

It appears from the evidence of the president of one of the largest Nebraska state banks that he was active in the publication of 2,000 pamphlets which were distributed generally in respect of the establishment of the guaranty fund, and he was also chairman of a committee of three bankers by whom this suit was begun. In his expressed opinion, the payment of the special assessment, and its continuance for a number of years, would have the effect of causing the large state banks to "nationalize—all who can will nationalize and the balance will go out of business. I think four hundred banks will be operating with impaired capital."

In 1926, during the months of June, July, August, and September, twenty-six, full-page newspaper advertisements, attractively featured with pictures and aptly prepared reading matter, appeared in one of Omaha's leading newspapers. These advertisements stressed the proposed protection that was shortly to be afforded the depositors of money in the state banks throughout Nebraska. And on one page of these advertisements 336 banks are listed as having paid their *pro rata* share of the cost of the publication. The largest state bank, located in Omaha, paid between $500 and $600 as its share of the expense of this newspaper publicity. The enterprise was given wide circulation in practically every town and its suburbs where a state bank was located, by illustrated newspapers with

reading matter that was calculated to attract favorable attention, and the patronage as well, of those having money for bank deposit. Following are some of the headings of the illustrated pages:

"A Story no other State can Tell;" "No Mattress Banks in Nebraska;" "Strong Banks make Strong States;" "In the Hands of Skilled Bankers;" "State Banks Protect Their Deposits in Nebraska;" "Nebraska is a Remarkable State;" "Pushing Your Money Through the Window;" "In Nebraska the Guarantee Works both Ways;" "All Work together in Nebraska;" "Safe Through the Slump of Deflation Days." "The Men Who Told the Story that No Other State Can Tell" concludes the series of illustrated pages, and is followed by an enumerated list of 336 state banks that sponsored the depositors' guaranty fund enterprise.

From the evidence it clearly appears that a majority of the state bankers throughout Nebraska, and many others as well, counted the bank depositors' guaranty fund, in its inception, a valuable asset, and many predicted that this beneficent plan would add greatly to the stability of the state banks. To illustrate this feature of the guaranty fund law, a brief excerpt from an advertisement which appeared in January, 1928, in one of the Nebraska papers having a large circulation, may be noted:

"First, there are a few state bankers here and there who have good banks and who think they are greatly imposed upon by being compelled to pay an assessment to the guaranty fund. This is a natural feeling as they are in no way responsible for the banks that fail. * * * The guaranty fund, so-called, is merely an insurance company whereby the state banks of Nebraska are the members and must pay through an assessment each other's losses up to the maximum amount of six-tenths of one per cent. a year. * * * Any good bank, making a fair profit, can pay this assessment without injury to itself and can do so to the great benefit of the state."

In respect of the many failures of banks about this time, the cashier of a Lincoln state bank testified that, in his opinion, the failure of nearly 300 Nebraska state banks

was caused largely by the general economic condition existing prior to 1928; that he did not think the bank assessments from 1923 to July 1, 1928, were a contributing factor in the failure of banks during that period, and that, in his opinion, the guaranty fund law and the assessments collected thereunder had a steadying influence on the deposits of every state bank. Continuing, he testified that "it is no exaggeration to say it has accounted for at least one hundred million dollars deposited in the state banks of Nebraska which would not otherwise have been made except for the bank guaranty law." In his opinion, the conditions of the banks and their ability to pay the assessment is "incomparably better than in 1923."

In the present case, the trial court found that the guaranty fund was confiscatory, and that its enforcement constituted the taking of private property without due process, and that there should therefore be an indefinite abatement of the enforcement of the act until such time as such enforcement could be made without mischievous consequences. It may be observed, however, that the bank guaranty fund law has been held by the highest court in the land to be a constitutional act and well within the meaning of the federal Constitution.

Substantially like questions as here involved were considered and decisions were rendered by the supreme court of the United States in *Noble State Bank v. Haskell,* 219 U. S. 104, and *Assaria State Bank v. Dolley,* 219 U. S. 121, and in both cases it was held that the act was not repugnant to the provisions of the Constitution. And in *Shallenberger v. First State Bank,* 219 U. S. 114, a case involving the validity of the guaranty fund law of our own state, the act was again upheld on authority of the decision in the above cited *Noble State Bank* case. In its memorandum opinion (219 U. S. 575) denying the application for rehearing in the *Noble State Bank* case, the court said:

"Even where powerful arguments can be made against the wisdom of (this) legislation this court can say nothing, as it is not concerned therewith." And in the body of the opinion, Mr. Justice Holmes, the author of the opinion, among others, made this observation:

"We fully understand the practical importance of the question and the very powerful argument that can be made against the wisdom of the legislation, but on that point we have nothing to say, as it is not our concern. * * * The payment can be avoided by going out of the banking business, and is required only as a condition for keeping on, from corporations created by the state."

*First State Bank of Claremont v. Smith,* 49 S. Dak. 518, is cited by defendants and is in point. The court there observed that the banks had for many years accepted the benefits of the guaranty fund law and in consequence were not then in position to resist the just claims of depositors. The court also observed that the personal rights of the individual must always yield to the "rightful exercise of the police power."

The Nebraska statute contains this provision for the direction of those who are charged with the administration of banking:

"The business of banking, or the receiving of deposits of money or instruments of credit subject to be repaid upon check, draft, certificate, passbook or order; the discounting, negotiating of promissory notes, drafts, bills of exchange, and other evidences of debts; and the loaning of money upon personal or other security is hereby declared to be a quasi-public business and subject to regulation and control by the state." Comp. St. 1922, sec. 7983.

"The banking business, carried on pursuant to a state charter, is quasi-public and, for protection of the public and in its interests, is subject to reasonable regulation by the state." *Citizens State Bank v. Strayer,* 114 Neb. 567.

It may here be noted that the maximum amount of the guaranty fund special assessment was reduced by the legislature in 1923 from one per cent. to one-half of one per cent., but subsequently the department of trade and commerce, pursuant thereto, levied the special assessment of one-fourth of one per cent., within the maximum amount now fixed by the legislature, and of which complaint is now made by the plaintiff bank on its own behalf and in behalf of 558 other state banks, as above noted.

The paramount object, and clearly the legislative intention in the creation of the depositors' bank guaranty fund law, was first for the protection of the depositors' money in the state banks. And from the fact that, under normal banking conditions, such act would likewise benefit the state banks, such banks were, at least, not unfriendly to the enactment of the law in question. But it goes without saying that there never was, nor could be, any compulsion upon the state banks to accept deposits of money on the bank guaranty basis. But money was accepted by the state banks, pursuant to the terms of the depositors' guaranty fund law, and by that law such banks are clearly bound.

The demands on the guaranty fund are burdensome, but the situation before us was created, or in any event was made possible, by the legislature in the enactment of the law. It is a basic principle that it is, ordinarily, not within the province of the courts to annul a legislative act except as a last resort and in a case where no other remedy is at hand. In view of the benefits which arose from the deposits of large sums of money in state banks, pursuant to the terms of the bank depositors' guaranty fund, should the banks now be heard to make complaint of the special assessment of one-fourth of one per cent. upon their deposits? Have the observations of Mr. Justice Holmes in the *Noble State Bank* case, above cited, ever been answered? If so, our attention has not been directed thereto.

For the reasons herein appearing, the temporary injunction granted by the district court is dissolved, the judgment is reversed, and the action dismissed.

REVERSED AND DISMISSED.

Eberly, J., concurs in the result.

Rose and Day, JJ., dissent.

JOHN HILLIARD PETERS, APPELLANT, V. NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY ET AL., APPELLEES.

FILED DECEMBER 10, 1929. No. 26843.

1. **Wills:** CONSTRUCTION. Under section 5594, Comp St. 1922, "The court, without much regard to the canons of construction, will place itself in the position of the testator, ascertain his will, and, if lawful, enforce it." *In re Estate of Combs*, 117 Neb. 257.
2. ———: ———. "The rules of law," mentioned in section 5594, Comp. St. 1922, do not mean rules of construction in conflict with the very rule of construction sought to be established by this statute, requiring the intent of the testator to be followed "so far as such intent is consistent with the rules of law."
3. ———: ———. In all the circumstances involved and shown in the opinion, *held*: (1) That the will of the testator devised to appellant the fee simple title to the land involved; and (2) that the restriction on alienation for the term provided in the will was a valid restriction.
4. ———: VIOLATION OF RESTRICTIONS AGAINST ALIENATION. Whether a violation of restrictions against alienation of a fee simple title, devised by will, exists and supports a right of action in equity is a question to be determined by the facts and law in each individual suit.
5. **Quieting Title:** LACHES. In all the circumstances involved and shown in the opinion, *held*: (1) That the conveyance made by the appellant before the end of the restrictive period was voidable, and not void; and (2) in view of the acts and conduct of appellant, and in view of the fact that he waited so long after the period of restriction had expired before bringing the suit, that his right to set aside his deed was barred.

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

*Thomas E. Conley, Hasselquist & Chew* and *Adolph Wenke*, for appellant.

*Foster & Anderson, Charles H. Kelsey* and *Fay H. Pollock, contra.*

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

GOSS, J.

John Hilliard Peters appealed from the judgment of the trial court, refusing to quiet in him the title to 200 acres of land in Stanton county, and quieting the title in the appellee, William F. Schulz, subject to a mortgage in favor of appellee, Northwestern Mutual Life Insurance Company, decreed to be a first lien.

The land came to Peters in 1915 through the duly probated will of his father, John Peters, who died seised of considerable land, and who provided in his will for his widow, his two daughters, and his four sons. Appellant's arguments are concerned chiefly with a portion of the eighth paragraph of the will, which devised the 200 described acres of land to appellant, subject to certain payments to the widow and subject to the payment of his defined share of the indebtedness on another quarter section of land if the testator should not have paid that indebtedness. The payments are not the subject of controversy. The argument centers about two things: First, the legal effect of the following words contained in the eighth paragraph of the will—"I also direct that said land herein devised to my said son, John Hilliard Peters, shall not be sold, nor incumbered by trust deed, mortgage or otherwise prior to the year 1925;" and, second, the acts and conduct of the plaintiff after he was vested with title under the will.

For a better understanding of the issues, it is well to state here certain other facts fully pleaded and indicated in the evidence.

Appellant was probably born December 7, 1890. His father's will was executed October 28, 1914, and his father died in February, 1915. Appellant was then living on and farming the land in question and continued to live there until about March 1, 1922, when he moved to Omaha, where he has since worked as a traveling salesman. From his majority he did business with the Stanton National Bank, borrowing comparatively small sums of money. After he acquired the land under his father's will his borrowings greatly increased until, on October 30, 1920, he

owed the bank $35,467.98 on unsecured notes, some of which were then due and payable. On that date appellant and his wife, Kate Peters, entered into a written agreement, duly acknowledged, with Frank L. Sanders, acting for the bank and for the use and benefit of the Stanton National Bank, in consideration of the renewal of the notes, to execute a collateral promissory note for $36,000, together with a mortgage securing the same upon the real estate owned by John Hilliard Peters and Kate Peters. It was agreed therein that the collateral note and mortgage should be security for the said indebtedness and for payment of all interest accruing thereon; that Peters and wife warranted and guaranteed the title to the real estate and to cure at their own expense any defects in title to the premises mortgaged.

On the same day appellant executed and delivered to Frank L. Sanders the collateral note and mortgage for $36,000. It covered the 200 acres devised under the will and also an undivided one-half interest in 292.28 acres owned jointly by appellant and another. The latter tract was mortgaged expressly subject to two mortgages already existing thereon. The principal notes in favor of the bank were renewed in 1921. Appellant was unable to pay them.

On October 5, 1921, in order to aid in making effectual the warranty and guaranty as to the 200 acres, and also to convey the land to the bank through its nominee, appellant and his wife joined all the other heirs (and their respective spouses) of John Peters in a warranty deed to the 200 acres in favor of Andrew Spence. Mr. Spence had become the president of the Stanton National Bank in place of Frank L. Sanders and was acting for the bank. The land was taken over absolutely on the basis of $40,000 or $200 an acre. As a consideration for the settlement, the bank released its mortgage as to the 292.28 acres, paid $1,200 to third parties on account of a mortgage, took over appellant's $200 stock in a Hi-line Company, and assumed the taxes on the land. As a part of the transaction it surrendered the principal notes of appellant, and on October 11, 1921, canceled the collateral note and mort-

gage. Under the settlement appellant was to vacate the premises on March 1, 1922, and Spence was to take possession on that date. This was done.

While Spence held the title for the bank he mortgaged the land to the Northwestern Mutual Life Insurance Company, appellee herein, for $12,500. On March 16, 1923, Spence conveyed the land to the Stanton National Bank, and on March 1, 1925, the bank conveyed by warranty deed to William F. Schulz, appellee, who has ever since lived on the land with his wife and three children and who has made valuable improvements thereon. He paid the bank a consideration of $40,000, being $14,000 in first mortgages on Stanton county farm land, $13,500 in town property in Stanton, and $12,500 represented by the mortgage on the land.

The petition was filed March 31, 1927. The Stanton National Bank was not made a party. The Northwestern Mutual Life Insurance Company and William F. Schulz and wife were the only defendants named. Plaintiff sought to quiet title against them on the ground, in substance and effect, that he became the owner of the fee simple title through his father's will, and that the rights of the defendants were acquired prior to 1925, in violation of the terms of the will restricting alienation; that it was the intention of the testator to create a constructive spendthrift trust, and that the defendants, having notice of the restriction, acquired no interest in the land through the conveyances under which they claim.

The insurance company set up its mortgage, and the defendants Schulz set up their title by mesne conveyances from plaintiff through the bank and the officers of the bank acting for it, showing the history of the acts and representations of plaintiff in relation to the whole matter. They pleaded that, when Spence took a deed on behalf of the bank, plaintiff insisted that, notwithstanding the terms of his father's will, he had a fee simple title with the power of alienation, agreed to get all others who might have an interest in any reversion to convey, and agreed to warrant the title if they would take it and release him

from the debts owed the bank and assume the certain other obligations heretofore named. Relying thereon the bank canceled his debts, assumed the obligations, and accepted title buttressed by the warranties and conveyances from plaintiff and his wife and all the other heirs and their spouses; and the defendant Schulz made many improvements, at considerable expense, detailed in his pleadings, while the plaintiff stood by and waited until he became insolvent and could not make good his warranties and guaranties nor respond in personal damages, until his debts to the bank had become barred, and until more than two years after the first of the year 1925, before asserting the alleged infirmity of title. Wherefore they claim he is estopped by his conduct and barred by his laches from maintaining this suit.

It appears that, on March 12, 1927, plaintiff and wife, for an expressed consideration of $25,000, mortgaged the 200 acres to Thomas E. Conley and R. B. Hasselquist (who are his attorneys in the suit). This mortgage was filed March 31, 1927, the same day the petition was filed, but Conley and Hasselquist were not made parties. Somewhere along the line they were included as defendants, as they joined plaintiff in a pleading filed November 26, 1927, and their rights are adjudicated adversely to them in the decree entered October 12, 1928. Likewise, on March 26, 1927, plaintiff and wife mortgaged the 200 acres to Donald Matheson for $6,250. This was filed March 31, 1927, and he joined plaintiff and his attorneys in the pleading above referred to and was cut out by the decree. Conley, Hasselquist and Matheson have not appealed.

There is little, if any, dispute about the facts. The salient facts were rightly found by the trial court in favor of defendants. The result is dependent on matters of law. The issues of law arising out of the facts may be condensed as follows:

First. Appellant asserts and appellees dispute that the restraint of alienation of the fee as provided by the will is valid.

Second. Even if that restraint of alienation is held to

be valid according to its terms, yet appellees contend and appellant denies that the conduct of appellant was such that estoppel and his laches are a complete defense against his suit in equity.

Section 5594, Comp. St. 1922, requires that, in the construction of a will, it shall be our duty "to 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."

When the will was made in October, 1914, we do not find that there was anything in the evidence to indicate that the testator had so short an expectancy of life that it would end, as it did, in his death in February, 1915; nor do we find evidence that the plaintiff was a spendthrift and that his father intended to create a spendthrift trust. Plaintiff's later financial condition probably arose in his case, as it did in many others of the period, in the purchase of other lands and in the deflation of value of lands and of farm products. So the question of the intent and of the right of the testator to restrict alienation is unvexed by any facts other than those discoverable from the will itself.

Counsel have not pointed out, nor do we find a case in our own court, where a fee simple title with a restraint for a definite time, but ending within the life of the devisee, as in the case at bar, has been the subject of an opinion, though several of our cases have been discussed in the briefs as if they were definitely in point. In *Albin v. Parmele,* 70 Neb. 740, the will expressly provided, as to the devisee: "The intention being to give him a life estate therein without the power to sell or dispose of it." The remainder in fee was held to belong to the heirs of the devisee, as appeared from the full contents of the will, interpreted in the light of the intent statute. *Weller v. Noffsinger,* 57 Neb. 455, involved a trust estate which was to continue until the beneficiary should arrive at the age of 30. The beneficiary had not arrived at that age. The court held that the legal title was in the trustee and his creditors took no title by virtue of their execution. In *Hiles v. Benton,* 111 Neb. 557, the will, the intent of which

was there sought, expressly devised a "life use," and then said: "That there may be no mistake or misunderstanding as to my intention and purpose, I here state that it is my purpose and intention that my son, Harry Hiles, shall have the use of my real estate during his life, without power and authority to sell, mortgage, or to in any manner alienate said use for any purpose." It was held that the intent of the testator was to place the life use of the property beyond the reach of the creditors of the devisee of that life use. *Reuter v. Reuter,* 116 Neb. 428, involved a deed, conveying a life estate, with conditions against incumbrances, with a remainder in fee to a designated class.

However, there are, in some of the foregoing cases and in others in our court, many indications of the relaxation of ancient rules of construction of wills and deeds brought about by the statute requiring the intent of the testator or grantor to be followed when such intent is consistent with the rules of law.

One of the most recent cases expressing the governing principle compelled by section 5594, Comp. St. 1922, is *In re Estate of Combs,* 117 Neb. 257 (citing cases), in which we said: "No rule of law is better settled or more in accord with good sense than that which requires the intention of the testator to be ascertained from a liberal interpretation and comprehensive view of all the provisions of the will. No particular words, no conventional forms of expression, are necessary to make an effective testamentary disposition of his property. The court, without much regard to the canons of construction, will place itself in the position of the testator, ascertain his will, and, if lawful, enforce it."

There is no doubt that the ancient rule against restrictions of alienation of a fee simple title has been much relaxed by the modern trend of interpretation of wills and deeds; and, under a statute such as ours, the intent of the testator is the imperative guide unless inconsistent with the rules of law. In *Hiles v. Benton,* 111 Neb. 557, Judge Redick is quoted with approval as saying: "It occurs to me that the rule of law here spoken of does not include

legal rules of construction in conflict with the very rule of construction sought to be established by the statute, for this would be a *felo de se.*"

In *Libby v. Clark,* 118 U. S. 250, an ejectment action from Kansas, Libby claimed under a patent issued to Hurr, an Ottawa Indian, granting him and his heirs 320 acres of land duly allotted to him as an Indian of the Ottawa tribe, pursuant to the terms of a treaty ratified July 28, 1862. The treaty provided that no Indian grantee should alienate or incumber the land allotted to him until he should, by the terms of the treaty, become a citizen of the United States, and further provided that such allottees should become citizens five years after the ratification. The deed from Hurr to Kallock, under which Libby claimed, was dated December 1, 1865. It was refused in evidence because more than two years of the period before Hurr could become a citizen under the treaty yet remained and there was no accompanying evidence that he was otherwise a citizen. On the point that the patent to Hurr conveyed a fee simple title with a restraint on alienation, Mr. Justice Miller, who wrote the opinion, said: "The title conveyed to Hurr by the patent was a *fee simple;* that is it was all the title or interest in the land. No one shared this title, or had any interest in it, and it descended, or would have descended, to his heirs. The restriction on his right to convey did not deprive the title of the character of a fee simple estate. * * * The limitation of the power of sale for five years is not inconsistent with a fee simple estate."

"A condition, that the grantee shall not alien to a particular individual, or for a limited time, or that he shall not use it for a specified purpose, or in a prescribed manner for a limited time, has always been held valid." *Cornelius v. Ivins,* 26 N. J. Law, 376, 385.

Such restraints upon alienation of a fee simple title "as are limited and reasonable in their application, and as to the time they must operate, are valid and will be upheld. 1 Washburn on Real Property, 67-69; 4 Kent Com. 135." *Munroe v. Hall,* 97 N. Car. 206.

A condition in a will, devising land to an infant, that it shall not be sold until he is 35 years of age, is not an unreasonable restraint of alienation and is valid. Many cases cited. *Wallace v. Smith,* 113 Ky. 263.

Other cases to the same effect: *Jauretche v. Proctor,* 48 Pa. St. 466; *Camp v. Cleary,* 76 Va. 140; *Langdon v. Ingram's Guardian,* 28 Ind. 360; *Andrews v. Spurlin,* 35 Ind. 262.

Each case of the interpretation of intent of a testator or grantor must be considered and determined in the light of its own facts. Taking into consideration the circumstances surrounding the testator, and giving active life and force to the statute on intent, we are of the opinion that, in this particular instance, the will devised to appellant a fee simple title to the 200 acres, with a lawful restraint upon his alienation thereof until the year 1925.

This leaves for consideration the question whether, when Peters brought this suit in equity, he was in a position to maintain such a suit. We have shown that he did not file his petition until March 31, 1927. He therefore did not commence the suit until two years and three months after the date of removal of the restriction of alienation imposed by his father's will. It was not until three months after the restriction had expired that appellee Schulz completed his deal and payment for the farm and went into possession. He continued in undisputed possession and ownership of the farm for two years before Peters asserted any right or title against him. In the meantime he had not only made valuable improvements, as heretofore stated, but the evidence shows that Peters had come to the place and asked permission to drive through one of the fields because the road was blocked by snow. He conversed with Schulz and his son about certain buildings on the farm, but neither then nor at any other time claimed any ownership of or interest in the place. Schulz had bought and paid for the place, had made improvements thereon and lived there for two years relying on the title. That title had come from appellant and was buttressed by deeds with covenants of warranty, not only from appellant, but from his brothers and sisters.

Full and complete consideration had been paid to appellant for the land. Appellant's only claim of justification for his position is that he was restrained by the terms of his father's will from conveying the land and that his deed made prior to 1925 was void. Was it void or was it, at the most, merely voidable?

Even, "Upon the breach or nonperformance of a condition annexed to the grant of a freehold estate, the title conveyed is not void, but is only voidable by the act of the grantor or his heir, who must take advantage of the condition and repossess himself of the estate by actual reentry, or by some act equivalent thereto and manifesting an intent to terminate the estate." 18 C. J. 381, sec. 442. And "Equity may relieve from forfeiture in case of breach of conditions in deeds, as in case of other penalties, and will adapt the relief to the nature of the case, but the granting of relief rests in the sound discretion of the court." 18 C. J. 381, sec. 440.

In the will there was no reversion expressed. There was no penalty provided. Appellant has proceeded on the theory that a reversion was implied in his favor and that his deed was void. But it would seem as if the deed was, at the most, voidable only, and that equity reserves to the court the usual discretion to dispense equity only to those who do equity.

"A provision in a deed of gift from father to son that the vendee shall not convey the property to any person other than the father's bodily heirs for the term of twenty years is a reasonable restriction upon alienation. A conveyance made in violation of such restriction is merely voidable and not void. Such forfeitures may not be exacted after the expiration of the restrictive period." *Francis v. Big Sandy Co.*, 171 Ky. 209.

To the same effect is *Price v. Virginia Iron, Coal & Coke Co.*, 171 Ky. 523. See, also, the learned discussion in *Kentland Coal & Coke Co. v. Keen*, 168 Ky. 836, holding that, where one has made a conveyance in violation of a restriction, that is, before the restrictive period has elapsed, and the right to proceed for a forfeiture is relied

on, "this right must be exercised during the time through which the prohibitive time is imposed by the condition, and if this right is not exercised by such person or persons within such time, the deed made in violation of the condition becomes absolute, as such deeds are voidable and not void."

We are of the opinion that the most appellant can claim as against his mortgage and contract of October 30, 1920, and as against his deed of October 5, 1921, is that, being made before the end of the restrictive period, they were merely voidable, and not void. They contained the usual covenants of warranty. If it had not been for the limited restraint upon alienation imposed by his father's will, any title that thereafter came to grantor would have inured to the benefit of his grantees under the well-known rule which needs no citation of authorities.

When he executed and delivered these instruments the appellant knew that the restraint was operative and he knew that it would so continue until the year 1925. He intended, as shown by his personal acts in taking the most ample consideration to himself and in securing the waiver by deeds of his coheirs and devisees of any reversion of title to them, to make finally effective as of January 1, 1925, his conveyance of title. Not having acted then on what he now claims was a continuing right of forfeiture after that date, he allowed the appellee Schulz to take over and pay a full and complete consideration for the land as of March 1, 1925, and more than two years thereafter he seeks to exact the forfeiture.

We think his position untenable. He asks equity but does not offer to do equity. We do not go to the length of some of the cases we have cited and say that his upset date within which he could maintain his suit would be the last day of the period of restraint. It may be that in such a case of restraint upon alienation there might be good reason to prevail upon action taken within the usual period of limitations. Each case must be determined in the light of its own circumstances. We are of the opinion that, in the particular circumstances of this case, the appellant, by

his mortgage, contract, deed and conduct, allowed the appellee Schulz to become placed in a situation where it would be inequitable to divest him of his title. It is unnecessary to repeat the facts which are so apparent. So long after the expiration of the period within which appellant might have asserted his lack of power but continued to waive action to assert it, equity will not lend its aid to restore him to a place of vantage and to displace therefrom one who would not have been there but for the acts and conduct of the appellant. Whether it be called estoppel or laches is immaterial. The important thing is that the facts and the law applicable thereto prevent the appellant from recovering as a matter of equity and good conscience.

The judgment of the district court is

AFFIRMED.

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STANLEY V. CARR ET AL., APPELLANTS, V. CLARK H. FENSTERMACHER ET AL., APPELLEES.

FILED DECEMBER 10, 1929. No. 26706.

1. **Municipal Corporations: POWERS: METHOD OF EXERCISING.** Where the legislature grants a municipal power and prescribes exclusive methods of exercising it, the municipality must follow those methods.
2. ———: ———: ———. A grant of power to a city may imply a means of exercising it in addition to statutory methods without restriction as to others.
3. ———: LIGHTING UTILITY: METHOD OF PAYMENT. In cities of the second class the cost of a municipal lighting utility may be defrayed by means of a tax levy and, if insufficient for that purpose, by a bond issue. Comp. St. 1922, sec. 4397.
4. ———: ———: ———. Where a city of the second class has on hand sufficient available money to pay the purchase price of a municipal lighting utility, resort to a tax levy or to a bond issue for that purpose may be unnecessary, such methods, though authorized by statute, not being exclusive.
5. ———: ———: ———. The word "may" in the statute authorizing a city of the second class to defray the cost of a municipal lighting plant by means of a tax levy or a bond issue does not necessarily mean "shall" or exclude other methods.

6. ———: ULTRA VIRES CONTRACTS. Contracts beyond the power of a municipality are such as it cannot lawfully enter into for any purpose.

7. ———: LIGHTING UTILITY: METHOD OF PAYMENT. Power of a city to install and maintain a municipal lighting plant by means of a tax levy or a bond issue may, for such purposes, imply power to make a cash payment from funds already on hand and to pay the remainder of the purchase price out of net earnings of the plant, the two methods first mentioned not being exclusive.

8. ———: ———: CONDITIONAL OBLIGATION. In a city charter a provision requiring an appropriation in advance of incurring an indebtedness may not apply to a conditional obligation payable alone out of funds on hand and net earnings of a municipal lighting plant.

9. ———: ———: ESTIMATED COST. Failure of a city engineer to state a definite amount as the estimated cost of particularly described equipment for a municipal lighting utility, instead of "costs not to exceed" a particular sum named, *held* a mere irregularity not invalidating a subsequent contract of purchase.

10. ———: ———: NOTICE TO BIDDERS. In a notice to bidders, failure of a city to state the hour for closing and opening bids as provided by statute, instead of requiring bids "on or before" a specific date named, *held* not to invalidate a subsequent contract of purchase, where the information necessary to proper bidding was given and one bid only was submitted.

11. ———: ELECTRICITY: RATES. The duty of a city to fix reasonable rates for electricity furnished to consumers through a municipal lighting plant *held* not violated by a contract to purchase necessary equipment for it and to pay a portion of the purchase price out of its net earnings, where the contracting parties agreed that such earnings should be based alone on lawful charges.

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

*Squires, Johnson & Johnson* and *Sullivan & Wilson*, for appellants.

*Dressler & Neely* and *Perry, Van Pelt & Marti* and *N. T. Gadd, contra.*

*Paul E. Boslaugh, Thomas J. Keenan* and *Grady Corbitt, amici curiæ.*

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

ROSE, J.

This is a suit in equity to decree the invalidity of an ordinance authorizing the city of Sargent to buy a Diesel engine and other equipment for the improvement of an electric light and power plant already in operation and to enjoin the municipal officers and the seller of the equipment from performing a contract of purchase into which they entered. Plaintiffs are Stanley V. Carr and Edward Williams, who plead that they are resident taxpayers and users of electricity furnished by means of the plant; that the city was without power to enact the ordinance or to enter into the contract of purchase; that the municipal officers did not follow the statutory methods of procedure; and that the ordinance and contract of purchase are void. In the petition the ordinance, the contract, and other facts upon which plaintiffs rely for an injunction are pleaded at great length. Regularity of the municipal proceedings, validity of the contract of purchase and other grounds of defense are fully pleaded in the answer of defendants. Upon a trial of the issues the district court dismissed the suit and plaintiffs appealed.

The validity of the contract is vigorously assailed on the ground that the only legal way to purchase the equipment was to raise the necessary funds by taxation or by means of a bond issue authorized by a vote of the people, neither step having been taken. Those methods are authorized by the city charter and it is argued that they are exclusive. Comp. St. 1922, secs. 4396-4399. The city was operating an electric light and power plant at the time the Diesel engine was purchased. The new equipment was procured in the following manner: The council enacted and the mayor approved an ordinance declaring the old equipment to be inadequate, authorizing the purchase, directing notice for bids, and providing for payment of the purchase price out of the net receipts from the operation of the plant and not out of any funds raised by taxation, notice to bidders so specifying. The ordinance

provided further that the unpaid indebtedness incurred should be evidenced by conditional warrants payable out of the net receipts from the operation of the plant and that the warrants should not be general obligations of the city nor payable by taxation. The notice to bidders described the Diesel engine and the other necessary equipment desired and recited that the city engineer's estimate of the cost would be approximately $16,500. Fairbanks, Morse & Company, defendant, made the only bid—$15,435. It was accepted. From funds on hand the city paid $3,000 and for the remainder, or $12,435, issued conditional warrants payable only from net earnings of the plant. The contract of purchase and the conditional warrants conformed generally to the terms of the ordinance. The sellers of the new equipment reserved the right to retain title thereto pending nonpayment of any part of the purchase price. The decree denying an injunction was not superseded. The new equipment was installed and the city continued to operate the plant as improved.

Plaintiffs argued that the statutory methods of raising funds by means of taxation or by a bond issue excluded every other method, and that consequently the ordinance, the contract of purchase and the conditional warrants were void. The charter of Sargent shows that the two methods indicated were authorized by statute. Comp. St. 1922, secs. 4397-4399. The statutory procedure must of course be followed where the specific methods of raising money are adopted. It is shown by the record that no attempt to raise funds by taxation or by a bond issue was contemplated or made. Both methods were specifically rejected by ordinance, contract and conditional warrant. It does not necessarily follow, however, that power to raise money to pay for the utility or the improvement thereof by other means was excluded by the legislative grant. The legislation does not contain exclusive terms. A grant of power to a city may imply a means of exercising it in addition to specific statutory methods without restriction as to others. In direct language cities of the class to which Sargent belongs are specifically empowered in a single

section of the charter "to purchase, construct, maintain and improve" a lighting system. Comp. St. 1922, sec. 4396. The section next following provides that the cost of such a utility "may" be defrayed by means of a tax levy and, if insufficient for the purpose, by a bond issue. The word "may," in the sense used, does not necessarily mean "shall." If the city has on hand sufficient available money for that purpose resort to a tax levy or a bond issue is unnecessary. *Christensen v. City of Fremont,* 45 Neb. 160. On precedent the power to raise funds for a lighting plant by the methods mentioned in the statute is not exclusive. Contracts beyond the power of a municipality are such as it cannot lawfully enter into for any purpose. *Stickel Lumber Co. v. City of Kearney,* 103 Neb. 636. In the present instance the city of Sargent had $3,000 available for the initial payment. Under the contract payment of the remainder of the purchase price, $12,435, cannot be enforced by means of a bond issue or a tax levy. The seller of the new equipment and the holders of conditional warrants are limited to collection of deferred payments out of net earnings of the plant. By the very terms of the contract of sale individual property owned by residents of Sargent cannot be taxed to pay any part of the purchase price. The evidence shows that the new equipment was needed to make the plant efficient. There is nothing in the record to show extravagance, fraud or official corruption in the municipal proceedings. Performance of the contract according to its terms will not result in the taxation of any property owned by plaintiffs. The city had power in some form to make the purchase. The method adopted was not specifically prohibited by law and does not seem to be illegal. The power to pay for or improve a lighting utility with available money on hand or with net earnings of the plant is implied by the general grant. A general liability of the city was not created. Under the circumstances, therefore, want of power and alleged illegality in the respect indicated are not sufficient grounds for granting an injunction.

Plaintiffs argue further that the purchase is void be-

cause the annual appropriation bill did not contain an estimate of the expenditure as required by statute. Comp. St. 1922, sec. 4373. A formal appropriation in advance was unnecessary in the present instance, since funds to meet the expenditure are not to be raised by taxation, the obligation being payable alone out of funds on hand and net earnings of the plant and not being a general indebtedness of the city. *State v. Martin*, 27 Neb. 441; *Moore v. City of Central City*, 118 Neb. 326; *Slocum v. City of North Platte*, 192 Fed. 252.

Another point urged as a ground for an injunction is that the contract is void for want of a city engineer's previous estimate of cost. Such an estimate seems to be required by law where the expenditure exceeds $500. Laws 1925, ch. 51. The engineer did in fact submit what was treated by the city and the bidder as an estimate, but it is condemned by plaintiffs as "no estimate at all." It described the Diesel engine and the other equipment desired, and concluded: "Costs not to exceed $16,500." The statute did not prescribe a form for an estimate. The failure of the engineer to state a definite amount instead of the maximum cost was an irregularity at most. It served the statutory purpose of an estimate. No one was misled, deceived or wronged by it. The bid was lower than the sum stated by the engineer and there is nothing to show that the purchase price was excessive. The irregularity is not a ground for an injunction.

Failure of the city in its notice to bidders to state the hour for closing and opening bids is also urged as a ground for equitable relief. The advertisement required bids "on or before the 7th day of May, 1928." The rule in absence of a statute prescribing a particular form is that harmless informalities do not vitiate the notice for bids where the information necessary to proper bidding is given. There was a substantial compliance with the statute in respect to notice and the irregularities challenged are not fatal defects entitling plaintiffs to an injunction. There was only one bid for the Diesel engine and no one was injured by the omission.

Plaintiffs contend further that the contract to pay for the equipment out of the net earnings of the electric light and power plant will prevent the mayor and council from performing their duty to fix reasonable rates for electrical currents. The ordinance and the contract limit the sellers of the equipment and the holders of the conditional warrants to net earnings based on lawful charges for light and power. The point does not seem to be well taken.

On the whole case the conclusion is that the suit was properly dismissed.

AFFIRMED.

Good and Thompson, JJ., dissent.

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## H. BORSKY, APPELLEE, V. NATIONAL FIRE INSURANCE COMPANY, APPELLANT.

FILED DECEMBER 10, 1929. No. 26873.

1. Insurance: POLICY: CONSTRUCTION. Where a fire insurance policy contains a provision that insurer shall not be liable for loss while the insured automobile is being rented under contract or leased, and during the life of the policy the car is destroyed by fire while it is being operated by a lessee who has leased the car under contract, there can be no recovery.
2. ———: ACTION ON POLICY: DIRECTION OF VERDICT. In an action on a fire insurance policy, where the record discloses that at the time of loss by fire the policy was suspended and not in force, it is error to refuse to direct a verdict for the insurer.

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

*Rose, Wells, Martin & Lane,* for appellant.

*Howell, Tunison & Joyner, Kennedy, Holland, De Lacy & McLaughlin, contra.*

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

GOOD, J.

From an adverse judgment in an action on a policy of fire insurance, defendant appeals.

The policy covered an automobile which was destroyed by fire during the life of the policy. One of the several defenses pleaded and relied on is that, under the terms of the policy, the automobile was not covered by the policy at the time of the fire, because it was being used as a leased or rented car.

The policy contains the following clause: "Unless otherwise provided by agreement in writing added hereto, this company shall not be liable for loss or damage to any property insured hereunder: * * * (b) while the automobile described herein is * * * being rented under contract or leased."

From the record it appears that plaintiff bought and kept the car for his individual use, and it was stipulated in the policy that it was to be used only for private and pleasure purposes. Plaintiff also owned and operated a public garage and taxicab and "drive-it-yourself" business. In the evening on which the car was destroyed, plaintiff's foreman, in violation of his instructions, leased the car in question to a colored boy for his private use, and the latter, with a number of companions, was using the car in a "joy ride," when it upset, took fire and was practically destroyed.

Defendant urges that the trial court erred in not directing a verdict for defendant; in refusing to sustain a motion for judgment notwithstanding the verdict; and that the judgment is not sustained by the evidence.

No rider or written agreement was added or attached to the policy providing for coverage of the automobile while leased or rented. The question for determination is: Was the automobile, while leased, covered by the policy without such rider or written agreement?

Plaintiff argues that since the policy contains no specific forfeiture clause the court, by interpretation or construction, is powerless to incorporate one into the policy. He cites and relies on the opinion in *Hagelin v. Commonwealth Life Ins. Co.*, 106 Neb. 187, wherein it was held: "Where there is no specific provision in a policy of life insurance for forfeiture, either whole or partial, on a

breach of a condition by the assured, the court will not write one in; nor can the insurer afterwards impose new conditions creating a forfeiture without the consent of the assured, and without a new consideration."

We find no occasion to depart from nor to criticize the ruling above quoted, but we think it inapplicable to the instant case. In the *Hagelin* case the policy was issued on the life of Paul Hagelin and contained a provision: "But if at any time he engage in military or naval service in time of war (the militia not in active service excepted), he shall secure the company's written consent and pay the extra premium therefor." Hagelin became a soldier in the World war, and the company was advised of his military service. It did not cancel the policy. There was no provision in the policy for a forfeiture in case the assured did engage in military service, or for its suspension during such service; nor did the policy contain any provision as to the amount of additional premiums that might be due if assured engaged in such service. From a wound, inflicted while in the military service, Hagelin died. This court held that there was no forfeiture provided for his failure to pay the additional premium, whatever it might be, and that the company issuing the policy could not defeat a recovery under the circumstances. In the instant case, however, the automobile is not covered by the insurance policy while it is used as a leased or rented car. If the provision in the Hagelin policy had been that during the time Hagelin was engaged in military service the policy should not be operative or effective, then we would have a similar situation. The record discloses that the premium, in the instant case, paid for a $1,600 policy of fire insurance was $6.90, and it also discloses that the regular premium rate for insurance upon cars leased or rented is $8 per $100 higher, or more than 20 times the amount that was paid in this instance. The policy, itself, clearly provides that during the time the car is being used as a leased or rented car it is not covered by the policy. There is no forfeiture, but simply a suspension of coverage while the car is being leased or rented. While the exact question

has not been hitherto before this court, we have decided analogous questions.

In *Houston v. Farmers & Merchants Ins. Co.*, 64 Neb. 138, it was held: "Where credit is extended and a note taken for the premium to be paid for a policy of insurance, and both the note and the insurance policy provide that in case the note is not paid at maturity the policy shall be suspended, inoperative and of no force or effect so long as the note or any part thereof remains due and unpaid, the insurance company cannot be held liable for a loss occurring after the maturity of the note and while the same is unpaid." Similar rulings have been announced in the following cases: *Phenix Ins. Co. v. Bachelder*, 32 Neb. 490; *Home Fire Ins. Co. v. Garbacz*, 48 Neb. 827; *Antes v. State Ins. Co.*, 61 Neb. 55; *Farmers Mutual Ins. Co. v. Kinney*, 64 Neb. 808; *Hooker v. Continental Ins. Co.*, 69 Neb. 754; *Nimic v. Security Mutual Hail Ins. Co.*, 84 Neb. 403; *Belk v. Capital Fire Ins. Co.*, 102 Neb. 702; *Dressler v. Commonwealth Life Ins. Co.*, 105 Neb. 669.

In each of the cases cited above it is apparent that the stipulation provided for in the policy amounted to a suspension of the policy during the time of default in premium payment. The same principle, applied to the instant case, suspends the policy during the time that the automobile therein insured is being used as a rented or leased car. Insurance companies are permitted to select the kind of risks against which they will insure, and may also select the kind of risks against which they decline to insure. It is entirely within their discretion whether they will insure cars while being used in racing meets, or rented or leased, to be driven by the lessee. An insurance company may properly refuse to insure an automobile while it is being used for carrying highly inflammable or explosive material, and may, by contract, provide that if an automobile, covered by the policy, is so used during its life it will be suspended during such use. It is conceded that at the time of its destruction the car in question was leased or rented, and that while it was being so used by the lessee and through the latter's carelessness the car was upset, resulting in a fire and its prac-

tically total destruction. Under its terms, the policy was suspended while the car was being used by the lessee as a rented or leased car.

The learned trial court erred in refusing to direct a verdict for defendant and in not sustaining its motion for a judgment notwithstanding the verdict. The conclusion we have reached renders it unnecessary to discuss other assignments of error.

The judgment of the district court is reversed, and the action dismissed.

REVERSED AND DISMISSED.

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THEODORE H. PHILLIPS, APPELLEE, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLANT.

FILED DECEMBER 10, 1929. No. 26835.

1. **Master and Servant: NEGLIGENCE: APPLIANCES.** The selection by an employer of one simple tool, easily understood and comprehended, suitable for the work and not demonstrated and recognized of itself to be dangerous, rather than some other tool, is not negligence. The pick, commonly used by track-men on railroads, is such a simple tool, and failure to replace it with tie tongs to handle ties is not negligence.
2. ———: ———: ———. The rule requiring an employer to exercise ordinary care to provide reasonably safe tools for his employee has little application to simple ones, in common use, easily understood and comprehended, and in which defects can be readily ascertained by persons of ordinary intelligence.
3. ———: ———: ———. In the selection of tools, the employer is given much freedom of choice, and in the exercise of this discretion must use reasonable care and ordinary prudence.
4. ———: ———: DIRECTION OF VERDICT. Where, as in this case, there is no evidence of negligence, the trial court should direct a verdict.

APPEAL from the district court for Holt county: ROBERT R. DICKSON, JUDGE. *Reversed and dismissed.*

*Byron Clark, Jesse L. Root, J. W. Weingarten* and *Julius D. Cronin,* for appellant.

*M. F. Harrington* and *George M. Harrington, contra.*

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

DAY, J.

This action was brought under the federal employers' liability act, by one Phillips, to recover damages for an injury received while employed as a section foreman by the Chicago, Burlington & Quincy Railroad Company. The plaintiff recovered a verdict in the lower court, from which the defendant appeals. It is not questioned that this case is controlled by the federal employers' liability act, under which it is brought. Phillips, while employed as above stated, was injured in taking out and replacing a tie in the roadbed of the company. In the performance of this task, he received the injury for which he seeks to recover damages. The company provided, as a tool, a common pick, and while engaged in removing ties from the roadbed the pick slipped out of the tie, and he tumbled over the embankment and struck a snag, which entered his rectum, seriously injuring him.

In a case brought under the federal employers' liability act for damages, there can be no recovery against the employer, unless some act of negligence on the part of the employer be alleged and proved. *Chesapeake & Ohio R. Co. v. Stapleton,* 278 U. S. 585. In the words of that opinion: "The language of the federal employers' liability act shows unmistakably that the basis of recovery is negligence and that without such negligence no right of action is given under this act. *New York Central R. Co. v. Winfield,* 244 U. S. 147; *Erie R. Co. v. Winfield,* 244 U. S. 170." This court has followed this rule laid down by the federal court in numerous cases, notable among which is the case of *Nanfito v. Chicago, B. & Q. R. Co.,* 103 Neb. 577, in which case it is written: "It seems that the federal courts have so construed this act that there is no liability thereunder without proof of negligence of the defendant which was the proximate cause of the injury complained of"—citing *Missouri, K. & T. R. Co. v. Foreman,* 174 Fed. 377; *Seaboard Air Line Railway v. Horton,* 233 U. S. 492.

Since the federal employers' liability act does not contain a definition of negligence, we must determine whether or not negligence exists in this case from the common law, as interpreted and applied in the federal courts, if that interpretation differs from that in the state courts. *New Orleans & N. E. R. Co. v. Harris*, 247 U. S. 367. We cite only a few of the cases upon this question as a basis for discussion of the questions involved in this case. This proposition has been so frequently discussed by the federal courts and this court, and the holdings have so consistently followed without deviation in every case the rule above set out, that we need not labor further with it here.

The question squarely before this court for its determination in this case is whether or not the defendant was negligent in its failure to furnish tie tongs instead of picks for the use of its track-men in removing and replacing ties. The question involved in this case is not that of a defective tool, which was known to the employer to be defective, and was continued in use and the employee injured as a consequence. We must determine whether the furnishing of one tool for the work rather than another was such negligence as would sustain a verdict for the plaintiff. The employer is not bound to supply the best, the newest, or the safest tools to insure the safety of his employees. It is his duty to use all reasonable care and prudence for the safety of his employees, by providing them with machinery and tools reasonably safe and suitable for the use to which they are to be put. In *O'Neill v. Chicago, R. I. & P. R. Co.*, 66 Neb. 638, it was held, quoting from *Titus v. Bradford, B. & K. R. Co.*, 136 Pa. St. 618:

"Absolute safety is unattainable, and employers are not insurers. They are liable for the consequences, not of danger, but of negligence; and the unbending test of negligence in methods, machinery, and appliances is the ordinary usage of the business. No man is held by law to a higher degree of skill than the fair average of his profession or trade, and the standard of due care is the conduct of the average prudent man. The test of negligence

in employers is the same, and however strongly they may be convinced that there is a better or less dangerous way, no jury can be permitted to say that the usual and ordinary way, commonly adopted by those in the same business, is a negligent way, for which liability shall be imposed. Juries must necessarily determine the responsibility of individual conduct, but they cannot be allowed to set up a standard which shall, in effect, dictate the customs or control the business of the community."

It is the duty of the master to furnish his servant with reasonably safe tools. 39 C. J. 308. But—"The rule as to the duty of the master in furnishing the servant with safe tools and appliances does not apply to simple tools in common use and with which the master and servant are equally familiar." 39 C. J. 342. Where the tools or appliances furnished are of a simple nature, easily understood and comprehended, and in which defects can be readily ascertained by persons of ordinary intelligence, the foregoing rule has little application. *Vanderpool v. Partridge*, 79 Neb. 165. Again, in *Lynn v. Glucose Sugar Refining Co.*, 128 Ia. 501, it is said that the rule of law is well recognized that it is the duty of the master to use ordinary care in furnishing reasonably safe tools and appliances for his servants. It is only machinery and appliances which are recognized in their nature as dangerous to employees using them, to which the employer owes a duty to look out for their safety. The injury in this case was unusual and not to have been contemplated as a result of the plaintiff losing his balance and falling over when his pick slipped from the tie. The accident, and the consequent injury, was not occasioned by the dangerous character of the tool employed. The pick is a simple tool which has been in use for such purposes from the time the first railroad was built. It was suitable for the use which was made of it. To permit the jury to compare two tools as simple as the pick and tie tong, and to determine that one was safer than the other and that the failure to furnish the safer tool was negligence on the part of the employer, would be to permit the jury to determine the standard which should govern the duty

of the employer to the employee, and permit them to require the employer to compensate the employee, not because of its negligence, but rather because there was an accident, and as a result thereof the employee was injured. It was an unusual combination of circumstances contributing to the injury. A more unusual chain of circumstances leading to a more unusual injury could not be imagined. The pick slipped, the plaintiff stumbled and fell upon a snag, which struck him and entered his rectum, causing a serious injury. But a serious injury and an unfortunate result to the plaintiff, which is deplorable, cannot be the basis of recovery under the federal employers' liability act.

The plaintiff in this case relies upon the case of *Anderson v. Illinois C. R. Co.*, 109 Ia. 524, and *Chicago & N. W. R. Co. v. Bower*, 241 U. S. 470. In the former case, decided by the supreme court of Iowa in 1899, prior to the enactment of the federal employers' liability act, the plaintiff was required to do work which he was not accustomed to do, and in his seven years employment had not been required to do before. In that case the plaintiff was required to use a tool which was not suitable for the purpose, and which was so recognized. This does not describe the situation here. In the latter case, the court held that there was no question of attributing negligence to the employer for merely failing to install the latest and newest appliance, but that it was the question of not having the latest type of appliance in use, after its discovery and applicability had been demonstrated by experience, and perhaps under conditions little different from those which had obtained when in use before, in the face of notice that it was not reasonably safe and suitable. As applied to this case, it has not been proved that it had been demonstrated that a pick is not a reasonably safe and suitable appliance with which to remove and replace old ties in the railroad, and that the railroad company continued to use said tool, after it had been so demonstrated. This case does not come within the rule therein stated. In *Lynn v. Glucose Sugar Refining Co.*, 128 Ia. 501, the Iowa supreme court

pointed out perhaps more clearly the distinction between those cases and the case at bar. In that case, in order to recover for negligence for failure to furnish one tool for another, the court said, in substance, that it was not enough to establish the negligence of the employer to show that one tool might result in injury, and that the usual tool was different, but that it would be necessary that the evidence should go farther and prove a recognized danger in the use and employment of such as was not ordinarily in use for the purpose, in order to charge the defendant with negligence in permitting such use. "It is only machinery and appliances which are recognized as in their nature dangerous to employees using them, or working in proximity to them, as to which the employer owes a duty to the employee of looking out for his safety."

The federal courts have held that the employer has reasonable discretion in selecting facilities for the use of employees. It is the duty of the master to provide reasonably safe machinery or appliances for the servant to do the work. In making such provision, they are given much freedom of choice, and in the exercise thereof they must use reasonable care and ordinary prudence. *Toledo, St. L. & W. R. Co. v. Allen,* 276 U. S. 165; *Union P. R. Co. v. Marone,* 246 Fed. 916.

The pick which was used by the track-men in this case was not a tool which was recognized as dangerous in its use. It was a simple tool, ordinarily used for the purpose, and the failure of the railroad company to supply tie tongs in place thereof was not such negligence as would justify a recovery by the plaintiff under the federal employers' liability act, and the trial court should not have submitted the question of negligence to the jury. *Chicago, M. & St. P. R. Co. v. Coogan,* 271 U. S. 472.

While other questions are raised by the appellant's brief, their consideration here would be purely academic, since their discussion or determination is not necessary to a decision of this case, in view of the conclusion which we have reached with respect to the question of negligence. Since we have reached the conclusion that the failure of

the railroad company to furnish the parties with a tie tong instead of a pick for their work as track-men is not negligence to sustain a verdict under the federal employers' liability act, the judgment is reversed and the action dismissed.

REVERSED AND DISMISSED.

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RALPH G. COAD, APPELLEE, V. LONDON ASSURANCE CORPORATION, APPELLANT.

FILED DECEMBER 12, 1929. No. 26968.

1. **Insurance:** POLICY: CONSTRUCTION. Where an insurance policy by its insuring clause clearly covers an article, and an exemption clause does not clearly exclude it, the policy, being strictly construed against the company preparing it, will be held to cover said article.
2. **Contracts:** CONSTRUCTION. The rule of construction applicable to contracts is that, where general words follow particular or specific terms, they are restricted in meaning to those articles which are of the same kind as those specially mentioned.

APPEAL from the district court for Douglas county: CHARLES E. FOSTER, JUDGE. *Affirmed.*

*Ziegler & Dunn* and *George W. Becker,* for appellant.

*Ralph G. Coad, pro se.*

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

DAY, J.

This was an action brought by Ralph G. Coad against the London Assurance Corporation to recover from the defendant under a fire insurance policy for a radio which was damaged by lightning. The case was first instituted in the municipal court of the city of Omaha, where the plaintiff recovered. It was appealed to the district court for Douglas county, where the court, a jury being waived, found against the defendant, whereupon an appeal was taken to this court.

The only question in this case is whether or not the plaintiff's radio was covered by the policy of insurance of the defendant. The defendant contends that the loss sustained was not covered by the policy because it was excluded by the lightning and electrical exemption clause of said policy. It is therefore obvious that the determination of this case depends upon a construction of the policy.

The insurance policy in this case is designated as the "Uniform Standard Nebraska and North Dakota Dwelling Policy," which the parties agree has been in use in this state for more than 25 years. In order to understand the question here presented, the insurance clause, so far as applicable, is set out, as follows: The company insures the plaintiff "against all direct loss or damage by fire and lightning, except as hereinafter provided, * * * on household * * * furniture and utensils, useful and ornamental (the property of assured and all members of the assured's family)," including, among other specially enumerated articles, "electrical apparatus, appliances and devices; scientific apparatus, appliances, devices and implements, and all other furniture and fixtures not belonging to and constituting a permanent part of the building." This insurance clause of the policy clearly includes the radio as being insured against fire and lightning. If the policy ended at this point, there would be no question but that the plaintiff would be entitled to recover for the loss of the radio. But the company contends that the radio is not covered because of the electrical exemption clause, which is as follows: "It is a special condition of this policy that the company shall not be liable for any loss or damage to dynamos, exciters, lamps, switches, motors and other electrical appliances or devices, caused by electrical currents, whether artificial or natural (including lightning), and will be liable (if covered by this policy) only for such loss or damage to them as may occur in consequence of fire outside of the machines, appliances or devices themselves." It will be noted that there is a difference in the language of the insurance clause and the exemption clause. In the exclusion clause, the words dynamos, exciters, lamps,

switches, and motors are used. These are specific and particular descriptions of articles to be excluded, and are followed by the general words: "And other electrical appliances or devices." The rule of construction applicable to contracts is that, where general words follow particular or specific terms, they are restricted in meaning to those articles which are of the same kind as those specially mentioned. *Hoffman v. Eastern Wisconsin R. & L. Co.*, 134 Wis. 603. It is not contended by the assurance company that a radio is named or included in any of the words of particular description, but it is claimed that it is included in the words, "and other electrical appliances or devices." A radio is not of the same kind as the particularly described articles and is not therefore included by the general words just quoted. Certainly, it is not clear that the radio is excluded by the electrical exemption clause. It is the general rule that the insurance policy should be construed strongly against the insurance company, because of the fact that it prepared the contract, rather than the insured, and had the time and opportunity to select with care and ingenuity, and with a view to its own interest, the language in which it was written. *Connecticut Fire Ins. Co. v. Jeary*, 60 Neb. 338; *Hass v. Mutual Life Ins. Co.*, 84 Neb. 682; *Riser v. Federal Life Ins. Co.*, 207 Ia. 1101; *Githens v. Great American Ins. Co.*, 201 Ia. 266, 44 A. L. R. 863. Therefore, since it is clear that the radio in question was included in the insurance clause, and it is not clear that it was one of the losses excluded by the electrical exemption clause of the policy, the policy ought to be construed against the assurance company as covering the radio. The judgment of the lower court is

AFFIRMED.

## IN RE ESTATE OF THOMAS BAYER.
## ANNA HAMILTON ET AL., APPELLANTS, V. ANTON M. BAYER ET AL., APPELLEES.

FILED DECEMBER 12, 1929. No. 27016.

1. Wills: TESTAMENTARY CAPACITY: PROOF. Where a will is contested upon the ground that, at the time of its execution, the testator was of unsound mind, the proponents having established a *prima facie* case that the testator was of sound mind, contestants must introduce sufficient evidence to support a contrary finding by the jury, and, unless the evidence is conflicting there is no disputed question of fact for the court to submit to the jury.
2. ———: ———. The evidence in this case examined, and *held* to establish, without conflicting testimony, that at the time the testator executed the will he knew the extent and character of his property, the natural objects of his bounty, and the purposes of his devises and bequests. This makes him mentally competent to make a will.
3. ———: CONTEST: UNDUE INFLUENCE: BURDEN OF PROOF. Where a will is contested because it is alleged that it was procured by undue influence, the burden is upon the contestants to establish by proof, or by fair inference to be drawn from facts proved, that there was undue influence, which induced the testator to dispose of his property contrary to his intention. In such a case, suspicion or supposition of undue influence is not sufficient either to require the submission of the question to the jury, or to sustain a verdict.
4. ———: ———: DIRECTION OF VERDICT. If in a case contesting a will on the ground of mental incompetency and undue influence, the evidence is insufficient to sustain a verdict upon either of these issues in favor of the contestants, the trial court should withdraw these issues from the jury and direct a verdict.

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

*Lewis C. Paulson,* for appellants.

*C. P. Anderbery* and *King & Bracken, contra.*

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

DAY, J.

This is a proceeding which has for its object the allowance for probate of an instrument as the last will of Thomas Bayer, deceased. The county court allowed the instrument as the will, but upon appeal to the district court it was found not to be such will, which finding was reversed by this court *(In re Estate of Bayer,* 116 Neb. 670) and the cause was remanded for a new trial. The case is here again for review after a second trial in which the will was found not to be the last will and testament of the deceased. The widow and three children of deceased appear as proponents of said will, while three other children appear as contestants. Thomas Bayer died April 20, 1924, leaving a widow and seven children. The will in dispute was executed November 18, 1922. There is no question as to the proper execution of the will, but the contestants urge that when the will was made the deceased did not have sufficient mental capacity to make said will, and that it was the result of the exercise of undue influence. The proponents contend that the evidence is not sufficient to sustain the finding of the jury against the allowance of said instrument for probate, either as to lack of sufficient mental capacity, or upon the question of undue influence.

In this state the burden is upon the proponents of a will to prove, not only the execution of the will, but the capacity of the testator. In *Seebrock v. Fedawa,* 30 Neb. 424, it was said: "It is the duty of the proponents in the first instance to offer sufficient testimony of the capacity of the testator to make out a *prima facie* case." We are not prepared to say that, where the proponents prove the testator to have been capable of transacting ordinary business, he is required to go further in order to make a *prima facie* case of testamentary capacity. The proponents having established a *prima facie* case as to the testamentary capacity of the deceased, it is necessary, in order to defeat the will, that the contestants introduce sufficient evidence to overcome the presumption arising out of the *prima facie* case made by proponents. The burden of proof does not shift, but the burden of going ahead, as some authorities put it,

does. The rule above stated in *Seebrock v. Fedawa, supra,* is approved in the following authorities: *In re Estate of Kubat,* 109 Neb. 671; *Steinkuehler v. Wempner,* 169 Ind. 154, 15 L. R. A. n. s. 673; *In re Estate of Sweeney,* 94 Neb. 834. The question directly before us in this case is whether, upon the proponents having established a *prima facie* case, the contestants offered any evidence tending to prove mental incapacity sufficient to sustain the verdict of the jury. If the evidence relating to mental capacity to make a will is conflicting, the issues of fact are questions for the jury. *In re Estate of Kerr,* 117 Neb. 630. The defeated litigants in the contest of a will are not entitled to a trial *de novo* on appeal to the supreme court, but upon such appeal the issues of fact are determined by the sufficiency of the evidence to sustain the verdict. With this rule in mind, we have searched the record diligently to discover whether or not there was evidence to support the finding of the jury in this case. There is no evidence in the record that Thomas Bayer, deceased, was of unsound mind, either at the time of the execution of this will, at his death, or at any intervening time. Not only is there an absence of proof of testamentary incapacity; but, giving the testimony the construction most favorable to the contestants, their testimony seems to indicate that the deceased was of sound mind at all times from the execution of his will to his death. It shows that he knew the extent and character of his property, the natural objects of his bounty, and the purposes of his devises and bequests. This is sufficient to render him mentally competent to make a will. *In re Estate of Kubat,* 109 Neb. 671, citing and following *In re Estate of Laflin,* 108 Neb. 298.

We reached this conclusion without reference to, or consideration of, the evidence offered in rebuttal by the proponents for the will. It consists of the testimony of more than 20 of the prominent citizens of the town in which the deceased lived, who were personally acquainted and closely associated with him, and who testified that he was a man of sound mind, capable of attending to his business, and did attend to it, up almost to the day of his death. At

his death he was 92 years of age, and it was stipulated in the record that he was a "strong man physically, and that he was in good health up to the time he died." This court said at the time the case was here previously: "The trial court should have withdrawn the question of competency from the jury, the evidence in the record being wholly insufficient to sustain a finding in favor of the contestants on that issue." *In re Estate of Bayer,* 116 Neb. 670. It is now argued here that the evidence before the court at this time is different, although a large part of it was read from the evidence of the previous trial. We do not deem it necessary that we compare the records in the two cases, with a view to determine such question, but we have determined, solely from the record now before us, that the question of the testamentary competency of Thomas Bayer should have been withdrawn from the jury in this case, inasmuch as there is no conflicting evidence or disputed question of fact to be submitted to a jury upon this issue for their determination. *In re Estate of Kubat, supra; In re Estate of Kerr,* 117 Neb. 630.

The second question presented to us for our consideration is whether the purported will was executed as a result of undue influence. It is charged by the contestants that one of the proponents, a son of the deceased, exerted undue influence upon the testator, with the result that the instrument is not the last will and testament of the deceased. The burden of proving this contention is ordinarily upon the contestants, and competent proof is required that the said will was procured by undue influence in order to set it aside. *In re Estate of Dovey,* 101 Neb. 11. In *In re Estate of Wilson,* 114 Neb. 593, the rule is set out as follows: "Where it is alleged that the execution of a will was procured by undue influence, the burden is upon the party alleging it to establish that the testator was induced by improper means to dispose of his property differently from what he intended." The following cases are cited: *Seebrock v. Fedawa, supra; Boggs v. Boggs,* 62 Neb. 274; *In re Estate of Dovey,* 101 Neb. 11; *In re Estate of Fenstermacher,* 102 Neb. 560; *In re Estate of Kees,* 114 Neb. 512; 40 Cyc. 1150.

The proponents challenge also the sufficiency of the evidence to sustain the verdict of the jury with respect to the question of undue influence, and we are again required to search the record with respect to this issue to determine whether or not, with the most favorable view of the evidence to the contestants, they have established that the will was the result of the undue influence of John J. Bayer. Undue influence must be such as damages the free agency of the testator, at the time the will was executed. Mere supposition of undue influence is not sufficient to carry the case to the jury, but it must appear by proof, or by fair inference to be drawn from the facts established, that there was undue influence. *In re Jackson's Estate,* 220 Mich. 565. In respect to the execution of this will, there is not any testimony tending to prove that undue influence was exerted upon the testator by his son, John J. Bayer. The only evidence in the record that can be construed as intimating an undue influence is that of one of the daughters, and this evidence was not with respect to this will but relative to a deed that was given to the son in January 1921, sometime previous to the execution of this will, and three years before the testator died. At the time this deed was recorded, and all the children knew about it, this daughter testified that she spoke to him with reference to it and that he said: "Child, I will tell you the honest to God's truth, I had to have peace the rest of my life, he left me no rest and I had to do the like." This is the only evidence we have found in the record to support the contention of undue influence, and it was concerning a matter not relating to the will, which occurred three years before the death of the testator. This deed was not called in question during the life of the testator. The contestants in this case do not suggest that while he was living he lacked the mental capacity to transact his own business. For three years John J. Bayer was in possession of the land in question, with the deed recorded, a fact known to all of the contestants in this case. The thought suggests itself to us that, if Thomas Bayer, at such time, was not mentally competent to transact his own business, and was being imposed upon

by this son, the contestants in this case were negligent in their filial duty to their father, in not rallying to his relief at that time. The picture developed by the entire record in this case is of a strong, vigorous man, able to look after his own business, and so self-confident of that fact as to have brooked no interference from his children or or any one else. The record in this case, filled with petty family quarrels, most of which have arisen with this contest, and which it is hoped will be forgotten when it is ended, fails to disclose evidence sufficient to support a finding of the jury that the will was the result of undue influence exerted by John J. Bayer, and the question of undue influence exerted, as well as the question of testamentary capacity, should have been withdrawn from the jury. If sufficient evidence has not been introduced in a case upon the issue of undue influence to raise a question of fact upon conflicting evidence, then the court should direct a verdict. "Where the evidence in the contest of a will, on the ground of mental incompetency and duress, is insufficient to sustain a verdict in favor of the contestant on either of those issues, a peremptory instruction in favor of proponents is not erroneous." *In re Estate of Laflin*, 108 Neb. 298. The cause should not be submitted to the jury as an invitation to them to substitute their judgment as to the proper disposition of the property for that of the testator, and thus deny him the right to control his property while living, and to direct by will its use after his death.

In conformance with the foregoing opinion, the judgment is reversed and the cause remanded, with directions to enter judgment admitting the will to probate as the last will and testament of Thomas Bayer, deceased.

REVERSED.

STATE, EX REL. BEATRICE CREAMERY COMPANY, APPELLEE, V. FRANK MARSH, SECRETARY OF STATE, APPELLANT.

FILED DECEMBER 12, 1929. No. 27267.

1. **Licenses:** STATUTORY PROVISION. Section 681, Comp. St. 1922, provides that the corporation fee for domestic corporations shall be computed upon their paid-up capital stock. The language of this section is so clear and unambiguous that judicial construction is unnecessary and improper.
2. ———: ———: FRANCHISE TAX. The tax provided by section 681, Comp. St. 1922, is in its nature a franchise tax, rather than one upon the property, the capital stock, or the business of the domestic corporation.
3. **Commerce:** FRANCHISE TAX. Such a franchise tax levied by the state for the privileges and advantages of corporate existence and measured by the amount of the paid-up capital stock, rather than upon property without the state, or upon volume of business, is not a tax upon interstate commerce.
4. **Case Distinguished.** *State, ex rel. Case Threshing Machine Co., v. Marsh*, 117 Neb. 832, construed only the sections referring to the corporation tax of foreign corporations, and is not decisive of the question of the tax of domestic corporations presented here.
5. **Taxation:** CORPORATIONS: CONSTITUTIONAL PROVISIONS. The provision of section 1, art. XII of the Constitution, that foreign corporations shall not be given greater rights or privileges than are given domestic corporations, refers to the granting of franchises and corporate privileges, rather than taxation.

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

*C. A. Sorensen, Attorney General, Clifford L. Rein* and *Irvin A. Stalmaster*, for appellant.

*Allen & Requartte, contra.*

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

DAY, J.

The Beatrice Creamery Company commenced an action in the district court for Lancaster county, asking a writ of mandamus to compel the secretary of state to accept

$250 as its corporation tax for 1929. The defendant demurred to plaintiff's petition and appeals from an order overruling its demurrer. The plaintiff, a domestic corporation, has a paid-up capital stock of $12,000,000, of which only $690,000 is used and employed in carrying on its business in the state of Nebraska, while the remainder is used and employed in other states. This controversy wages over the question as to whether the annual corporation fee levied upon corporations shall be computed upon the total paid-up capital stock or only upon such capital employed in its business within the state. If the plaintiff, as it contends, should pay only such tax measured by its capital stock used and employed within the state, the amount tendered is computed upon this basis, and the writ should issue.

The corporation fee involved herein is provided by sections 679, 680, and 681, Comp. St. 1922. In substance these sections provide for the annual report of corporations organized under the law of this state, which report shall set forth, among other things, the amount of the authorized capital stock subscribed and paid up. It is further provided that the corporation shall pay an annual fee to the secretary of state, graduated in an ascending scale according to the amount of paid-up capital stock of the corporation. There is no ambiguity about the provisions of this statute, its language is clear and unequivocal, and there exists no necessity for a construction of these sections to determine the legislative intent. Indeed, these sections are so clear and unambiguous as to be improper subjects for judicial construction. It is self-evident and certain that the legislature intended that as to domestic corporations the fee should be computed upon its total paid-up capital stock.

This tax, which the state seeks to impose, is in its nature a franchise or excise tax. It is not a tax upon the property of the corporation. Neither is it a tax upon its capital stock, nor a tax upon the business of the corporation. The state of Nebraska gave the plaintiff corporate life and permits it to live. Its powers are derived from the laws of the state. The amount and the manner of the issue of

its stock, the liability of the holders thereof, and all other incidents in the creation, the growth and the development of this corporation, are all powers and privileges conferred upon it by the state. For all of these corporate benefits and advantages, the state seeks to levy a tax as the price of its corporate existence. If the corporation accepts the boon of corporate existence, it may well bear the burden. A state may tax a domestic corporation a franchise fee as it sees fit, and prescribe any mode of measurement for the fee it finds convenient. It may require the payment of a fee as a condition precedent to the granting of a charter to do business, and an annual fee each year for its continued exercise of rights and privileges of the franchise.

The plaintiff in this case contends that the tax imposed, being measured by the amount of paid-up capital stock, the most of which is employed in other states, amounts to a tax upon interstate commerce. It has a paid-up capital stock of $12,000,000, which stock was issued under, and by authority of, its corporate franchise. Its management, control, and use is governed by its franchise. The franchise fee, based as it is upon the amount of capital controlled by this franchise, is not a tax upon property without the state, or upon interstate business. *Kansas City, Ft. S. & M. R. Co. v. Kansas,* 240 U. S. 227; 12 C. J. 111. Such a tax, being for the privilege granted by the state for being a corporation, is not a tax upon interstate commerce because a part of the paid-up capital stock is employed in interstate commerce.

The plaintiff also urges that sections 683-697, Comp. St. 1922, indicate the intention of the legislature to place domestic and foreign corporations upon an equality with reference to the payment of the occupation tax. These sections of the statutes apply only to foreign corporations, and do not apply to domestic corporations. The recent case of *State v. Marsh,* 117 Neb. 832, is cited to support plaintiff's view. In that case the only question presented to the court for its determination was the construction of the above section of our statutes as applied to foreign corporations, and the language quoted relative to a domestic

corporation was used "arguendo," and was not decisive of the question here presented.

The next question presented is that section 1, art. XII of the Constitution of Nebraska, providing that foreign corporations shall not be given greater rights or privileges than are domestic corporations of a similar character, means equal protection to both foreign and domestic corporations. This provision refers to the granting of franchises and corporate privileges, rather than to taxation. In any event, the method provided for computing the tax upon corporations, foreign and domestic, is not unequal as between the two classes of corporations. The state of Nebraska is required to perform certain acts in relation to domestic corporations which are not required by foreign corporations. The tax levied on the foreign corporation merely permits it to exercise quasi-corporate powers within the state. The state is not required to regulate or supervise, nor would it be permitted to do so, the issuance and sale of stock. The state has neither duty to regulate the management of its corporate business, nor to dictate the functioning of the corporate body. Moreover, there is no inequality. Every state has the power to levy an excise tax upon its own corporate creations. Foreign corporations doing business in Nebraska are subject to a franchise tax in the state of their domicile, such state having the right to tax corporations created by it. 26 R. C. L. 121, 124, 125; *Delaware R. Tax,* 18 Wall. (U. S.) 206; *Wiggins Ferry Co. v. East St. Louis,* 107 U. S. 365; *Henderson Bridge Co. v. Kentucky,* 166 U. S. 150; *Society for Savings v. Coite,* 6 Wall. (U. S.) 594; *Home Ins. Co. v. New York,* 134 U. S. 594; *Flint v. Stone Tracy Co.,* 220 U. S. 107; *Kansas City, Ft. S. & M. R. Co. v. Kansas,* 240 U. S. 227; *International Shoe Co. v. Shartel,* 279 U. S. 429. Domestic corporations here are foreign corporations in other states and so the potential taxing power is equal with respect to all corporations doing business in the state.

The plaintiff urges that the inequality, just discussed, will have the effect of deterring corporations from organizing and engaging in business in Nebraska. The officers

of the state have, since 1913, applied and interpreted these sections of the statutes relative to foreign corporations as construed by this court in *State v. Marsh, supra,* and relative to domestic corporations as we do in this case. If such an application of the law is driving corporations from the state, it is a question of policy properly directed to the attention of the legislature rather than the court. For this same reason, the state argues, that we should give great consideration to the administrative and legislative interpretation of these sections of the statutes. Upon this question, we quote the language of *State v. Marsh, supra*:

"The continuous interpretation of the statute in question, placed upon it by the officers of the state charged with its enforcement, together with the fact that, notwithstanding such interpretation, although five sessions of the legislature have been held during that time, no attempt has been made to amend the law, is such an administrative and legislative construction upon the act as should be followed by the court. Such construction is of great persuasive force, and will ordinarily be adopted by the courts when it does not do violence to the language, purpose or policy of the act. *Douglas County v. Vinsonhaler,* 82 Neb. 810; *United States v. Minnesota,* 270 U. S. 181."

We are of the opinion that, although the sections of the statutes referring to foreign corporations subject them to a tax computed only upon the amount of paid-up capital actually employed in business in the state, the sections referring to domestic corporations require them to pay a tax computed upon their total paid-up capital stock. Computed upon this basis, the amount tendered the secretary of state is insufficient to pay the corporation fee of the Beatrice Creamery Company for 1929, and therefore the writ ought not to issue. The judgment of the lower court is reversed and the cause dismissed.

REVERSED AND DISMISSED.

IRVIN R. MOREARTY, APPELLANT, V. CITY OF MCCOOK, APPELLEE.

FILED DECEMBER 31, 1929. No. 26998.

**Evidence** in record examined and *held* to support the judgment.

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

*Bernard McNeny* and *C. D. Ritchie,* for appellant.

*Perry, Van Pelt & Marti* and *Cordeal, Colfer & Russell, contra.*

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

PER CURIAM.

This is the second appearance of this cause before this tribunal. The issues presented on this appeal are somewhat different from those which engaged the attention of this court at the former hearing. *Morearty v. City of McCook,* 117 Neb. 113. The opinion in that case contains a full statement of the issues then before this court for consideration and the disposition made thereof. In substance it was declared in that opinion that the proof before the court established the fact that the plaintiff's contract was valid, had been substantially performed, and that the measure of damages sustained by the city, if any, would be the cost of remedying certain omissions of the plaintiff, and the case was remanded, with permission to defendant, city of McCook, to amend its answer setting up its damages, if any, occasioned by the failure of appellant, plaintiff below, to make final estimates and assessments of the cost of paving in question, if it so desired.

It is to be noted that the plaintiff in declaring on his contract in the first case alleged that plaintiff "has duly done and performed all things required of him by said contract of employment." So far as the subjects under consideration in this case, viz., the failure of plaintiff below to make final estimates and the assessments of the

cost of paving, the allegations in plaintiff's petition were traversed, if at all, at the former trial by a general denial only. It seems: "At common law it was ordinarily required of the pleader to make, not only an allegation of the performance of a condition precedent, but also a statement of the time and manner of its performance or an excuse for nonperformance, in order that the court might determine, as a matter of law, whether or not the intention of the parties had been fulfilled, and in order that a traversable issue might be presented. But according to the general rule as it now exists, and is established in some jurisdictions by statute, in pleading the performance of conditions precedent, it is not necessary for plaintiff to state the facts showing such performance, but he may aver generally that he has duly performed all the stipulations and conditions on his part; and in such case defendant cannot set up in defense the nonperformance of any condition which he has not specified in his plea." 13 C. J. 727, sec. 850. Our statute expressly provides: "In pleading the performance of conditions precedent in a contract, it shall be sufficient to state that the party duly performed all the conditions on his part." Comp. St. 1922, sec. 8640. Under such statutory provision the rule appears to be: "If defendant relies on the nonperformance of the contract by the plaintiff, he must allege that fact in his answer. In pleading such nonperformance, the facts which constitute the breach must be alleged, and the breach assigned must conform to the terms of the contract. * * * Where by statute plaintiff is authorized to plead a general performance of all conditions precedent, defendant must, if he relies on the fact that any of the conditions precedent have not been performed, set out specially the condition and the breach, thus confining the issue to be tried to such particular condition or conditions precedent as he may indicate as unperformed." And: "Where a breach by plaintiff is not such as to defeat his right of action, defendant cannot plead it in bar, but must take advantage of it by properly pleading it in recoupment of damages." 13 C. J. 738, sec. 879. See *Kahnweiler v. Phenix Ins. Co.*, 67 Fed. 483; *Penn*

*Mutual Life Ins. Co. v. Ornauer,* 39 Colo. 498; *Thomas v. Walden,* 57 Fla. 234; *McGrath v. Crouse,* 6 Kan. App. 507; *Preston v. Roberts,* 12 Bush (Ky.) 570; *Delaware River Quarry & Construction Co. v. Freeholders of Hunterdon,* 86 N. J. Law, 294.

A mere general denial, therefore, is insufficient to raise the issue. *Herpolsheimer v. Citizens Ins. Co.,* 79 Neb. 685. It would seem, therefore, under the pleadings in the case heretofore presented, considering substantial performance by the plaintiff of the contract sued upon as a condition precedent and the due performance thereof properly alleged in plaintiff's petition, this allegation had not been traversed by the plea of the defendant, and the sole and only contestable issues before the court at the time of our former hearing, in substance, were: First, that the contract sued upon had not been in fact made and entered into by the defendant city; and, second, that, if it had been, it pertained to regular official duties required of the plaintiff as the duly appointed city engineer of the city of McCook for which he could not lawfully receive compensation in excess of his salary. These contentions were resolved against the defendant in that case and with that disposition we are fully satisfied. The result of the situation then in suit was that, while substantial compliance with the contract of employment may be conceded to be a prerequisite to recovery, the allegation of plaintiff's petition of full performance had not in fact been traversed by the defendant and in legal effect stood admitted. On the other hand, as stated by Howell, J., in his opinion in that case, undisputed evidence appearing in the record disclosed that, while there had been a substantial performance of the contract, in certain respects such performance was actually incomplete. It thus plainly appears that upon the former appeal the defendant city, after determination by this court of the issues properly presented in its behalf, stood as one having mistaken its remedy. In this situation it is well established in principle that this court, in the exercise of its sound judicial discretion, may, notwithstanding the technical rights based upon procedure to which the opposing

party is ordinarily entitled, reverse the case, with directions to the trial court to permit a reformation of the issues, even though the latter may have in all respects proceeded strictly in accord with law. *Moseley v. Chicago, B. & Q. R. Co.*, 57 Neb. 636.

In the present case, therefore, we are fully satisfied with the opinion of Howell, J., heretofore adopted, remanding with directions to permit the defendant to amend its answer setting up its damages, if any, occasioned by the failure of the appellant, the plaintiff below, to make final estimates and assessments of the cost of paving in question. And we remain satisfied with the further instruction to the district court in connection therewith that the measure of damages would be "the cost of remedying the defects."

This court imposed no limitation on the powers of the trial court to hear and fully determine the subjects of action thus referred to it, and at the trial following the remand thus made, the record now before us discloses that the trial court instructed the jury in effect that the validity of the plaintiff's contract was not in question and that he had substantially performed the same, save and except that the plaintiff failed to make final estimates of the cost of paving and sewer construction and failed to make a valuation of the property benefited by such improvements and failed to assess the cost back against such property, and submitted to the jury for their determination the following interrogatory: "Question: What was the reasonable and necessary expense, if any, incurred, and damage sustained, by the defendant on account of the failure of the plaintiff to make the final estimates of the amount of work performed by and the amount due the contractor; the failure of the plaintiff to make a valuation of the property benefited by the paving and sewer construction; and the failure of the plaintiff to assess the cost of such paving and sewer construction back against the property benefited thereby?" This action is certainly in accord with the directions of this court.

To this interrogatory the jury returned the answer, "$15,000." Thereupon the court, deducting the amount thus found by the jury from the aggregate due the plaintiff, entered judgment for the sum of $9,416.50 in favor of plaintiff.

We have carefully considered the evidence in the bill of exceptions. It appears that the plaintiff submitted no evidence whatever on the issues then being considered. The defendant's evidence is therefore uncontroverted, and there appears to be sufficient competent evidence in the record to sustain the verdict. In this view of the case, we do not find that the court committed any reversible error in the application of the rule of damages prescribed for it, "the cost of remedying the defects," nor in its rulings on the admission of evidence. It follows that the action of the district court in the premises was correct and its judgment is therefore

AFFIRMED.

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CHARLES W. MEAD, APPELLEE AND CROSS-APPELLANT, V. GUILES J. POLLY, APPELLEE AND CROSS-APPELLEE: GUILES J. POLLY, GUARDIAN, ET AL., APPELLANTS AND CROSS-APPELLEES: GUARANTY FUND COMMISSION ET AL., CROSS-APPELLEES.

FILED DECEMBER 31, 1929. No. 27009.

1. **Insane Persons:** MORTGAGE BY GUARDIAN: NOTICE. For the mortgaging of real estate by a guardian of an insane ward, the proceeding by which a license is granted under section 1436, Comp. St. 1922, by a district court for the purposes named therein, is a proceeding *in rem* and not adverse to the interests of the ward. In such cases the provisions of the foregoing section do not require service of the notice of the application for a license to be made upon the insane ward.
2. **Homestead.** The homestead right of a wife in lands owned by the husband and occupied by the family as a home is under section 5586, Comp. St. 1922, "real estate."
3. **Constitutional Law.** Section 1436, Comp. St. 1922, does not, by reason of not requiring notice to a ward, violate the constitu-

tional provision prohibiting the taking of property without due process of law.

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

*Sherman W. McKinley* and *George W. Leamer*, for appellants.

*Sidney T. Frum* and *Rose, Wells, Martin & Lane, contra.*

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

GOSS, C. J.

This appeal relates to the foreclosure of a mortgage. The guardian of Fanny Polly, insane, and her guardian *ad litem* appeal because the judgment allowed the plaintiff mortgagee to be subrogated by reason of prior liens paid off with the proceeds of his mortgage. The plaintiff cross-appealed because the court denied his right to a decree on his mortgage and because the amount awarded him was somewhat less under the finding and order of subrogation than would be due on his mortgage.

Inasmuch as the sustaining of the cross-appeal of the plaintiff would dispose of all the other issues in the case, we shall proceed to consider whether the plaintiff's mortgage was valid.

On April 30, 1915, Guiles J. Polly and Fanny Polly, his wife, executed and delivered a first mortgage on the 155 acres involved in favor of the United States Trust Company and a second mortgage thereon in favor of the same company for $600. While these mortgages still subsisted, Fanny Polly was, on March 27, 1921, adjudged insane, and was committed to the state hospital at Norfolk. On December 23, 1922, Guiles J. Polly filed in the county court his petition to be appointed guardian of his wife. On January 15, 1923, he was so appointed, he qualified and ever since has been such guardian. On December 26, 1922, Mr. Polly applied to the Omaha Trust Company in writing for a loan of $8,000 on this land, stipulating that the mortgage

should be a first lien, appointing an agent to receive the money, and authorizing the deduction, from the proceeds of the loan, of any advances so made. On January 31, 1923, the guardian filed in the district court for Dakota county a petition for a license to execute a mortgage for $8,000 on the said land owned by him but in which Fanny Polly had an interest by reason of her relationship to him. He pleaded rather fully the existing liens on the property and certain expenses of the guardianship and of his ward, showing that the total amount of the proceeds of the loan would be needed for these purposes. On February 8, 1923, the judge of the district court made the order authorizing the guardian to execute a mortgage upon the interest of said Fanny Polly and Guiles J. Polly for $8,000 for the purposes named.

On March 31, 1923, Polly, for himself and as guardian for his wife, executed and delivered to the Omaha Trust Company a mortgage for $8,000 on the land to secure a note for that sum. The note and mortgage were afterward assigned to plaintiff. A considerable portion of the proceeds was used to pay off the two mortgages to the United States Trust Company and to discharge tax liens on the property. The balance of the $8,000 was paid to Polly to be used for the purposes stated in his application.

In their original brief the appellants set forth only two errors relied upon for reversal: First, that the court erred in allowing the plaintiff to be subrogated; and, second, that it erred in allowing 10 per cent. interest. But in their reply brief they went directly to the main point in plaintiff's cross-appeal and presented the question whether section 1436, Comp. St. 1922, which was in effect when the license to execute plaintiff's mortgage was granted, authorized the guardian to execute the mortgage upon the homestead standing in his name. The appellants take the negative of that question; upon the affirmative depends plaintiff's rights to establish the full lien of his mortgage as contended for in his cross-appeal.

So the first and chief issue between the parties is this: Had the district court authority to grant to Guiles J. Polly,

guardian of Fanny Polly, the right to mortgage her interest in land of her husband in which she had a homestead interest and an inchoate right to take under the statutes of descent if she survived her husband?

In 1927 the history of section 1436, Comp. St. 1922, was carefully reviewed down to and including the amendment in chapter 104, Laws 1923, and it was held constitutional as against an attack involving the question whether the amendment shown in chapter 205, Laws 1921, contained more than one subject clearly expressed in the title of the act. *In re Estate of Austin,* 116 Neb. 137.

The decree of the district court in the case at bar did not expressly find nor adjudge the section unconstitutional. It merely found, referring to plaintiff's mortgage on the homestead, that "the said mortgage is not a valid lien thereon because it was not signed and acknowledged by the said Fanny Polly, and plaintiff is not entitled to the foreclosure thereof." Nor do appellants expressly argue that section 1436 is unconstitutional. Rather they say it does not apply to such a state of facts as involved here. In their reply brief they say: "This particular point has never been decided by this court. It is a question of the reading of the statute."

They rely upon and stress the lack of notice given to Fanny Polly when the license was obtained and by implication suggest that, if the statute was otherwise applicable as a basis for a license, it was unconstitutional in that it allowed Fanny Polly to be deprived of her property without due process of law, because the statute does not provide for notice. Nor was any notice given her of the proceedings in which the license to mortgage was granted.

In *Myers v. McGavock,* 39 Neb. 843, it was held: "An application by a guardian for license to sell the real estate of his wards for their maintenance and education is a proceeding *in rem*—one instituted by their guardian for their benefit. It is, in effect, the application of the wards. It is not a proceeding adversary to them; and notice to them of such application is not essential to the jurisdiction of the district court to grant the license."

In *Hunter v. Buchanan,* 87 Neb. 277, Chief Justice Reese writing the opinion, it was held: "A sale of real estate by a guardian of an insane ward, under license for the purpose of paying debts due from the ward, is a proceeding *in rem,* and not adverse to the interests of the ward. In such cases the provisions of section 49, ch. 23, Comp. St. 1909, do not require the service of the notice of the application for a license to be made upon the insane ward." The opinion quoted from one of like effect, delivered by Mr. Justice Field in *Mohr v. Manierre,* 101 U. S. 417, in a case likewise involving the real estate of an insane person under a Wisconsin statute.

Although it is not the universal rule, yet it has been held uniformly by this court that, in proceedings under a license obtained "by an administrator to sell real estate of his decedent for the purpose of paying debts, there are, strictly speaking, no adverse parties. The proceeding is of the nature of an action *in rem.*" *Brusha v. Phipps,* 86 Neb. 822; *McClay v. Foxworthy,* 18 Neb. 295; *Schroeder v. Wilcox,* 39 Neb. 136. Such being the rule adopted in administrator's sales in this jurisdiction, "it follows with the stronger reason" that it must apply to sales by guardians of insane wards, as was stated in *Hunter v. Buchanan, supra.*

So we are of the opinion that, for the mortgaging of real estate by a guardian of an insane ward, the proceeding by which a license is granted under section 1436, Comp. St. 1922, by a district court for the purposes named therein is a proceeding *in rem* and not adverse to the interests of the ward. In such cases the provisions of the foregoing section do not require service of the notice of the application for a license to be made upon the insane ward.

Section 1436 provides that a district court or judge thereof may grant authority to guardians of estates to mortgage any real estate belonging to such estates for the purposes named. Appellants assert that the land involved here was not real estate belonging to Fanny Polly and therefore it did not come under the statute. It cannot be disputed that she had an interest in the land by virtue of

her homestead right and an interest therein by virtue of her inchoate right to take by descent if she survived her husband; and that she could not be divested of her homestead right by conveyance or incumbrance save by an instrument in which she was joined by her husband. Comp. St. 1922, sec. 2819.

In *Galligher v. Smiley*, 28 Neb. 189, it was held that a homestead is constituted by residence of the family and by selection according to law. "Where these things exist, the homestead becomes a right in the premises, exempted by law from forced sale."

Section 5586, Comp. St. 1922, says: "The term 'real estate,' as used in this chapter, shall be construed as coextensive in meaning with 'lands, tenements and hereditaments,' and as embracing all chattels real, except leases for a term not exceeding one year."

The interest of Fanny Polly in the real estate was a vested interest. It could not be divested by her husband alone either by deed or by will. It may be alienated or abandoned, but in this instance it has not been abandoned. It is still the family homestead. Whether a homestead right is technically an estate or is a chattel real it is unnecessary to determine here. It is a more essential right than a leasehold estate for a year and a day, which is defined by the statute as a chattel real. For the purposes of this case, we hold that the homestead right of a wife in lands owned by the husband and occupied by the family as a home should be construed under section 5586, Comp. St. 1922, as "real estate."

We have shown that the interest of Fanny Polly in the land was an interest in real estate; and that no notice was given her and none was necessary in the proceedings in the district court in which license was granted her guardian to mortgage the lands involved. It therefore follows that section 1436, Comp. St. 1922, does not, by reason of not requiring notice to a ward, violate the constitutional provision prohibiting the taking of property without due process of law. The district court had jurisdiction of the sub-

ject-matter and of the parties and was authorized to grant the license.

No appeal was taken from the judgment of the district court granting the license to make the mortgage sought to be foreclosed by plaintiff. Therefore, the attack thereon by the defendants, who are appellants here, is a collateral attack and cannot be sustained. The guardian had given a bond and he and his surety are legally responsible for the failure, if any, to protect the rights of the ward in the distribution of any of the net balance of the proceeds of the mortgage after payment of the existing liens on the land. Plaintiff's mortgage and the liens paid by him were valid and were fully proved. No valid defense was shown. He should have had judgment.

Having reached the conclusion that the plaintiff's mortgage is valid and should be enforced in full, it follows that the decree was erroneous; and it becomes unnecessary to consider the claims of the appellants arising by reason of the erroneous decree allowing subrogation only.

The judgment of the district court is reversed, with directions to enter a decree in favor of the plaintiff for the amount due on his mortgage, including, of course, the liens of taxes paid by him under the provisions of the mortgage.

REVERSED.

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P. F. PETERSEN BAKING COMPANY, APPELLEE, V. CITY OF FREMONT, APPELLANT.

FILED DECEMBER 31, 1929. No. 26927.

1. **Licenses.** To be valid, a city ordinance imposing an excise or a license tax upon a business or an occupation must be definite in its application to those upon whom the burden falls, reasonable in amount and uniform as to the class upon which it operates.
2. **Hawkers and Peddlers: "ITINERANT VENDOR."** In a city ordinance the term "itinerant vendor" of bread and of other enumerated commodities at wholesale does not, in absence of a legislative definition, include a wholesale baker selling bread and distributing it daily to his regular retail customers by means of his own motor trucks.

3. Licenses: VALIDITY. An excise tax on the wholsale business or occupation of a baker who sells bread and distributes it daily by motor truck to regular customers in a neighboring city is void if so excessive and confiscatory as to amount to a prohibition to do so.

APPEAL from the district court for Dodge county: FREDERICK L. SPEAR, JUDGE. *Affirmed.*

*Allen Johnson,* for appellant.

*Montgomery, Hall, Young & Johnsen, contra.*

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

ROSE, J.

This is an action to recover from the city of Fremont, defendant, $600 exacted by it in the form of license taxes on the occupation and business of itinerant vendors of bread at wholesale. That amount was demanded by defendant and paid under the terms of a city ordinance imposing a yearly license tax of $300 "on each itinerant vendor" of bread and of other enumerated commodities at wholesale. P. F. Petersen Baking Company, plaintiff, paid the annual tax of $300 August 13, 1927, and demanded repayment August 16, 1927. The Standard Bakeries Corporation paid the annual tax of $300 August 27, 1927, demanded repayment August 30, 1927, and afterward assigned its claim for repayment to plaintiff. The demands for the return of the two items amounting to $600 were based on the ground that the ordinance and the taxes were illegal and void. The city refused to comply with the demands for repayment, retained the money so exacted, and plaintiff brought this action to recover it back. The facts upon which plaintiff relies for a recovery are fully pleaded in the petition which challenges the ordinance and the taxes as fatally indefinite, unreasonable and confiscatory.

The validity of the ordinance and the reasonableness of the taxes are pleaded in an answer to the petition. The answer contains also a plea that the corporations named are "itinerant vendors" of bread at wholesale in Fremont

within the meaning of that term as used in the ordinance.

Upon a trial of the case the district court found that the ordinance was indefinite, unconstitutional and void, and that the taxes levied under it were unreasonable and confiscatory. From a judgment in favor of plaintiff for $659.50, including interest, defendant appealed.

The validity of the ordinance and taxes is the question presented by the appeal. In the first section the ordinance provides:

"That there is hereby levied a license tax on each and every occupation and business within the limits of this city, in this section enumerated, to raise revenue thereby in the several different sums on the several different businesses and occupations respectively as follows: * * *

"On each itinerant vendor at wholesale, of fruits, potatoes, vegetables, flowers, groceries, hay, straw, bread, grain, pastries, or other kinds of goods not herein specified, $300 per year."

To prevent criminal prosecutions and interruption of business requiring plaintiff and its assignor to make daily sales and deliveries of bread to retail dealers and regular customers in Fremont, the taxes in controversy were paid as indicated. Plaintiff and its assignor are wholesale bakers of bread in Omaha. By means of their own motor trucks they distribute daily their own products to retail dealers and customers within a radius of 75 miles, including retailers in Fremont. To be valid a city ordinance imposing an excise or a license tax upon a business or an occupation must be definite in its application to those upon whom the burden falls, reasonable in amount and uniform as to the class upon which it operates. Its application should not be left by city lawmakers to the whim or caprice of taxing or collecting officers. A valid excise or license tax depends on a lawful exercise of legislative power—a power not committed to administrative or police officers. The term "itinerant vendor" is not defined by city ordinance in the present instance. It has no legal or popular meaning that extends its application to a wholesale baker selling bread and distributing it daily to regular re-

tail customers by means of its own motor trucks. Taxing or collecting officers are without authority to supply such a definition or to extend the municipal legislation beyond its definite import. That part of the ordinance relating to each "itinerant vendor" at wholesale is obviously indefinite and uncertain and for that reason is unenforceable in absence of a legislative definition of the term quoted.

The provision in controversy, as the city treasurer has attempted to apply it, would not be uniform as to class, even if the words "itinerant vendor" had been made applicable to plaintiff and its assignor in definite terms. They are engaged in a lawful enterprise on an extensive scale. They have a right to conduct their business in Fremont on reasonable terms applicable alike to all wholesale bakers in the same class. They cannot legally be excluded from Fremont by means of a prohibitive excise tax that wholesale bakers therein are not required to pay. The evidence shows a discrimination. Wholesale bakers in Fremont were not subjected to the business or occupation taxes. In practical effect those taxes were not imposed for licenses permitting the Omaha bakers as licensees to transact business in Fremont but to prevent them from doing so. The city's discrimination as to class gave the term, "itinerant vendor" of bread at wholesale, an unauthorized meaning amounting to "nonresident vendor." The taxes, as the city attempted to enforce the ordinance, were not, therefore, uniform as to class.

The taxes were also invalid as imposing an unreasonable and confiscatory burden. It is a fair inference from the evidence that the net annual profits of each of the two Omaha bakeries, based on net earnings at the time of the trial, exclusive of the excise taxes, would be approximately $420. An annual tax of $300 on the occupation of each would destroy the incentive to sell and deliver bread in Fremont and would amount to an illegal prohibition of the right to do so. The law applicable to the present controversy has been stated as follows:

"While cities of the second class having more than five thousand inhabitants have authority to impose a tax on

any occupation or business within the limits of the city, yet such ordinances must be so framed as to make such taxes uniform in respect to the classes upon which they are imposed; and such taxes must be reasonable, considering the nature of the business, and not so high as to prohibit the carrying on of the business." *Caldwell v. City of Lincoln*, 19 Neb. 569.

There does not seem to be any error in the proceedings and the judgment of the district court.

AFFIRMED.

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FARMERS GRAIN, LUMBER & COAL COMPANY, APPELLEE, V. SHERMAN TAYLOR, SR., APPELLANT.

FILED DECEMBER 31, 1929. No. 26987.

Trial: PEREMPTORY INSTRUCTION. Where the evidence on a controverted issue of fact is sufficient to support a verdict for defendant, a peremptory instruction in favor of plaintiff is erroneous.

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

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

*C. B. Ellis, Jack & Vette*, and *Sanden, Anderson, Laughlin & Gradwohl, contra.*

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

ROSE, J.

Plaintiff sued Sherman Taylor, Sr., defendant, to recover $363.89 with interest on an account for merchandise delivered to his son, Edwin Taylor, at the special request of defendant upon the latter's oral promise to pay plaintiff therefor. The answer was a general denial. Pending litigation defendant died and the cause was revived in the name of Sherman Taylor, Jr., administrator, defendant. The case was tried to a jury and at the close of the testi-

mony the district court directed a verdict in favor of plaintiff for $395.18. From a judgment for that sum defendant appealed.

One of the assignments of error challenges as erroneous the peremptory instruction in favor of plaintiff. During the trial the parties stipulated that the amount due plaintiff from defendant, if anything, was $395.18. Plaintiff took the position that the senior Taylor procured the merchandise for his son by means of an original, oral promise to pay for it. The defense was that the promise, if made, was one to answer for the debt of another and, not being in writing, was void under the statute of frauds. An examination of the record on this issue shows there is evidence tending to prove the defense, thus presenting a question for the jury. The peremptory instruction in favor of plaintiff was therefore erroneous. It follows that the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

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## JULIUS A. JOHNSON V. STATE OF NEBRASKA.

FILED DECEMBER 31, 1929. No. 26935.

1. **Criminal Law: WITNESSES: CREDIBILITY.** "It is elementary that where, in a criminal prosecution, the evidence conflicts in respect of material facts, the credibility of the respective witnesses is for the jury." *Baker v. State*, 112 Neb. 654.
2. **———: EVIDENCE: REVIEW.** "Unless it appears that the evidence in the trial of a criminal case is so deficient that all reasonable minds, if uninfluenced by passion or prejudice, must agree that there is reasonable doubt of the guilt of the defendant, a reviewing court cannot set aside the verdict of the jury as unsupported by the evidence." *Johnson v. State*, 88 Neb. 328.

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

*T. F. A. Williams, Edgar Ferneau, Fred G. Hawxby* and *Robert M. Armstrong*, for plaintiff in error.

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

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

DEAN, J.

December 1, 1928, an information was filed in the district court for Nemaha county against Julius A. Johnson, defendant, wherein he was charged in four counts with the embezzlement of $11,681, during the months of March, April, and May, 1928, from the Farmers Security State Bank of Rohrs while he was cashier of the bank. The first count charges an embezzlement of $1,500, on or about April 13, 1928; the second an embezzlement of $81, on or about April 11, 1928; the third an embezzlement of $100, on or about March 17, 1928; and the fourth count charges an embezzlement of $10,000, on or about May 15, 1928, making the total sum of $11,681, as noted above, which was charged as having been embezzled by the defendant. The jury found the defendant guilty on all of the above named counts. The court thereupon sentenced defendant to serve from one to six years in the penitentiary on each count of the information, the sentence to run concurrently. The defendant prosecutes error.

It must first be noted that in respect of the fourth count the state, in its brief, concedes that "not enough witnesses whose accounts were short were called to establish the aggregate" sum of $10,000, named in the fourth count of the information. It follows, of course, that the prosecution of the fourth count, having been abandoned by the state in its argument, need not here be noticed further.

In behalf of the defendent his counsel contend that his mentality was so defective that defendant was unable to distinguish between right and wrong at the time when he committed the acts complained of, and that the judgment should therefore be reversed. And in respect of defendant's mental condition at all times material to this inquiry, the evidence of two physicians was submitted to the jury, and it appears from their evidence that defendant was suf-

fering from a tumor on his brain at the time in question and that he underwent an operation therefor shortly after the acts complained of are charged as having been committed. It appears, however, that the tumor was not removed because of the fact that, as advised by both physicians, such an operation would endanger his life. And both physicians also expressed the opinion that the defendant, at the time in question, did not have the ability to distinguish between right and wrong. The state, however, offered the evidence of six or seven nonprofessional witnesses, mostly neighbors of defendant, and they testified to the contrary in respect of mentality.

A bank examiner testified that, when he went to the bank to make an examination of its condition shortly before the defendant was apprehended, the defendant "seemed to know just what he was doing." He further testified: "Q. State, when you called upon him for explanations of certain items, the manner of his replies and the conversation with relation thereto. A. The answers usually came very quickly and very plausibly as to the subject that I was asking about." From the evidence of this witness, and other witnesses on this feature, it appears that sufficient competent evidence was introduced to warrant a finding by the jury that the defendant could distinguish right from wrong at the time of the commission of the offenses. To substantially the same effect was the evidence of the cashier of a bank in a neighboring town. This witness testified that they at one time worked in the same bank and that he observed no change in defendant's manner or general conduct or appearance since the time when they formerly worked together, and that in his opinion the defendant then, and at the time of the trial, knew right from wrong.

A merchant of Rohrs, who had lived there 40 years, was president of the Rohr bank four years and also a member of the board of directors. He testified that his store was located next to the bank building where defendant was employed and that defendant was the only person in charge of the bank during this four-year period. He also

testified that the defendant's conduct was then peculiar in some respects, but that he did not see any difference in the way he had always done his work, and that, in his opinion, defendant's mentality was such that he could distinguish between right and wrong during all the time of his acquaintance with him.

Another witness saw defendant nearly every day and in his opinion, defendant was apparently always the same and could distinguish right from wrong. The evidence of another witness was that defendant absolutely knew right from wrong; that he attended school with him and at a later period they worked in the same bank, and that "Gus (the defendant) while he was a nervous dispositioned fellow and his dress was always reasonably good and he had a peculiar way of handling business perhaps that was his own, natural, but then he handled it." In the expressed opinion of this witness, the defendant was able to distinguish right from wrong in respect of the acts complained of herein.

A banker in a neighboring city, and at or about the time in the employ of the guaranty fund commission, testified that his acquaintance with the defendant continued for about 25 years before defendant was complained against. When interrogated as to whether the books of the bank would balance where "an individual submits a check to the bank, upon the bank, which the bank pays and charges to his account in the sum of $1,500 and gives for that check a certificate of deposit for the bank for $1,500, while the books of the bank contain no record of the certificate of deposit," he answered that the books would not balance, and "the cash should be long," and that, to make the books balance, $1,500 in cash would have to be taken from the bank. He also testified that in one instance $81 was handed to defendant for deposit by one of the bank's patrons, for which a duplicate deposit slip was given but no entry was made in the bank books of this deposit. He also testified that a shortage of $100 appeared in another account and without the depositor's knowledge. And in another in-

stance it appears that defendant took $500 out of a depositor's account without the knowledge of the depositor.

In respect of the $81 deposit, above referred to, the depositor testified that the defendant gave her a duplicate deposit slip therefor, but that the $81 was never entered in her passbook. Another testified that he deposited a check for $1,500 for which he received a duplicate deposit slip from the defendant, but that no entry was ever made on the bank books of the deposit so made by him. It also appears from the evidence of other witnesses that their passbooks disclosed withdrawals of money from their accounts in amounts for which they did not write checks, and that their passbooks were balanced by the defendant.

Certain witnesses testified on defendant's part that he was a man in good repute in his home community. Others testified that his mentality was failing. But the case was tried in defendant's home community before a jury which was composed of men, so far as the record discloses, who were impartial and unbiased as between the parties.

"It is elementary that where, in a criminal prosecution, the evidence conflicts in respect of material facts, the credibility of the respective witnesses is for the jury." *Baker v. State,* 112 Neb. 654.

It clearly appears that the defendant had abundant opportunity to divert the money of the depositors in the bank and to appropriate it to his own use without immediate detection. The charge of defendant's malfeasance is established beyond a reasonable doubt and the verdict is sufficiently supported by the evidence. We have held that:

"Unless it appears that the evidence in the trial of a criminal case is so deficient that all reasonable minds, if uninfluenced by passion or prejudice, must agree that there is reasonable doubt of the guilt of the defendant, a reviewing court cannot set aside the verdict of the jury as unsupported by the evidence." *Johnson v. State,* 88 Neb. 328.

Defendant complains of the court's refusal to give certain instructions, and also of certain instructions given by the court. We have examined the instructions and, when

considered in their entirety, we do not find prejudicial error.

The judgment of the trial court must be and it hereby is affirmed in respect of all counts except the fourth which the state, as herein noted, concedes is not supported by sufficient evidence to sustain a conviction. In all other respects the judgment is affirmed.

AFFIRMED IN PART.

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## ESTHER LIEB, APPELLANT, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLEE.

FILED DECEMBER 31, 1929. No. 26999.

1. **Negligence**: QUESTION FOR JURY. In a personal injury action involving the issues of negligence and contributory negligence, and where, from the evidence respecting such issues, different minds may reasonably draw different conclusions, the question is one of fact for the jury.
2. ———: TRIAL: INSTRUCTION. In a personal injury action, grounded upon the negligence of the defendant, and where contributory negligence is alleged as a defense, and there is evidence tending to prove the charge of negligence and contributory negligence, it is incumbent upon the trial court to give an instruction stating the comparative negligence rule, as provided by section 8834, Comp. St. 1922.
3. **Carriers**: NEGLIGENCE: REFUSAL OF INSTRUCTION. In an action by a passenger against a street railway company for personal injuries caused by starting, without warning, a street car while plaintiff was either in the act of alighting or about to alight therefrom, it is error for the trial court to refuse an instruction informing the jury that it was the duty of defendant, after stopping the car for passengers to alight, to wait a sufficient length of time, before putting the car in motion, to permit passengers, in the exercise of reasonable diligence, to alight in safety.
4. ———: ———: PLEADING. In an action for personal injuries, where plaintiff, a passenger, in her petition charged that, while in the exercise of due care on her part, she was on the rear platform steps of the street car, in the act of alighting therefrom and that the agents and employees of said defendant negligently, wrongfully, and without due notice to plaintiff, caused said street car to be suddenly started forward. such

allegation is sufficiently broad to cover the question as to whether the car was stopped a sufficient length of time to permit plaintiff to alight in safety.

5. ———: ———: ERRONEOUS INSTRUCTION. In a personal injury action for damages, by a passenger of a street railway, grounded on the alleged negligence of the defendant in starting its street car, without warning, while she was upon the rear platform in the act of alighting therefrom, and the evidence tends to support such charge, it is error to instruct the jury that defendant does not owe a duty to warn such passenger that the car is about to be started.

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

*Waldron, Silverman & Newkirk,* for appellant.

*Edward J. Shoemaker, contra.*

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

GOOD, J.

This is a personal injury action in which defendant had the verdict and judgment, and plaintiff has appealed.

It was alleged in the petition that plaintiff was a passenger in one of defendant's street cars; that she signaled her intention to alight at the next stopping place; that the car stopped, and while she was in the act of alighting therefrom it was negligently and suddenly started by the motorman, and she was thereby thrown to the ground and sustained serious injuries. Defendant answered, denying any negligence, and alleged that at the time of the accident plaintiff attempted to leave the car after it was in motion, and that the accident and alleged injuries were due solely and entirely to her contributory negligence. In her reply plaintiff denied contributory negligence.

From the record it appears that plaintiff, her daughter, and sister-in-law were passengers on one of defendant's street cars in Omaha, and that as it was approaching the intersection of Commercial avenue and Boyd street she signaled to the conductor her intention to alight; that the

car stopped and the three started to alight; that the daughter was first and alighted in safety; that the plaintiff was second, and while in the act of stepping from the street car it was put in motion, she was thrown to the pavement and sustained injuries, and that no notice was given by the motorman of his intention to start the car at the time. These facts appear without dispute. It also appears that at the street intersection, above mentioned, there is a steam railway, and that the rules of the defendant require the conductor to go forward upon the tracks thereof, to see that there are no approaching trains, and then to signal to the motorman to proceed. The evidence of defendant tends to show that the conductor, after the car had stopped and some passengers had alighted, proceeded ahead of the car to the railway crossing and signaled to the motorman to proceed; that he did not see any passengers alighting, or attempting to alight, from the car at the time he signaled to the motorman, but that the car had proceeded but a few feet when he observed a passenger, in an attempt to alight, falling to the pavement, and that the car was immediately stopped. The motorman testified that after receiving the signal from the conductor to proceed he looked to the rear of the car and saw no passengers on the platform or attempting to alight. The testimony of a passenger, a witness for defendant, tends to show that plaintiff had gone to the rear platform for the purpose of alighting from the car at the time it was started.

The errors assigned are that the verdict is contrary to law and the evidence, and not sustained by sufficient evidence, and in the giving and refusing of instructions.

With respect to the sufficiency of the evidence, it appears that there was evidence on behalf of defendant tending to prove that plaintiff had ample opportunity to alight from the car while it was standing, and that she attempted to alight after the car had started. The rule applicable is that, where different minds may reasonably draw different conclusions as to the negligence and contributory negligence from the facts proved, then the question is one of fact for the jury and not one of law for the court. Wheth-

er plaintiff was guilty of such contributory negligence as would affect her right to recover was a question of fact to be determined by the jury under proper instructions.

The pleadings and evidence raised the questions of defendant's negligence and plaintiff's contributory negligence. Section 8834, Comp. St. 1222, provides:

"In all actions brought to recover damages for injuries to a person or to his property caused by the negligence of another, the fact that the plaintiff may have been guilty of contributory negligence shall not bar a recovery when the contributory negligence of the plaintiff was slight and the negligence of the defendant was gross in comparison, but the contributory negligence of the plaintiff shall be considered by the jury in the mitigation of damages in proportion to the amount of contributory negligence attributable to the plaintiff; and all questions of negligence and contributory negligence shall be for the jury."

This section was applicable to the record presented in this case. It was the duty of the trial court to give to the jury an instruction on comparative negligence in accordance with the statute. This the trial court failed to do; its failure was prejudicial error.

Plaintiff complains of the court's refusal to give an instruction to the effect that it was the duty of defendant, after stopping the car for passengers to alight, to wait a sufficient length of time to permit passengers, in the exercise of reasonable diligence, to alight in safety, before putting the car in motion. That the instruction states a sound principle of law is not controverted, but defendant argues that it was properly refused because it was not applicable to the issues raised, and contends that failure to stop the street car long enough to permit plaintiff to alight in safety was not alleged in the petition and, therefore, this issue was not presented.

We are unable to accept defendant's view as to the effect of the pleading. The allegation of the petition in that respect is: "While plaintiff in the exercise of due care on her part was on the rear platform steps of said street car, in the act of alighting therefrom, the agents and em-

ployees of said defendant in charge of said street car wrongfully, negligently and with utter disregard for the safety of this plaintiff, and without notice to plaintiff, caused said street car to be suddenly started forward, thereby causing plaintiff to be violently thrown from said street car steps to the ground."

In *Cain v. Kanawha Traction & Electric Co.*, 81 W. Va. 631, the supreme court of West Virginia had before it practically the identical question. In that case the allegations of the petition were very similar to those in the instant case, and the question there presented was, as here contended by defendant, that the allegations were insufficient to raise the question of failure to stop the car a sufficient length of time to permit passengers to alight. In that case it was held:

"In an action for personal injuries the declaration charged that defendant, while plaintiff, a passenger, was in the act of alighting, without warning him 'carelessly and negligently and suddenly' started its car whereby and with great force and violently he was thrown upon the pavement and injured. The evidence tended to prove that plaintiff was not given a reasonable time to alight, and that the conductor of the car in disregard of his duty signaled the motorman to go ahead, while plaintiff was in the act of leaving the platform. There was no variance."

In the body of the opinion it was said (page 634):

"We observe that the allegation is not that the car was suddenly and *violently started*, but that it was 'carelessly and negligently and suddenly' started and without 'warning to him.' * * * It has been frequently decided here, in actions of this character, that there is no variance in respect to specification of mere matters of detail, concerning the manner or instrumentalities by which the injury is inflicted, if the substantial elements of negligence be proved. *Kennedy v. Chesapeake & O. R. Co.*, 68 W. Va. 589, 592, and cases cited.

"If on the trial the evidence was sufficient to establish the fact that plaintiff was not under all the circumstances allowed a reasonable time to alight, or the defendant was

otherwise negligent in not observing him in his perilous condition and protecting him, and he was without fault, * * * would not such evidence support without variance the charge of carelessly, negligently and suddenly starting the car and doing plaintiff the injuries as charged? We think it would."

The reasoning of the court in the above case appeals to us as logical and sound. A careful examination of the allegation of negligence in the petition in the instant case will disclose that the negligence does not relate to the manner in which the car was started, but to the time of starting; that is, when plaintiff was either alighting from the car or about to alight. Whether sufficient time was given was fairly included in the averment. It follows that the refusal to give the requested instruction was erroneous.

Plaintiff further complains of the refusal of the court to give the following instruction:

"You are instructed that where a street car is stopped on signal at a regular car stop to permit passengers to alight, and the employees of the street railway company know, or by the exercise of proper care should know, that the passenger is attempting to alight, it is negligence to put the car in motion before such passenger has alighted or while he is attempting to do so; and the fact that the rules of the street car company require conductors, before crossing the tracks of a steam railroad, to go forward, and on the tracks of the steam railroad and look for other cars or locomotives thereon, before signaling the motorman to go ahead, will not excuse the conductor from first discharging his duties to passengers alighting from his car."

There is abundant authority to sustain the proposition of law stated in the requested instruction. The rule is stated and supported by many authorities in the annotation to *Wright v. Boston & M. R. Co.*, 83 N. H. 136, 56 A. L. R. 975, 981. The following cases are especially in point: *Oklahoma U. R. Co. v. Mitchell,* 105 Okla. 152, and *Memphis Street R. Co. v. Shaw,* 110 Tenn. 467. The instruction requested was applicable to the situation disclosed by the record. Denial of the request was error.

Complaint is made by plaintiff of the sixth instruction given by the court in the following language:

"You are instructed that it is not the duty of the defendant company, or its servants, to warn its passengers that the car upon which they are riding is about to start, and, therefore, you are not to consider that an act of negligence in the determination of this cause."

Plaintiff argues that the instruction is not a correct statement of the law, and that, even if it were, it is not applicable to the situation; while defendant contends that it correctly states the rule and cites and relies upon a number of cases, all of which we have examined, and we find none in point. Several of those cases relate to passengers who had entered the street car but had not yet reached their seats, and, as to such a situation, it was held that no duty rested upon the street railway company to warn such passengers of the intention to start. Among the cases cited to support defendant's contention is *Jacobson v. Omaha & C. B. Street R. Co.*, 109 Neb. 356. In that case a passenger had alighted from the street car, and the question there was as to the duty of the company to warn passengers of danger from other sources in the street onto which the passenger was alighting, and had no relation to the giving of warning that the car would start. It is quite evident that, if one is about to enter a car and has one hand, possibly, upon the rail, before the car is started the passenger should, under such circumstances, be given sufficient time to enter the car, or warned that the car is about to start, so that he may not attempt to enter. The same rule is applicable to a passenger alighting from a car. If one is in the act of alighting, or about to alight, from a car, it should not be started without warning so that the passenger may not attempt to alight. Even the rule, as applied to passengers standing up in a car, has been modified, as where such persons were known to be afflicted with some disease or crippled, and it has been held that before starting the car even such persons were entitled to be warned. *Jacobson v. Omaha & C. B. Street R. Co., supra,* and *McCoy v. Omaha & C. B. Street R. Co.*, 104 Neb. 468. In the in-

stant case, it is perfectly clear and beyond dispute that plaintiff was upon the platform when the car started and was either in the act of alighting or about to alight. That starting a car under such circumstances, without warning the passenger, is negligence cannot be gainsaid. The giving of the instruction, therefore, under the circumstances and proof as it existed, was erroneous and was prejudicial to the plaintiff.

We do not deem it necessary to discuss other assigments of error.

For the reasons given, the judgment of the district court is reversed and the cause remanded for further proceedings according to law.

REVERSED.

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MARTHA A. EGGELING, ADMINISTRATRIX, APPELLEE, V. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY ET AL., APPELLANTS.

FILED DECEMBER 31, 1929. No. 26914.

1. **Negligence**: DUE CARE: PRESUMPTION. The presumption of due care arising out of the natural instinct of self-preservation is not evidence, but a mere rule of law, and obtains only in the absence of direct or circumstantial evidence justifying reasonable inferences one way or another upon that subject; when such evidence is produced the presumption disappears and is not entitled to be considered.
2. **Railroads**: DUTY OF DRIVER AT CROSSING. One driving toward a railroad track with horses and wagon over a road along which exist obstructions which partially shut off a view of an oncoming train must stop, look, and listen before attempting to cross, and if a clear view of sufficient of the track cannot be had by remaining in the wagon, if practicable he should dismount if an adequate view of the track could be obtained only by so doing. (Withdrawn)
3. **Negligence**: INJURY AT RAILROAD CROSSING: GROSS NEGLIGENCE. No recovery can be had by one who suffers harm by crossing a railroad track recklessly or by failing, without reasonable excuse, before crossing to take the precautions which the conditions indicate are available to him. Such conduct is negligence

more than slight which under the comparative negligence law bars recovery.

4. ———: CONTRIBUTORY NEGLIGENCE. Evidence examined, and *held* that, under the circumstances shown, no reasonable excuse for a failure to stop, look, and listen is presented.

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

*E. P. Holmes* and *Guy C. Chambers*, for appellants.

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

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

THOMSEN, District Judge.

Action by Martha A. Eggeling, Administratrix of the Estate of Frank R. Eggeling, deceased, against the Chicago, Rock Island & Pacific Railway Company to recover damages for Eggeling's death occurring at a highway crossing near the town of Rokeby, Nebraska, at about 4 o'clock in the afternoon of July 28, 1927. The engineer was joined as a party defendant. Judgment for plaintiff was entered on a verdict by the jury. The defendants appeal.

Eggeling had been hauling grain to an elevator located on a side-track north and east of the highway crossing. He was familiar with the crossing. His farm was nearby. Rokeby was his trading point. The crossing, which was over the main track of the railroad, was the one customarily used by him to reach the town. On the day of the accident he had hauled five wagon loads of grain over this crossing to the elevator. At the time of the accident Eggeling was returning with an empty wagon from the elevator. The tracks are approximately at right angles to the highway. The highway at this point lies east and west. Eggeling was traveling westward. The train was coming from the north. The collision took place when the wagon was on the tracks of the oncoming train. The horses were in the clear. To one coming from the east the view to the northward, the direction from which the train was coming, was considerably obstructed. The obstructions consisted

of a hedge and weeds about 75 feet east and north of the crossing, the depot about 78 feet north of the crossing and near the tracks, two small buildings north and east of the depot, and a string of freight cars on a side-track east of these buildings. The track curved slightly eastward; but, since the curve began at a point about 325 feet north of the crossing, the curved condition could not enter as a factor in what transpired. To the northwest, part of the tracks could be seen from the highway at various distances ranging from 60 feet to within 22 feet east of the crossing, disclosing the main track at points, respectively, 1,037 feet, 900 feet, 827 feet, and 340 feet north of the crossing. After the 22-foot point, the prospect along the tracks and past the obstructions was an ever widening and lengthening one. Practically undisputed testimony shows that to the north the west rail could be seen from the highway at the following varying distances: 22 feet east of the east rail, 340 feet; 20 feet east, 440 feet; 15 feet east, 780 feet; and along the highway 10 feet from the east rail the west rail of the main track could be seen 1,210 feet north. The accuracy of these distances is strongly attacked by the plaintiff, not so much by testimony, but by a series of mathematical calculations by which results of shorter distances are reached. However, in such calculations the plaintiff failed to consider that the highway describes a slightly acute angle and that the distance along the highway to the track is greater than the distance to the nearest point. Thus, one standing on the highway is actually nearer the track than the distance from the same point to the track along the highway. Even a few inches make a material difference in such calculations. At any rate the camera views furnish a reliable basis of corroboration for the foregoing measurements; and the figures given above may be accepted as substantially correct.

The train was proceeding at 40 miles an hour; Eggeling at 3 miles an hour. Thus, multiplying the speed by 1½, the train was proceeding about 60 feet a second while Eggeling was traveling about 4½ feet a second. It would require 4 seconds for Eggeling to travel 18 feet. So, when

Eggeling was 18 feet from the track, the train was about 240 feet from the crossing. Twenty feet from the crossing it was possible for Eggeling to see up the track 440 feet. At 22 feet away he had a view of 340 feet, a greater distance up the track than the engine would be at that moment. At the speed at which Eggeling was traveling, at all the points where even only momentary views were possible, some portion of the train would have been visible to him. Thus, it is apparent that if Eggeling had looked at any time after passing the 22-foot point, or at the earlier places, he would have seen the train, and that he either did not look or proceeded to cross the tracks in reckless disregard of what he saw.

It may be true that the bell was not rung nor the whistle blown, although evidence to the contrary is substantial; but applying the oft repeated rule that the evidence should be considered in a light most favorable to this appellee, yet Eggeling was bound to do something in his own behalf. He may not, in reckless disregard of any possible negligence of the railroad, rely solely upon its statutory duty, proceed to a place of danger, and expect the train, which cannot turn out or stop instantly, to be an insurer of his safety. If he does nothing for his own security he is negligent, and if the physical facts leave no doubt so that reasonable minds would not differ in that he either proceeded recklessly or failed without reasonable excuse to take the precautions which the conditions indicate were available to him, he is as a matter of law guilty of negligence more than slight, which under our rule of comparative negligence bars a recovery. *Baltimore & O. R. Co. v. Goodman,* 275 U. S. 66; *Rickert v. Union P. R. Co.,* 100 Neb. 305; *Seiffert v. Hines,* 108 Neb. 62; *Haffke v. Missouri P. R. Corporation,* 110 Neb. 125; *Stanley v. Chicago, R. I. & P. R. Co.,* 113 Neb. 280; *Tyson v. Missouri P. R. Corporation,* 113 Neb. 504; *Allen v. Omaha & S. I. R. Co.,* 115 Neb. 221, and annotation in 41 A. L. R. 405.

The day was clear. The crossing and physical surroundings were all familiar to Eggeling. Under the conditions it cannot be said that the obstructions furnished "a reason-

able excuse" for a failure to stop, look, and listen. If, because of his position in the wagon, the time and distance may have been shortened within which to divert his horses from a direct course or to completely stop to avoid a collision after he could have seen the engine, it may have been the part of wisdom and only a reasonable precaution causing him but slight inconvenience to have led his horses by the head across the place of danger. But, regardless of the position he occupied in the wagon, he himself had fully 20 feet and more than 4 seconds in which to see the train approaching and in which to act for his own safety.

"It has long been the law that, when a person goes into a place of danger, known by him to be a dangerous place, he must exercise care for his own safety commensurate with the dangers and incidental perils he encounters in entering the place." *Conrad v. Wheelock,* 24 Fed. (2d) 996.

Complaint is made that the speed of the train was excessive. The speed was stipulated to be 40 miles an hour. The evidence does not show that such speed is unusual at this point, nor has appellee shown that under the conditions such speed is in any sense unlawful. Eggeling's duty of self-protection was not lessened by reason of any excessive speed. His obligation to stop, look, and listen, when any of these or all would have proved beneficial, remained the same although the speed were excessive. "Failure to do so is negligence more than slight in comparison with that of defendant, and will defeat a recovery, even though the whistle was not blown and the bell not rung, *or the speed may have been excessive.*" *Lewis v. Union P. R. Co.,* 118 Neb. 705. See *Moreland v. Chicago & N. W. R. Co.,* 117 Neb. 456; *Askey v. Chicago, B. & Q. R. Co.,* 101 Neb. 266.

Appellee also contends that a strong wind from the south made it impossible or difficult to hear the sound of the approaching train. If true, yet his security was not solely dependent upon his sense of hearing. If his safety were impaired on account of this factor, a fair sense of caution should have impelled him to exercise even greater care in looking and stopping.

In view of all the foregoing, instruction No. 10 requested by defendants and refused by the court should have been given. In this instruction the jury would have been directed to return a verdict for the defendants, which would have been clearly correct in view of the law so strongly established in this state.

"The accident was most unfortunate, but this is a lawsuit; it is governed by rules of law. Judges sitting upon the bench find no pleasure in denying a widow a recovery in a case of this character. It is easy to deny a motion for a directed verdict and let the jury pass upon the facts, and then more or less embarrassing to have to set aside the verdict. Expenses and inconvenience accumulate, and yet eventually any judgment based on such facts as appear here must be reversed. The *Goodman* case, *supra*, was just such a case. The opinion in that case was a clear admonition by the supreme court to trial courts to apply the law." *Conrad v. Wheelock*, 24 Fed. (2d) 996.

In appellee's argument it is intimated that the law places no burden upon the railroad if the failure to stop, look, and listen should in all cases bar recovery, even though the railroad fails to sound any warning as required by section 5377, Comp. St. 1922, as amended by chapter 168, Laws 1927, and even though the injured one had largely relied upon the fulfilment of the duty which such law imposes; that the failure to sound such warning was intended by the legislature to fix liability. However, this court has consistently held ever since 1895 when, in *Chicago, B. & Q. R. Co. v. Metcalf*, 44 Neb. 848, the *effect* of the law was thoroughly considered, that the failure to give the required warning did not establish negligence, but was merely *evidence* of it. If the people were dissatisfied with the state of the law as it exists, it would seem that the legislature would have fixed a different standard; and the very fact that during 35 years since that decision no change has been made in that portion of the law we now consider, would seem to indicate general popular satisfaction. At any rate, the court can only interpret and apply the law, not change it.

Other errors at the trial are claimed by appellants, but the foregoing disposes of the case; therefore such other claimed errors need not be discussed. For the reasons given, the judgment of the district court is reversed, with directions to dismiss.

REVERSED.

PER CURIAM.

The following opinion on motion for rehearing was filed May 2, 1930. *Paragraph of syllabus withdrawn.*

On reargument of this cause, the rule announced in second paragraph of syllabus is withdrawn because unnecessary to a decision of the cause. In all other respects the former opinion is adhered to.

CASES DETERMINED

IN THE

# SUPREME COURT OF NEBRASKA

JANUARY TERM, 1930.

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## IN RE ESTATE OF JOHN J. MAAG.
## ALICE M. MAAG, APPELLEE, V. ESTATE OF JOHN J. MAAG, APPELLANT.

FILED JANUARY 8, 1930. No. 26947.

1. **Husband and Wife:** ANTENUPTIAL CONTRACTS. "Antenuptial contracts between persons contemplating matrimony, determining the prospective rights of each in the property of both parties during and after marriage, are not against public policy and are enforceable." *Rieger v. Schaible*, 81 Neb. 33.
2. ———: ———: CONSTRUCTION. "A court of equity, when called upon to consider an antenuptial contract, should examine and construe the instrument in the light of the circumstances surrounding that particular case, and enforce or annul the agreement according to the facts disclosed in the case before it. No arbitrary rule can be laid down which would apply to all antenuptial arrangements." *Rieger v. Schaible*, 81 Neb. 33.
3. ———: ———: VALIDITY. "In view of the close and confidential relation existing between affianced persons, it is the duty of the prospective husband to make a full and fair disclosure of all material facts relating to the amount, character and value of his property, so that the prospective wife may have sufficient knowledge upon which she may exercise her judgment whether she will enter into such a contract." *In re Estate of Enyart*, 100 Neb. 337.
4. ———: ———: ———. "The burden is upon the husband, or his representatives, to show that an antenuptial contract apparently unjust to the wife and fairly procured." *In re Estate of Enyart*, 100 Neb. 337.
5. **Jury.** An appeal from the refusal of the county court to make an allowance out of the estate of a deceased husband for the support of his widow is a law action and is triable to a jury unless a jury be waived.

6. **Husband and Wife: ANTENUPTIAL CONTRACTS: ALLOWANCE TO WIDOW.** Under the facts and circumstances in this case, *held*, that the antenuptial contract in question is not a valid bar to the widow's allowance for her support out of her husband's estate; and the judgment of the district court is affirmed for the reasons set forth in the opinion.

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

*William G. Rutledge* and *Gray & Brumbaugh*, for appellant.

*Mulfinger & Webb* and *Shotwell & Ready, contra.*

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

GOSS, C. J.

This is an appeal on behalf of the estate of John J. Maag, deceased, from the judgment of the district court. That court reversed the judgment of the county court and directed it to make a reasonable allowance to the widow for her support pending the settlement of the estate.

John J. Maag died November 10, 1927. His will, executed October 10, 1923, was proved and admitted to probate in Douglas county, January 24, 1928. The testator was survived by Alice M. Maag, his widow, who petitioned for the allowance, and by two sons and two daughters, born to him and a former wife, who died long prior to his marriage to the petitioner. The will provided for all of them. The only mention of the petitioner and the only provision for her constituted the third paragraph of the will and is in these words:

"To my wife, Alice M. Maag, if she then be living within six months after my death, the sum of five thousand dollars. This payment to be in lieu of all my wife's statutory rights as my said wife, and as full performance of the agreement between us."

The agreement referred to in the will was an antenuptial contract executed by John J. Maag and petitioner, then Alice M. Smith, in the forenoon of June 2, 1923, before

their marriage later on that same day. More will be stated as to this agreement later in the opinion.

On the same day the will was admitted to probate, Alice M. Maag filed in the county court her written election refusing to accept the provision made for her in the will and electing, in lieu thereof, to take under and by virtue of the laws of Nebraska; and on the same day she filed in the county court a petition asking that court to make her an allowance of $150 a month for her support as the widow. Thereupon the executor filed his answer and objections to the petition, setting up the antenuptial agreement entered into by the petitioner, by which it was alleged she bound herself to take $5,000 upon testator's death and to waive all other claims against his estate. Completed issues were made by her reply, which particularly raised the issue of lack of fair disclosure of the value of the property of John J. Maag and of the nature, character and value of the estate she was relinquishing. On a hearing the county court found that a full and fair disclosure of the extent and value of both his real and personal property was made by John J. Maag to her prior to the execution of the antenuptial agreement, and that she was fully capable and had the ability and opportunity to determine the value of his estate and did so determine the extent and value thereof prior to the execution of the agreement; that the agreement was a bar to said widow's participation in the distribution of the estate, except as to the sum provided in the will; that she was estopped from making any further claims to the proceeds of the estate, and that the terms of the antenuptial agreement should be upheld and enforced. The order of the county court, after making the findings above abstracted, concluded with the following judgment:

"It is therefore considered, ordered, adjudged and decreed that said antenuptial agreement is a valid agreement; that the terms of said agreement operate as a bar to and prevent the petitioner, Alice M. Maag, from participating as the widow of said John J. Maag in any distributive share of said estate, other than that named in said antenuptial agreement, and as provided for by decedent's will, and the

petition of said widow for an allowance of said estate should be and is hereby overruled."

In the district court, after part of the reply was stricken as presenting an issue not pleaded in the county court, the issues were pleaded as they were in the county court. The reply concluded with a prayer for the "allowance asked for in the petitioner's original petition, and for such other and further relief as to the court may appear she may be justly entitled."

The case was classified as a law case, was placed upon the law docket, and when it was reached for trial, "a trial by jury having been waived by agreement of parties," the cause was tried before the late Alexander C. Troup, district judge, and submitted to the court on all questions of law and fact. The court found generally and specifically for Alice M. Maag and against the executor and estate. The final judgment particularly found that John J. Maag did not make to the petitioner the full and fair disclosure of his property, as required by law, prior to the execution by her of the antenuptial agreement, "and that said alleged antenuptial contract has never been, nor is it now, a valid, binding, or enforceable contract as against said petitioner." The judgment thereupon adjudged the contract invalid, declared that petitioner was entitled to all the rights, as a surviving widow, as though said contract had never been executed, reversed the judgment of the county court and remanded the cause, with direction to allow a reasonable sum to the petitioner for her support pending the settlement of the estate. A motion for new trial was duly filed and overruled. The record contains a written opinion by the district judge filed the day the final judgment was rendered by him.

In the county court and in the district court, what the petitioner was seeking was an allowance provided by law for the support of the widow pending the settlement of the deceased husband's estate; in both courts the executor, acting for the estate, was seeking to have such allowance defeated. The defense in both courts was that she had waived

such allowance and had barred herself from it, by virtue of the contract she had made prior to the marriage.

Alice M. Smith had two children at the time she signed the antenuptial agreement and married John J. Maag. The original agreement is in the bill of exceptions. Date and all, it is entirely typewritten, except the signatures. Omitting the certificate of acknowledgment, which is in the usual real estate form, it is as follows:

"Antenuptial Agreement.

"This agreement made and entered into this 2d day of June, 1923, by and between John J. Maag, of Otoe county, Nebraska, aged fifty-eight years, and Alice M. Smith, of Douglas county, Nebraska, aged forty-five years, witnesseth: That, whereas, a marriage is contemplated by and between the parties hereto, and the object of the pecuniary condition and situation, their prospects and desires and mutual rights and obligations, having been fully considered, they hereby mutually covenant and agree, each with the other, and to which they respectively bind themselves, their heirs, executors, and administrators as follows:

"That the said John J. Maag, in consideration of the promise of the said Alice M. Smith, to marry him, and of the consummation of the said proposed marriage, and of her agreements herein contained, covenants and agrees that he will, upon his decease, pay or cause to be paid, or provide that there shall be paid, to her, if she is then living, the sum of five thousand dollars in good and lawful money of the United States, within six months after his death; and as a further consideration thereof, the said John J. Maag, hereby waives, disclaims, and releases, all right, title and interest in and to any and all real and personal property owned or possessed by the said Alice M. Smith at the time of said marriage, or may hereafter acquire by any means whatsoever, and in which he may or might lawfully and rightfully acquire any title or interest therein or thereto by virtue of said marriage. Said John J. Maag acknowledges that he knows said Alice M. Smith

is the owner of a residence property consisting of a house and lot in Omaha, Nebraska.

"And the said Alice M. Smith, in consideration of the said five thousand dollars and of the other covenants and agreements above mentioned, hereby waives, disclaims, and releases all right, title, and interest, in and to any and all of the real and personal property owned or possessed by the said John J. Maag, at the time of said marriage, or may hereafter acquire by any means whatsoever, and in which she may or might lawfully and rightfully acquire any title or interest therein or thereto by virtue of said marriage. Said Alice M. Smith acknowledges that she knows said John J. Maag is the owner of four hundred acres of land in Otoe county, Nebraska, and a residence property consisting of a house and the north 70 feet of lots 1, 2, 3, and 4, in block 20, Prairie City addition to Nebraska City, Nebraska, and a small amount of personal property.

"The intention being hereby to leave the absolute disposal of said real and personal property now owned or hereafter acquired by either of them, so that at the death of said parties, all of the property of said parties, respectively, shall descend, or be disposed of by will, to his or her lawful heirs, legatees or devisees, released and acquitted of all claims of dower, curtesy, homestead, or other interest of any kind or nature, that either might have had under the laws of Nebraska.

"In witness whereof, the parties hereto have hereunto set their hands the day and year first above written.

"John J. Maag.
"Alice M. Smith.

"In Presence of C. A. Tracy.
"Stephen Hansen."

The instrument was acknowledged June 2, 1923, before C. A. Tracy, a notary. Endorsements show it was filed in the office of the register of deeds of Douglas county at 11:55 a. m. the same day and in the office of the register of deeds of Otoe county July 11, 1923, at 1:15 p. m.

Antenuptial contracts are recognized by statute. "A

man or woman may also bar his or her right to inherit part or all of the lands of his or her husband or wife by a contract made in lieu thereof before marriage. Said contract shall be in writing signed by both of the parties to such marriage and acknowledged in the manner required by law for the conveyance of real estate, or executed in conformity with the laws of the place where made." Comp. St. 1922, sec. 1225.

Before entering upon the further relation of the facts and the law it may be well to state some general provisions of the law as settled in this jurisdiction.

"Antenuptial contracts between persons contemplating matrimony, determining the prospective rights of each in the property of both parties during and after marriage, are not against public policy and are enforceable;" and "In this respect, however, and before passing from this branch of the case, it might be well to state that a court of equity, when called upon to consider an antenuptial contract, should examine and construe the instrument in the light of the circumstances surrounding that particular case, and enforce or annul the agreement according to the facts disclosed in the case before it. No arbitrary rule can be laid down which would apply to all antenuptial arrangements." *Rieger v. Schaible*, 81 Neb. 33, 57.

"The burden is upon the husband, or his representatives, to show that an antenuptial contract apparently unjust to the wife was fairly procured;" and "In view of the close and confidential relation existing between affianced persons, it is the duty of the prospective husband to make a full and fair disclosure of all material facts relating to the amount, character and value of his property, so that the prospective wife may have sufficient knowledge upon which she may exercise her judgment whether she will enter into such a contract." *In re Estate of Enyart*, 100 Neb. 337.

A perusal of the antenuptial agreement shows that nowhere does it purport to disclose the value of the estate owned by either party. Nor does the evidence show that John J. Maag told Alice M. Smith at the time the contract was entered into the character or value of his property,

or that she then had knowledge of its character and value. The circumstances leading up to and surrounding the execution of that instrument, as shown by the evidence, are briefly sketched as follows: They first became acquainted in the late summer or early fall of 1922, and at Omaha, on Decoration Day, May 30, 1923, talk of marriage between them ripened into a definite agreement to be married on the following Saturday, June 2, 1923; she had never been in Otoe county, and while he had told her he owned 400 acres of land in that county he had never made any statement to her as to its location, description or value. On May 31, 1923, Mr. Maag left Omaha for his home in Otoe county, but he returned to Omaha on the evening of June 1 and telephoned Mrs. Smith from his hotel, asking her to come to the hotel to talk over a matter of business. She invited him to come out to the house and stated it was raining hard. He said he did not want to talk where so many were around and sent a taxicab for her. She went to the hotel, met him in the lobby, and went with him to his room, where they sat down on the side of the bed. She testified that he then took a paper out of his pocket and said: "I was down to Auburn this morning and had a little paper fixed up here I want to talk to you about. * * * This is all for your protection, if anything would happen to me; if I should be taken away, you will have a home and plenty to take care of you as long as you live. * * * I don't want you to think if you sign this I am not going to take care of you as long as you live, because I am. It is just for your protection so the children couldn't take everything." She testified he never said how much it was and she did not ask him, that she did not read it, nor did he furnish her a copy of it, that he nor any one else advised her what she would be entitled to as his widow if she survived him; that he took her home from the hotel that night, came after her the next morning and took her down to the courthouse, where the antenuptial contract was signed, acknowledged and filed in the office of the register of deeds of Douglas county. She testified that she did not read the instrument, nor was it read to her. The notary,

who was a deputy register of deeds and who took the acknowledgment and was one of the subscribing witnesses, testified, in substance, that because it was an unusual instrument he asked them both if they were familiar with the contents and they both answered in the affirmative. The filing was concluded at five minutes before noon; the parties went to Fremont, arriving about 4 p. m. and were there married at 7 p. m. that day.

While there was some evidence tending to impeach portions of the testimony of the petitioner, yet we find the ultimate facts are substantially as we have recited them in an endeavor to draw a fair picture of what we see in the record. Even if we were to conclude that Alice M. Smith actually read the instrument before it was executed, or that she answered the notary, when acknowledging it, that she knew its contents, yet those things, of themselves, would fall short of proving that her prospective spouse made a full and fair disclosure of, or that she knew, the extent, character and value of his holdings.

Neither spouse being the parent of the children of the other would take more than one-fourth of the real or personal estate of the other if that other died intestate. Comp. St. 1922, secs. 1220, 1222. The probate proceedings of John J. Maag had not gone far enough to show the exact value of the estate in the county court, but the inventory showed upwards of $60,000. There was evidence on the trial in the district court showing estimates ranging from $65,000 to $84,000, depending on the side producing the estimate. The petitioner if compelled to accept the $5,000 under the contract and will, rather than to be allowed to take her election under the statute, would forego at least the difference between say $16,000 and $5,000. It may be remarked that the evidence shows no appreciable change in the estate between the marriage and death. So there is a great disparity between the amount provided in the antenuptial contract and the amount the law would allow the widow. This amount is so grossly disproportionate to the interest the law would give the petitioner as to lead to the conclusion that, whether intentional or otherwise, it constituted

a legal fraud upon the petitioner. We say this without any intention of charging the deceased with active or intentional fraud. As shown in what we have hereinbefore quoted from *In re Estate of Enyart, supra,* the duty to make a fair disclosure of the amount, character and value of his property was an imperative one, cast by the law as a burden upon John J. Maag and his representatives before the validity of the antenuptial agreement can be established as a defense to the statutory right of a widow to take an allowance for support out of his estate. The same principles have been reiterated in *Stahl v. Stahl,* 115 Neb. 882, and in *In re Estate of Waller,* 116 Neb. 352.

It is argued by the executor that the petitioner, if not advised of the value of her prospective husband's estate or if ignorant of its character, extent and value, was charged with the duty of ascertaining it and yet did nothing in respect thereof. The cases we have cited from our own state show that this burden was not hers. The trial judge in his memorandum opinion succinctly covered that point with a case from another jurisdiction when he said: "But if any default or lack of duty should be charged to petitioner on that account, the law's answer to that is: 'The burden (duty) was not upon her to inquire but upon him to inform.' *Denison v. Dawes,* 121 Me. 402, and cases cited."

This case was a law case triable to a jury. *Sheedy v. Sheedy,* 36 Neb. 373. The executor now claims that it was converted by her reply (in the district court) to an issue in equity. It would seem a complete answer to this to say that the record shows that the parties waived a trial by jury. We do not find any place in the record where the question that it was an equity trial was discussed or referred to. Moreover, the issue in the county court seems to have been whether or not the widow was entitled to an allowance. Incidentally it depended as a matter of evidence upon whether she had waived it by her antenuptial contract, and the county court found that she had done so because the contract was valid. In the district court the issues had to be the same and were so; and again the con-

tract was pleaded as a defense. The district court held that the contract was not entered into in the circumstances required by law and was invalid and therefore not a bar to her allowance. It is true the petitioner in her reply in the district court prayed for "such other and further relief," but this could not convert a law case into an equity case. It was mere surplusage. While we are of the opinion it is purely a law case, yet we have no hesitancy in saying that if it were an equity case we would still, having gone very carefully into all the evidence, have found the ultimate issuable facts the same as did the trial judge.

In discussing such contracts, Judge Letton in the opinion in the *Enyart* case said: "In fact, most courts now support antenuptial contracts if fairly made. Such instruments frequently tend to peace and happiness by settling questions concerning rights of property, which, especially in the case of marriage of people in later life having children of a former marriage, often furnish grounds of irritation and friction which may defeat the very purpose of the union." To this philosophy, so aptly phrased, we think it not out of place to add a few observations, derived from a realization that there is an increasing number of those adopting this method of providing in advance of marriage for the distribution of estates after death. And yet such lay parties and, perhaps, to a lesser extent, the members of the profession who are sometimes, but not always, consulted, do not in all instances realize, or at least put into practice, the elements that form the basis of a valid antenuptial contract. The ideal contract of that nature would be preceded not only by a full and frank disclosure of every item of real and personal property but by an examination to discover and perpetuate the evidence of its quantity, character and value. If this were done and these things were set forth in the instrument itself, together with evidence that the parties knew what relation the provisions of the contract bore to the statutory rules of distribution, there would be less opportunity for litigation by a surviving spouse. If, in addition to what has been suggested, frank effort would be made by both parties to

secure and preserve evidence of third parties as to all the circumstances of the disclosure, the chances for future disagreement would be reduced to a minimum. It could not then be said, as it was said in *White v. White*, 112 Neb. 850, and as appears in the instant case: "She was too much hurried into it." An antenuptial contract means what the words signify. It has to be entered into before marriage. If valid, it cannot be changed after marriage. Whether valid or invalid, if entered into in haste it is often repented at leisure, sometimes by one party, sometimes, as in case of divorce, by both.

We believe the judgment of the district court is the proper one on the particular facts and the law of this case, and it is, therefore,

AFFIRMED.

Note—Husband and Wife, 30 C. J. 626 n. 22, 643 n. 43, 648 n. 8, 668 n. 65, 669 n. 72; 9 L. R. A. n. s. 953; 13 R. C. L. 1036; 17 L. R. A. n. s. 866; 13 R. C. L. 1037.

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JOHN WOLLMER, APPELLEE, V. JAMES WOOD ET AL.: THEODORE JOHNSON ET AL., APPELLANTS: ROY B. CARLBERG, CROSS-PETITIONER AND APPELLEE.

FILED JANUARY 8, 1930. No. 26776.

1. **Judicial Sales: CONFIRMATION: EXEMPTIONS.** The right of exemption of real property from the laws of the United States is not proper for consideration upon proceedings for the confirmation of a judicial sale of such real estate on which it is alleged the right of exemption has been imposed.
2. ———: ———: ———: **QUIETING TITLE.** The motion to confirm a sheriff's sale cannot be resisted on the ground that the land sold is exempt from the levy and lien of the judgment involved, and an attempt to resist it on that ground will not bar a subsequent action to remove the cloud caused by such sheriff's deed.
3. **Indians: ALLOTMENT OF LAND: ALIENATION.** The act of Congress of 1882 allotting lands to the Omaha Indians, the act of 1906, and the act of 1907, construed and *held* to be *in pari materia*, and to authorize, upon consent of the secretary of the interior, an Indian holding such allotment to sell and transfer a

full, complete and perfect title to his grantee of the real estate or any part thereof constituting such allotment, which conveyance when so made is effective to convey full title to the land or interest so sold "the same as if the fee simple patent had been issued to the allottee."

4. ———: ———: ———: LIABILITY FOR DEBTS. As a sale and conveyance by an Indian allottee made after receipt of the final fee simple patent from the government of the United States was effective to vest in his grantee full, complete and perfect title of the real estate so conveyed, forever exempt from the liability of debts of such allottee and patentee created before such patent was issued, and such land in the hands of a subsequent grantee is not exempt by federal law from payment of debts of the latter incurred prior to the issuance of the patent; so the identical result is accomplished by the execution of the conveyance provided for by the act of 1907 when approved by the secretary of the interior as therein provided.

5. ———: ———: ———: ———. *Held*, under the facts in the instant case, the title thus conveyed to James Wood by David and Daabe Preston was not exempted by the federal law from the payments of the debts of the former incurred prior to the approval and delivery of such deed.

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

*Stason & Knoepfler*, for appellants.

*Saxton & Hammes*, for appellee Wollmer.

*Roy B. Carlberg, pro se.*

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

EBERLY, J.

Appellee, plaintiff in the court below, instituted action to secure the foreclosure of a certain real estate mortgage and the sale of certain real estate described therein situated in Thurston county, Nebraska, against the defendants who are the appellants here, and with them impleaded James Wood and Susan S. Wood. This petition of appellee contains allegations common to foreclosure proceedings and also certain statements setting forth that the defendant Theodore Johnson claimed to own the premises described

by reason of certain proceedings based upon a judgment entered in the district court for Thurston county, Nebraska, on November 4, 1920, in favor of Theodore Johnson and against the defendants James Wood and Susan S. Wood upon an obligation which was incurred by the latter at and prior to the 12th day of September, 1919; that James Wood and his wife were Omaha Indians, and that the land in controversy at the time Wood became possessed of the title was not subject to the lien of the Johnson judgment, nor subject to be sold thereunder, and that the proceedings so far as the levy and sale were concerned, upon which Johnson's rights to the premises were based, were in truth and in fact void. The appellants here, defendants in the district court, admit the execution of the mortgages in suit; and the due rendition of the judgment of the defendant Johnson is not denied by any of the parties. The defendant Roy B. Carlberg is likewise the owner of a note and mortgage covering the same land executed by Wood and wife, the priority of which is junior to that of appellee Wollmer. This mortgage was set up by a cross-petition and the questions presented by this pleading are identical with those presented by the pleadings of Wollmer, and a like judgment was entered.

The real issue in the case is the right of Johnson to levy his judgment on and satisfy the same out of the lands described in appellees' mortgages. There was a trial of the issues to the district court for Thurston county which found in favor of the appellees, adjudged the lands exempt from the lien of appellants' judgment, and that the title based upon such levy and sale to the premises upon which appellants predicated their defense was therefore void, and decree of foreclosure and sale was entered in favor of the appellees as prayed. From this adjudication defendants, Theodore Johnson, Clara E. Johnson, and H. L. Drenguis, have appealed.

The uncontradicted evidence in the record discloses that David and Daabe Preston were Omaha Indians, and sustained to each other the relation of husband and wife. Each was an allottee of the government under the act of

1882 allotting lands to Omaha Indians, and both were past eighty years of age. They desired to secure a distribution of their real estate. For this purpose David Preston executed a will devising the allotments received by him. Contemporaneous with this in disposing of her allotment, Daabe Preston, together with David Preston, her husband, executed a deed which conveyed to their grandson, James Wood, the following described premises situated in Thurston county, Nebraska: Southwest quarter of the northeast quarter of section 30, township 25, north of range 9, east of the sixth principal meridian. This instrument, termed "Deed Noncompetent Indian Land," bears date March 31, 1917. However, there was no delivery of this conveyance made at that time, nor did the representatives of the federal government approve its terms until the 4th day of February, 1921. On that day this conveyance was approved by John Barton Payne, secretary of the interior.

It is further disclosed by the record that James Wood became indebted to Theodore Johnson in the sum of $2,500 on or prior to September 12, 1919. On that date this indebtedness was merged into a promissory note which Wood and wife then made and delivered to Johnson. Judgment was duly entered in the district court for Thurston county on this note November 4, 1920, for the sum of $2,785 with interest at 10 per cent. and costs of suit taxed at $17.75. The conveyance of the land in suit made by Preston and wife to James Wood, and which was approved on the 4th day of February, 1921, was recorded as provided by law in the land office in Washington, D. C., on the day of its approval, and recorded in Thurston county, Nebraska, on the 15th day of October, 1921. Appellee's note and mortgage were duly executed and delivered by James Wood and Susan S. Wood, his wife, and this mortgage was duly recorded in Thurston county on the 23d day of November, 1921. Thereafter an execution was issued on the Johnson judgment and was levied on the land described in the mortgage on the 29th day of March, 1923. In due time this land was sold under said levy to Johnson and the sale thereof duly confirmed by the district court for Thurston

county. This levy and sale the district court for Thurston county, in this proceeding, adjudged was void and conveyed no title to Johnson for the reason that the lands upon which the levy was made were "Indian lands" and not subject to the lien of the Johnson judgment because of the provisions of the federal law pertaining thereto.

On this record the appellants now present two propositions, viz.: First. Because of certain proceedings had in the district court for Thurston county, Nebraska, which ripened into the confirmation of the execution sale herein referred to, the appellees are bound by the decree of confirmation and especially by the finding therein "that said premises at the time of the levy and execution were the property of the defendant James Wood and subject to such levy on execution and sale." Second. That, even though this contention be denied, still the land in question was subject to the lien of appellants' judgment at the time of the levy and sale, and that the title of appellants based thereon is superior to the lien of appellees' mortgages.

The question first presented is essentially one of practice under the Nebraska Code. It may be conceded that it was the right of appellants, in view of the conditions which obtained at the time of the issuance and levy of the execution on their judgment upon the land in question, to have had all conflicting claims to the premises determined so that any purchaser at the sale would have been fully advised as to what was secured to him by his purchase. Under the practice which prevails in this jurisdiction this result would have been obtained by the issuance, service and return of the execution *nulla bona*, and the filing of a petition in the nature of a creditor's bill to which all persons in interest would be made parties setting forth the facts and tendering issues thereon. This would have secured to each person in interest his day in court with an opportunity to meet the claims of the plaintiffs and present their defenses thereto. *First Nat. Bank of Plattsmouth v. Gibson*, 60 Neb. 767. It is plain, however, that this course was not followed. Instead thereof the appellants desire to obtain the fruits of action which does not appear to have

been authorized either by the terms of our statute or by the established practice of our courts. Indeed the statute relative to the confirmation of judicial sales has no requirement as to notice being served on the judgment debtors or parties in interest in the suit, and the only requirement of notice in such cases pertains to confirmation had at chambers. It appears that the sale now under consideration was confirmed on one of the days of a regular term of court. And it may be further said that, in the regular course of judicial procedure, the only matter settled and adjudicated in the proceedings and order of confirmation of a judicial sale is that as to the proceedings of the sheriff and those acting under and with him in the levy, appraisement, advertising, making and returning of the sale. The questions as to the exempt character of the lands levied upon are not proper to present before the district court in considering objections to confirmation of the judicial sales of real estate. This court has held that at chambers a judge may confirm judicial sales, and this determination is hardly consistent with the idea that at such hearing there may be an adjudication of rights ordinarily determinable only by courts in the exercise of their regular jurisdiction as such. *Schribar v. Platt*, 19 Neb. 625; *Best v. Zutavern*, 53 Neb. 619; *Best v. Grist*, 1 Neb. (Unof.) 812; *Kaley v. Eselin*, 108 Neb. 544. In *Kaley v. Eselin, supra*, this court held:

"The homestead right of exemption of real property under the laws of this state is not a proper subject for consideration upon proceedings for the confirmation of a sale of the alleged homestead on execution.

"The motion to confirm a sheriff's sale cannot be resisted on the ground that the land sold is the homestead of the judgment debtor; and an attempt to resist it on that ground will not bar a subsequent action to remove the cloud caused by such sheriff's deed."

This principle is applicable to the situation before us and is controlling. It follows that none of the parties to this confirmation proceeding are prevented thereby from establishing the true nature of the lands, which are the sub-

ject of this action, in a subsequent proper proceeding to determine their real character as to whether subject to levy or not. Appellants' first proposition must therefore be resolved against them.

The controlling question is presented by appellants' second contention, which is that when the title was vested in James Wood it became subject to the lien of appellants' judgment at a time which made appellants' judgment senior and superior to appellees' mortgages. The federal statute which furnishes the source of this title is the act of 1882, 22 St. at Large, ch. 434, p. 341. This act, we take judicial notice, was continued in full force and effect by executive proclamations and was in full force at the time of the transactions detailed in this record, except as to amendments thereto properly made by congress. In this connection appellees contend that it was amended by the act of May 8, 1906, 34 St. at Large, pt. 1, ch. 2348, p. 182, of which the applicable provisions are the following:

"The secretary of the interior may, in his discretion, and he is hereby authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to the sale, incumbrance, or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent."

In addition to this it appears that a subsequent act of congress, passed March 1, 1907, 34 St. at Large, pt. 1, ch. 2285, p. 1018, is as follows:

"That any noncompetent Indian to whom a patent containing restrictions against alienation has been issued for an allotment of land in severalty, under any law or treaty, or who may have an interest in any allotment by inheritance, may sell or convey all or any part of such allotment or such inherited interest on such terms and conditions and under such rules and regulations as the secretary of the interior may prescribe, and the proceeds derived therefrom shall be used for the benefit of the allottee or heir so dis-

posing of his land or interest, under the supervision of the commissioner of Indian affairs; and any conveyance made hereunder and approved by the secretary of the interior shall convey full title to the land or interest so sold, the same as if fee simple patent had been issued to the allottee."

It is the contention of the appellants that the matters in suit herein are determined by the provisions of the act of 1907, while the appellees rely upon the act of 1906 to sustain their position.

As a necessary rule of construction it may also be said: "From the time of *Worcester v. Georgia,* 6 Pet. (U. S.) *515, *582, down to *United States v. Celestine,* 215 U. S. 278, it has been the rule of all courts to construe doubtful legislation in favor of the Indian." *Rider v. LaClair,* 77 Wash. 488.

It is also undoubtedly true that the source of all powers exercisable by the general government is the legislation duly enacted by the legislative branch thereof. The executive agencies may exercise only the powers thus created and vested in them, including such as may be necessarily implied. The warrant of authority, however, is to be found in the express terms of the statutes, which they must comply with and of which the world must take notice in dealing with these subjects of legislation. Thus it has been declared: "It is the intention expressed in a statute, and that alone, to which the courts may lawfully give effect. They may not assume or presume purposes and intentions that the terms of the statute do not indicate and then enact or expunge provisions to accomplish these supposed intentions." *Brun v. Mann,* 151 Fed. 145, 157. In the case of *United States v. Hemmer,* 195 Fed. 790, 801, it was held: "Even though the patent in this case had failed to show that Taylor was an Indian, and contained no limitation whatever upon alienation, the act of the executive officers of the United States issuing the patent without condition or limitation (if limitations should have been imposed upon alienation under the then existing provisions of the acts of congress) could not affect such limitation prescribed by

congress, and the purchasers from Taylor, the Indian, were chargeable with knowledge of the limitations imposed upon his title by the acts of congress. *Taylor v. Brown*, 5 Dak. 335, Id., 147 U. S. 640, 13 Sup. Ct. 549, 37 L. Ed. 313; *Eells v. Ross*, 64 Fed., 417, 12 C. C. A. 205. The rule of *caveat emptor* applies to these defendants taking this contract, assignment of the contract, judgment, and tax liens. They are charged with notice, not only of all the facts appearing on the face of the patent, but were also bound by actual as well as constructive knowledge and notice of any defect or mistake in the patent, which was obvious or which might have been known by proper diligence. *Wissler v. Craig's Adm'r*, 80 Va. 22; *Burwell's Adm'rs v. Fauber*, 62 Va. 446; *Tilley v. Bridges*, 105 Ill. 336."

And without further discussion, it may be said that both parties to the litigation agree that the restrictions attempted to be imposed by the secretary of the interior in the approval of this conveyance to Wood are unauthorized by the terms of the statutes applicable and are wholly void.

But it is insisted on the part of the appellees that the following provision of the act of 1906 precludes the attachment of the lien of appellants' judgment to the land in controversy and prevents sale thereunder, viz., "And said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent."

It would seem, however, that when the three acts of congress referred to herein are construed as being *in pari materia* some force and effect must be given to the legislation of 1907. This is at least the last expression of the legislative will. True, the act of 1906 provides: "Said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent." But it will be noted that this exemption is limited to the taker under the final patent which, it was contemplated, would terminate the trust period and vest in the allottee or in the allottee's heir a full and complete title relieved of all restrictions. There was a similar provision applicable to homestead titles granted by the government under the act of May 20, 1862, entitled "An act to secure homesteads

to actual settlers on the public domain." Section 4 of said act (U. S. Rev. St. sec. 2296) declares: "No lands acquired under the provisions of this chapter shall in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor." This language we construed to be in legal effect that, "Although lands acquired as a government homestead are forever exempt from liability for the debts of the patentee created before the patent was issued, such lands in the hands of a subsequent owner are not exempt by the federal homestead law from the payment of the debts of the latter incurred prior to the issuance of the patent." *Duell v. Potter*, 51 Neb. 241.

True, under the terms of the Omaha allotting act of 1882 the issuance of a patent in fee simple by the government is expressly made a condition to the termination of the restrictions imposed by that act. Even so, after receipt of final patent it is plain that the patentee had unlimited right to sell and transfer and, while the fee simple title remained in him, it was exempt from all indebtedness by him previously incurred. But, notwithstanding these provisions, the legislative will, as expressed in the act of 1907, was that additional powers should be conferred which are enumerated in the act, and, as a part thereof, further declares as a result of the exercise of the additional powers so conferred that "any conveyance made hereunder and approved by the secretary of the interior shall convey full title to the land or interest so sold, the same as if fee simple patent had been issued to the allottee."

Applying this language to the situation disclosed in the present case: It is thought that the terms of the act of 1907 fairly disclose the legislative intent that a conveyance by an allottee, who had prior thereto received his final patent, vested in the transferee a full and complete title forever exempt from liability for the debts of the patentee created before the patent was issued. But this exemption extended no further. The lands in the hands of the transferee were subject to his indebtedness without reference to the date of its creation. So the approval by the secre-

tary of the interior of the "Deed Noncompetent Indian Land" of such allottee, in legal effect, vested in the grantee of such deed a full and complete title relieved of all indebtedness of the grantor incurred by him prior to such approval; and likewise vested in the grantee named a full and complete title without restrictions as to alienation and without federal exemption as to such grantee's debts. Under the terms of the statute, whether the title be taken under such approved deed by a white citizen or by a red can make no difference. The controlling words vested in the grantee the same title, irrespective of blood or condition, and do not create or continue in the grantee any right of exemption personal to him whatsoever. Under these circumstances the rule applicable to appellants' judgment was announced by this court in *Lessert & Steele v. Sieberling & Co.*, 59 Neb. 309, as follows: "Real property, purchased by a judgment debtor subsequent to the rendition of judgment against him, is subject to the lien of such judgment as soon as the title vests in the debtor. Purchasers from such judgment debtor, who have actual or constructive notice of the lien, take the property charged with the lien."

This necessitates the conclusion that on the 4th day of February, 1921, the date of the approval by the secretary of the interior of the "Deed Noncompetent Indian Land" and the delivery thereof, a full, complete and perfect title was vested in James Wood which was subject to the lien of any existing judgment against him irrespective of the date of its entry or the date of the creation of the indebtedness upon which it was based. It therefore follows that the title vested in the appellants by the sale under their judgment lien was the full, complete and perfect title of James Wood, the lien of appellees' mortgages being subject to the lien of appellants' judgment. The execution sale thereunder vested in the appellants, purchasers thereat, the full, complete and perfect title to the premises wholly relieved of the lien of the mortgages in suit.

The action of the district court in the premises is erroneous and the judgment is reversed and the cause re-

manded, with directions to the district court to enter a decree in harmony with this opinion quieting the title in the appellants as prayed for in their answers.

REVERSED.

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SPLITTGERBER BROTHERS ET AL., APPELLEES, V. SKINNER PACKING COMPANY, APPELLANT.

FILED JANUARY 8, 1930. No. 26714.

1. **Trial:** CONDUCT OF COUNSEL. Upon the trial of issues of fact to a jury, counsel should not make declarations of fact during the introduction of evidence, nor repeat incompetent questions to which objections have been sustained, nor make comment on the evidence or witnesses until the time for argument has arrived, and such conduct is error.
2. **Corporations:** VALUATION OF ASSETS: DIVIDENDS. "If the assets of a corporation are valued honestly and fairly in view of all the facts known at the time of the declaration, a dividend is not rendered unlawful by the fact that such assets subsequently prove to be worth less than the valuation placed upon them." 14 C. J. 804.
3. ———: NET PROFITS. "The term 'net profits' or 'surplus profits' may be defined as what remains after deducting from the present value of all the assets of a corporation the amount of all liabilities, including capital stock, in other words, that which remains as the clear gain of a corporation, after deducting from its income all expenses incurred and losses sustained in the conduct and prosecution of its business." 14 C. J. 802.
4. ———: SALE OF STOCK: REPRESENTATIONS BY AGENTS. A purchaser of shares of stock in a corporation recently organized and then being promoted is not justified in relying upon a statement of the value of the stock made by a stock salesman, where the purchaser knew the value of the stock was problematical and depended upon the future success of the corporation's business.
5. **Trial:** INSTRUCTIONS: ESTOPPEL. "One who tenders an instruction which is given, which assumes the existence of evidence to establish an issuable fact in the case, cannot afterwards be heard to assert that there was no evidence received tending to prove such fact." *American Fire Ins. Co. v. Landfare*, 56 Neb. 482.

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

*Ritchie, Chase, Canaday & Swenson,* for appellant.

*G. P. North* and *F. H. Pollock, contra.*

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

RAPER, District Judge.

Splittgerber Brothers, a partnership, appellees, brought this action against the Skinner Packing Company, to recover the purchase price of five sales of preferred stock in the appellant company, which appellees allege was induced by false representation. The petition sets out six causes of action. The first is based on a sale of 20 shares on June 18, 1918, for which plaintiffs paid $2,000; the second count related to purchase of 20 shares on May 16, 1919, for $2,500; the third count was found to be an error and was abandoned; the fourth count is on a purchase of 60 shares on May 27, 1919; the fifth count is on a purchase of 100 shares on July 31, 1919, for $7,500, one-half paid for in cash and one-half on note, a renewal of which was unpaid; the sixth is on a purchase of 50 shares on August 22, 1919, for $6,250, one-half of which was paid for in cash and the remainder by note, renewals of which were unpaid. There was trial to a jury, which returned a verdict for plaintiffs on the five causes of action for the amount of the purchase price of each purchase with interest, less the amounts of the notes that were unpaid. A separate finding was made on each count.

The alleged false representations made by one L. B. Hughes, agent for the appellant, on the first cause of action were: (a) That the stock in the Skinner Packing Company was worth and of the actual value of $100 a share; (b) that the said company at the rate it was making profits was making a sufficient sum to pay 30 per cent. per annum to each stockholder; (c) that Paul and Lloyd Skinner had invested $400,000 in cash of their own money in the company; and (d) that the agents (stock salesmen) were working on a salary but not on commissions. The court in its instructions, because of lack of evidence, took from

the jury all these allegations except the first. As to the allegation concerning value of the stock, there was no evidence to prove the stock was not worth $100 a share, so there was no evidence to support the verdict on the first cause of action. Bernard Splittgerber was the only witness who testified to the representations on all the different sales. He was informed that the company had been recently organized, and that stock would have to be sold to finance the building and equipping of a large meat packing plant, and that very little had been done in executing the work except to purchase land and doing some grading, and he must have known that the value was problematical, and no one could foresee definitely the outcome, or the success of the venture. Under those circumstances he was not justified in relying upon a representation that the stock was of the value of $100 a share. It follows that the first cause of action should be dismissed.

On the four causes of action for the 1919 sales, plaintiffs in their petition allege certain false representations made by defendant's stock salesman, of which the court submitted to the jury the following: (a) That the stock was worth $125 a share; (b) that the company at the rate it was making profits was making sufficient to pay 30 per cent. dividends on all the stock; (c) that Paul and Lloyd Skinner had invested $400,000 in cash of their own money in the company; (d) that the company was making and had made large profits and had paid a dividend from the profits; (e) that the company had paid a dividend, which had not been paid from profits. Plaintiffs further allege that at the time of each purchase they informed the salesman that they were inexperienced in dealing in stocks and securities and knew nothing of the packing business nor the value of stocks nor the manner of ascertaining the value of same, and plaintiffs were assured by the salesman that they knew the value of the stock, and that plaintiffs could rely upon said representations, particularly as to the value of the stock, and that plaintiffs did believe and rely upon said statements. Plaintiffs allege that they first learned of the falsity of said state-

ments immediately before January 25, 1921, at which time they notified defendant of their election to rescind, and tendered back their stock and demanded the money they had paid therefor.

Bernard Splittgerber, who transacted all the business in connection with the sales, testified about the sale of May 16, 1919, that one Call, defendant's stock salesman, came to his home and asked if he had received a dividend on his stock, and witness told him "Yes," and Call then told him about how the plant was getting along and that they were building on it, about how long it would be before they started to operate the plant and that everything looked good, that the produce department was doing better than it did in 1918 up to that time and that it had earned around 15 per cent. or a little better up to that time on the capital stock; that witness could not buy the stock for $100, for they were selling it all over for $125 and that it was really worth more, and Call explained that the increase in value of land they had purchased and profits of produce department and business done in handling hams and bacon amounted somewhere around better than 40 per cent., almost 50 per cent., that is, it would amount to that if they kept on going at the rate they were going then, and that the Skinner boys had invested $450,000 of their own money in the stock, and that they were building or having built a large number of refrigerator cars; that Call told him that after the 8 per cent. dividend was deducted there was about 22 per cent. left in the treasury, and that with what they had already earned in 1919 added to the 22 per cent. already in the treasury would make 50 per cent. or more, and that, Call said, would make the stock really worth more than $125 a share. On May 27, 1919, Merrill and Call, defendant's stock salesmen, again visited Bernard at his home, and wanted Bernard to become a member of an advisory board. They talked about their packing plant and how good everything was going and wanted to sell Bernard more stock, and "they told me about the same stories that the other salesmen had been telling, and they said things were getting

better all the time." Bernard went to Omaha about the middle of July, 1919, and testified he met Robertson, treasurer of the company, and both Paul and Lloyd Skinner, and that one of the Skinners, in their office, told him they had invested $450,000 of their own money in the plant, and that he asked them, in the office, if things were going as good as the stock salesmen had been telling him, about making so much profit on the produce department, and one of the Skinners told him, even better; and they had Bernard's picture taken, and Robertson took him to see the plant. He did not say that he told the men in the office just what the stock salesmen had told him. About two weeks after the Omaha visit Mr. Call again came to Bernard's home, but no statement was related by Bernard as to what Call then represented to him, but he bought 100 shares at $125 a share. The subscription was made July 31, 1919. Again on August 22, 1919, Call visited Bernard and 50 more shares were purchased, but nothing is stated as to what Call told him at that time. On cross-examination Bernard said that Hughes, the first salesman, told him the stock salesmen were being paid a salary and were not working on a percentage basis, and that the salesman put down figures to show the earnings and what the stock was worth, but witness knew nothing of the way to estimate value of stock and relied on what the salesman told him. He testified on cross-examination that he knew the company had to sell stock before it could operate, and that he did not know how much stock had been sold when he made his purchases; that he did not know whether the salesmen on May 27, 1919, talked the whole thing over, but did recite some that were in accord with his direct testimony. There are some other matters testified to, which need not here be extended. Bernard's deposition was taken by the defendant in October, 1927. Several statements he made then were at variance with those given by him in court. His testimony in many respects is not very satisfactory, but the jury saw and heard him, and it was for the jury to say what degree of credit should be given to his testimony.

It was disclosed in the evidence that the Skinner Packing Company was organized about March, 1918, for the purpose of establishing a meat packing business on an extensive scale to compete with other large packing houses, and during all the years 1918 and 1919 was purchasing land and erecting buildings at a very large expense. While that was in progress the company engaged in a produce business buying and selling produce and meats. The work kept progressing during the next few years, but the packing plant was not in operation till some time after Splittgerbers' last stock purchase. The company asserts that there was a large increase in the value of the land that had been bought, and that the produce department had made profits, and with those profits, and interest on the notes given by purchasers of the company's stock and interest and appreciation of other securities, a dividend of 8 per cent. was properly and legally paid at the end of 1918, but the company does not contend that in 1919 it was making 30 per cent. profit or had made 15 per cent. at the time of plaintiffs' purchases in 1919, nor does it claim that the agents were paid a salary for selling stock, but this was withdrawn from the jury. Paul and Lloyd Skinner had subscribed for $400,000 of the stock, for which Paul gave Liberty bonds for $25,000 and his notes for $175,000, and Lloyd had given a check for $25,000, which was carried as cash, and $175,000 in notes. The check for $25,000 was never cashed and the Liberty bonds and check and their notes were turned back to them and their stock certificates canceled in June, 1920. Defendant contends that the value of the notes must be considered as the equivalent of cash, unless it affirmatively appears that the notes were not collectable, and inasmuch as no evidence was received to prove the notes were not collectable, the alleged representation that the Skinners had invested $400,000 in cash in the company must be presumed to be the truth. It was the custom of the company to sell stock for cash or part cash and part on time for which notes were given, and where notes were given the company held the stock as collateral. We do not concede that these

subscriptions of Paul and Lloyd Skinner, under the situation developed in this case, are the equivalent of a stock purchase for cash in those amounts. As the work progressed the company was a heavy borrower of money to carry on the project, and if these shares to the amount of $400,000 had been paid for in cash, one can readily see that it no doubt would have greatly strengthened the company's resources. The court at appellant's request instructed the jury that a note which is collectable is the equivalent of cash, and that if the jury found from the evidence that Paul and Lloyd Skinner had put into the company cash or its equivalent in notes which were collectable, the jury should disregard the allegations that the Skinners had invested the $400,000 in the company. The appellant cannot now complain of such submission to the jury.

In regard to the alleged false representation that the company had paid dividends from profits, at appellant's request the court instructed the jury that profits of a corporation include earnings from the operating departments, increases in values of properties purchased at figures less than they were worth, or that increased in value after the purchase, and earnings from interest on notes, Liberty bonds or other securities owned by the corporation; and the court further instructed the jury that the fact that an appreciation in real estate as shown by an appraisal was entered on the books of the company is not evidence that such appreciation so entered on the books of the company did not correctly reflect an increased value of the real estate. The testimony shows that on August 1, 1918, the Southwestern Appraisal Company made an appraisal of the real estate of the company and placed its value at $372,779.55, which property had cost the company $98,661.67, and on December 7, 1918, the directors authorized and directed the auditor to "set up" the appraised value to the end that the records might show the actual surplus in the company's financial affairs, and on the same date declared an 8 per cent. dividend on preferred stock, the dividend to be paid in cash to holders of shares fully paid for, and that

dividend be credited on the unpaid notes given for stock. It is disclosed by the evidence that the net surplus profits from the produce department was $3,504.77, and the increase in value of property, interest on notes given by stockholders of about $48,000 and interest then due on bonds and other securities of about $47,000, and that out of these surplus earnings and the appreciation in the value of their properties the company paid to stockholders in cash $56,000, and credited $48,000 on notes of stockholders. Under the instructions of the court that the increase in appraised value of the property should be accepted as the true value of those assets, the payment of the 8 per cent. dividend was justifiable.

"All dividends on corporate stock, in the absence of any efficient showing to the contrary, are presumed to be out of income." *Soehnlein v. Soehnlein,* 146 Wis. 330.

"The term 'net profits' or 'surplus profits' may be defined as what remains after deducting from the present value of all the assets of a corporation the amount of all liabilities, including capital stock, in other words, that which remains as the clear gain of a corporation, after deducting from its income all expenses incurred and losses sustained in the conduct and prosecution of its business." 14 C. J. 802. See, also, *Miller v. Bradish,* 69 Ia. 278.

The court in its instructions told the jury that it was for them to determine whether the defendant had profits or earnings out of which a dividend could have been paid, and defined a dividend as the profits of a corporation apportioned among its stockholders, but did not state what could properly be considered as profits. But the court instructed, at defendant's request, that, unless the jury found from the evidence that the plaintiffs understood that this dividend was paid exclusively from the operation of the business of the company, the allegation concerning the 8 per cent. dividend should be disregarded, and that, if plaintiffs understood that the dividend was paid out of a fund created in part by earnings from the operation of its business and in part from increase in value of its real estate and otherwise,

the allegation concerning the dividends should be disregarded. The defendant, therefore, cannot now claim that there was error in submitting to the jury the right of the company to declare the 8 per cent. dividend in December, 1918.

It is contended that the testimony of J. J. Buresh as to the value of the stock in 1919 was improperly admitted. He was plaintiffs' only witness on that question. He was auditor of the company from April, 1919, to March, 1921. The company's general ledger for 1918 and 1919 was lost, except a part of it consisting of some loose leaves, which were used by him, but which are not attached to the bill of exceptions. He testified that without that book he could only give estimate of the value of the stock from his memory of the company's condition. He testified that he knew how much stock was outstanding and what the book record showed were the assets and liabilities and from time to time made financial statements from the books, and would know the value of the stock in 1919, and "Well, I will say after eliminating certain items that I knew from working there that the stock would probably be worth $50 to $60" a share, and that the items he eliminated were promotion account and the amount paid for selling the stock, and their admission in the answer was placed in evidence that $487,100 of common stock and preferred stock of $5,997,950 at par value were outstanding, and of that amount $721,-597 of subscribers' notes were not paid and are uncollectable, and that no stock was sold after December 20, 1919; and witness testified that the uncollectable notes would reduce it materially, but could not say how much unless he had the rest of the figures; that the company paid over $1,000,000 for selling its stock, that he took into consideration such uncollectable notes and these uncollectable notes would reduce the value $10 a share. On cross-examination he testified that, when subscribers' notes were given for stock, the stock was held by the company as collateral, and if the notes were not paid, stock to the amount of the unpaid notes would be canceled and the amount of stock outstanding would automatically be reduced accordingly, and

that on December 31, 1920, as auditor, he made and signed a statement showing that the book value was $115 a share, and in June, 1920, he, as auditor, prepared a statement showing that the total assets at cost was $8,565,494.13, and deducting cost of promotion amounting to $848,121.55, or a representation to the investors of $104 a share. Add to this the increased value of the property, $1,500,000, and you have a total value of $9,217,372.85, or a relative value of $124 a share, after deducting all costs of promotion and organization; that he did not know how much Liberty bonds were on hand in July, 1919, but would say $500,000 or more, maybe $600,000; did not know how much had then been expended on cost of real estate, equipment and building; certificates of deposit then held were around $500,000 to $600,000; cannot remember how much cash was then on hand; could not remember the amount of stock then outstanding; that the promotion organization expenses in July, 1919, were around $300,000 to $400,000; did not know amount of stock sold between July and December, 1919, when stock sales ceased. His testimony plainly shows such lack of knowledge of the assets and liabilities that his testimony was incompetent.

Much time was devoted in the trial to show that Bernard Splittgerber knew, or was possessed of sufficient facts from which he should have known, as early as July, 1920, the facts concerning the alleged false representations, and was guilty of laches in waiting until January, 1921, to rescind. There are several circumstances which indicate that he might have known in July, 1920, the true condition of the company, in so far as affected the falsity of the representations, but he denied positively any such knowledge, and it was for the jury to say when he discovered, as he alleged, the falsity of the salesmens' statements. Among other circumstances urged by defendant was that Bernard had been appointed a member of an advisory board. There is nothing in this appointment that estops him from rescinding. The court instructed the jury that, if they found that plaintiffs discovered the fraud, or were put upon inquiry or had

good reason to discover the fraud in the summer or early fall of 1920, a rescission as of January 25, 1921, or thereabouts, was too late, and that, if they so found, they should return a verdict for defendant, so that issue was fairly submitted to the jury.

Appellant urges there was error in receiving improper testimony, part of which was later withdrawn. Mr. Ritchie, defendant's attorney, was the first witness called by plaintiffs, and two letters were admitted which he had written and sent out to the stockholders in the early part of January, 1921, in which he urged stockholders not to sue the company, but if they had a grievance to come before the directors, and stated that the stock was worth $100 a share, and explained some reasons for losses and troubles the company was having. Those letters are not relevant, but after the letters were admitted Mr. North asked Ritchie, "And in that letter you advised this man Taylor (to whom one of the letters was written) that he had better not sue the company, and he did and got judgment against the company, and it was paid? A. Yes; over my protest. Q. In this court, didn't he? A. Yes. Q. For $14,750? A. Yes. And then Mr. Ritchie went on to explain. In fairness to the court, it will be noted that there was no objection to these questions, but they were highly improper.

Another feature along this line occurred when plaintiffs' counsel charged that Mr. Ritchie was representing the Skinners in this suit. Mr. Ritchie denied that he was acting for the Skinners, and stated he had received no compensation from them. At the inception of this case Paul and Lloyd Skinner and the Skinner Manufacturing Company were made defendants, and Mr. Ritchie filed a demurrer for Lloyd Skinner and the Skinner Manufacturing Company, and a special appearance for Paul Skinner. These parties were later dismissed from the case, leaving only the Skinner Packing Company defendant. When Mr. Ritchie denied that he was acting for those parties, the plaintiffs introduced in evidence the demurrers and the special appearance. Afterward the court withdrew them from the jury.

It was immaterial whether Mr. Ritchie had been attorney for those parties or not. If that had been the only attack on Mr. Ritchie, the subsequent withdrawal of those pleadings probably would have cured the error.

Misconduct of plaintiffs' attorney is another alleged error. The plaintiffs' attorney admits that some of the questions and statements of plaintiffs' counsel may have been ill-advised, but claims that the alleged misconduct of appellees' attorney were invited by defendant's counsel. The record shows many flagrant violations by both attorneys of the rules that should govern counsel in the trial of a case. At one time, a reference having been made about filing claims with the receiver, Mr. North said to Mr. Ritchie, "Mr. Ritchie, do you mean to say that you don't know that you disposed of hundreds of claims in that receivership?" Mr. Ritchie: "Claims?" Mr. North: "Claims of stockholders canceling their contracts." Some questions were asked the witness Buresh about Mr. Ritchie going into federal court as attorney for the company and making arrangements for the appointment of a receiver, and that Mr. Ritchie and two other attorneys became attorneys for the receiver. Objection to this was sustained. Another question asked the same witness if checks for attorney's fees in the spring of 1920 for Mr. Ritchie were made payable to him or to Skinner and Robertson. Objection to that was sustained. Another question was whether Mr. Ritchie was interested in the pay he was getting. Objection sustained. Mr. North then asked, "All right, I want to ask you whether you think that Mr. Ritchie was doing the best he could for the Skinner Packing Company, or whether you thought he was doing the best he could for Paul and Lloyd Skinner and Dr. Gilmore, directors of the company, that gave him his job?" At the court's suggestion the words "that gave him his job" were omitted, and the witness answered, "Well, I thought he was working in the interest of Paul and Lloyd Skinner and Dr. Gilmore. I know he had been the private attorney for Dr. Gilmore, prior to the trouble." Another question was asked, who was the lawyer for the company

when the contract, known as the "Dold" contract, was made and who checked and approved it, and afterward Keith Neville, receiver, said was very detrimental to the Skinner Packing Company? This was not answered. There were other instances where plaintiffs' counsel asked questions to which objection was sustained and counsel persisted in repeating same in substance. Mr. Campbell, a witness for defendant, was asked on cross-examination whether he knew false representations were made to one Theo. Huettner about sale of stock, and whether Huettner rescinded as soon as he learned of it. There are other similar episodes, which it is unnecessary to set out. The instances above cited were not invited by defendant's counsel. There were frequent bitter verbal clashes between the attorneys, for many of which defendant's counsel was responsible. These exchanges of personal charges and recriminations were so frequent that Judge Wakeley, who was ill near the close of the three weeks trial, stated he was unable to cope with counsel, and gave up that part of it. Throughout the record the trial judge, distinguished for learning and probity, appears as a grieved observer of continued improprieties which he felt himself unable to suppress. It is clear that he was unable to end them by admonition and entreaty.

Appellant urges error because the court gave several instructions marked "Instruction asked by defendant." This court has frequently advised against the propriety of so marking instructions. In this case the instructions were given before the arguments. In Mr. Chase's opening argument for defendant, he read one of the instructions which has been given. Mr. North said, "May I ask you whether this is instruction No. 4 of the court's instructions, or whether it is instruction No. 4 of the instructions requested by defendant Skinner Packing Company?" Mr. Chase: "It was an instruction, I think, prepared at our office, but given by Judge Wakeley." Mr. North: "It is the Skinner instruction No. 4, as requested by the Skinner Packing Company." The effect naturally would be to disparage the instructions.

The first petition was filed against the Skinner Packing Company on November 21, 1923, and an attachment then issued on affidavit of plaintiffs' agent that they claimed due them $30,750 and interest, total amount $37,231.32, and that he believed plaintiffs should recover that amount and that defendant was a nonresident. On November 28, 1923, an amended petition was filed, bringing in new parties. On December 28, 1923, one Canaday was appointed receiver of the company. On January 26, 1924, the original and amended petition were on motion of defendant company stricken from the files and the case dismissed without prejudice. On February 2, 1924, at the same term, the court entered an order amending its order of January 26, stating that it was not the intention of the court to provide for a dismissal of said cause which would result in automatic discharge of the attachment, and the order of January 26 was modified and corrected as follows: "Wherefore, it is ordered, adjudged, and decreed that the petition and amended petition and motion to strike from the files previously filed by the plaintiffs here be and are hereby stricken from the files of this court, without prejudice, and the plaintiffs are allowed 10 days from this date to file an amended petition." Appellant and the receiver moved to discharge the attachment because the affidavit did not correctly state the amount that plaintiffs believed they were entitled to recover, and also moved to quash the attachment because the original and first amended petition were stricken from the files and the attachment thereby discharged, and during the time between the order striking the said petitions from the files Joseph H. Canaday was appointed receiver by the district court for Douglas county.

The striking of the original and amended petition from the files with leave to file an amended petition in 10 days did not have the effect of terminating the case. The same causes of action were in the stricken pleadings as in the petition on which the case was tried. It was done at the same term of court, and the court had jurisdiction, and the striking of the petitions did not discharge the attachment.

For the errors above set out, the verdict and judgment on the second, fourth, fifth, and sixth causes of action are reversed and remanded to the district court for new trial. The first cause of action is dismissed.

REVERSED.

Note—Corporations, 37 L. R. A. 606; 14 L. R. A. n. s. 1176; 12 R. C. L. 493; R. C. L. Perm. Supp. 3108; 55 A. L. R. 23; 7 R. C. L. 283; R. C. L. Perm. Supp. 1960.

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JENS C. TAULBORG, APPELLANT, V. SOPHUS B. ANDRESEN ET AL., APPELLEES.

FILED JANUARY 8, 1930. No. 26500.

1. **Damages**: EVIDENCE. In an action for damages by reason of alleged negligence of another, evidence as to the financial standing of the parties is inadmissible.
2. **Trial**: EVIDENCE. Where a plaintiff in a personal injury action makes no attempt to show that the defendant is indemnified from loss by an insurance company, it is not proper for the defendant to offer testimony showing that he is not indemnified by insurance.
3. ———: INSTRUCTIONS. The instructions of the court to the jury must be read in open court, and if, after the jury have retired for deliberation, the necessity arises for further instructions or communications of any kind concerning the case, the same should be given in open court in the presence of the parties or their counsel.
4. **Negligence**: AUTOMOBILES: CARE REQUIRED IN DRIVING. The operator of a motor vehicle in backing the same onto a street or highway must look backward, not only before he begins his operation, but also while he is in the act of backing, and must give a signal of his intention to back when a reasonable necessity for it exists, in order that he may not collide with or injure those lawfully using such street or highway.
5. **Appeal**: INSTRUCTIONS. Record examined and *held* that the supplemental instruction given the jury after they had retired was erroneous and constituted reversible error.

APPEAL from the district court for Douglas county: JAMES E. RAIT, JUDGE. *Reversed.*

*Gray, Brumbaugh & McNeil,* for appellant.

*Edward J. Shoemaker, contra.*

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

RYAN, District Judge.

This is an action by Jens C. Taulborg against Sophus B. Andresen and Hazel Andresen for damages resulting from an automobile accident. The plaintiff alleges in his petition that on the 3d day of October, 1926, while he was riding toward Omaha as a passenger in an automobile driven by one Amos Giller, defendants negligently and without warning backed a truck, owned and operated by them, from a place just off the edge of the paving on the right-hand side of the Military highway, in front of and against the car in which the plaintiff was riding; that as a result thereof the plaintiff was seriously injured and suffered damages.

The specific acts of negligence charged against the defendants were their failure to observe a proper lookout for cars approaching from the west along the Military highway, which the defendants knew was a highway upon which cars were almost continually passing, and in their failure to sound their horn or in any manner announce their intention to back the truck onto the highway and in front of the approaching line of traffic.

The defendants' answer was a general denial and an allegation that at the time of the collision the defendants' truck was standing parallel to the pavement, and that it was standing still and was headed in an easterly direction. Defendants further alleged that the plaintiff and the driver of the car in which the plaintiff was riding were negligent, in that they drove at a dangerous rate of speed and did not have the car under control. The reply of the plaintiff was a general denial. At the conclusion of plaintiff's evidence the court upon motion directed a verdict in favor of the defendant Hazel Andresen and dismissed the action as to her. This action is not complained of and is sustained by the evidence.

It appears from the record that the accident occurred a short distance northwest of the city of Omaha, at a place where Seventy-second street intersects the Military highway, and that the Military highway is a paved road connecting the cities of Omaha and Fremont. The defendants were operating a fruit stand near the place where the accident occurred. The evidence is in hopeless conflict as to the manner in which the accident occurred. Plaintiff claims, and introduced evidence tending to show, that the defendant, Sophus B. Andresen, backed his truck onto the paved highway in front of the automobile in which the plaintiff was riding, as it approached from the west. The defendant denies this and introduced testimony to the effect that the automobile in which the plaintiff was riding was being operated at a very high rate of speed, and that as it approached a place opposite to where the truck was standing it swerved off from the pavement and struck the defendant's truck and in this collision the plaintiff was injured.

The plaintiff makes numerous assignments of error, but they may be considered under two general headings: First, misconduct of counsel for the defendants; and, second, errors of law occurring at the trial.

The specific misconduct complained of on the part of defendants' counsel is a reference in his opening statement to the financial condition of the defendants, wherein he referred to them as "living on a rented farm." This same line of conduct was continued in the examination of the defendants as witnesses. Plaintiff further complains that the defendant was permitted to testify that he did not have any insurance on his car at the time the accident occurred.

The alleged error of law complained of consisted in the court submitting to the jury, after they had retired for deliberation, a memorandum, delivered to them in the jury room by the bailiff, being an instruction given by the court defining the term "Proper Lookout," without notice to the parties or their counsel and not in the presence of the parties or their counsel. It appears that the jury retired for

deliberation on October 26, 1927, at 9:25 a. m.; that at 2:50 p. m. they sent the following communication to the court: "Honorable Judge Rait. Will you please define for this jury what is meant by 'consisted in his failure to observe a proper lookout for cars approaching from the west?' This jury would appreciate your definition of the word 'lookout' as pertaining to automobile driving. W. B. Griffin, Foreman of Jury." That without notice to the parties or counsel and not in the presence of the parties or their counsel the court sent the following reply to this communication: "Gentlemen. In answer to the above inquiry you are advised that 'Proper Lookout' means to look out for or observe approaching cars, providing a person ordinarily prudent would have looked for or observed approaching cars under the circumstances surrounding this accident. 2:50 p. m. Attach to instructions. James E. Rait, Judge."

The verdict of the jury was returned at 4 o'clock p. m. Counsel for plaintiff argues that it is evident, from the communication of the jury to the court and the request for the definition of the term "Proper Lookout," that the jury were committed to the plaintiff's theory as to the manner in which the accident occurred, and that the instruction given by the court, without notice and not in the presence of parties or their counsel, was prejudicial error.

We shall consider the assignments of error in their order. In an action for damages by reason of alleged negligence of another, evidence of the financial standing of the parties is clearly inadmissible. If a party has sustained damages by reason of the negligence of another, he is entitled to a verdict for the amount of the damages which he is able to prove, and no more, and he is entitled to such a verdict regardless of the ability of the defendant to pay. As was said in *Laidlaw v. Sage,* 158 N. Y. 73, where similar evidence had been admitted: "It has ever been the theory of our government and a cardinal principle of our jurisprudence that the rich and poor stand alike in courts of justice; and neither the wealth of the one nor the poverty of the other shall be permitted to affect the administration of the law."

As to the showing that the defendant was not protected by liability insurance the appellee relies upon the case of *Jessup v. Davis,* 115 Neb. 1. In that case, following the doctrine announced in *Miller v. Central Taxi Co.,* 110 Neb. 306, this court held that it was error for the court to sustain an objection to interrogatories which tend to develop the fact as to whether the defendant is indemnified from loss by an insurance company. This doctrine appears to have been announced by the court and adopted as a rule of practice in this state by reason of the fact that the insurance companies by virtue of the insurance contract are given the absolute right to control the defense of any action that may be brought and become the sole interested parties defendant to the extent of the amount of the insurance.

In the *Jessup* case, *supra,* the court said: "In the form of the proceeding before us the real defendant, though unnamed apparently, as a matter of fact, seeks to avail himself of the benefit of the vouchments of the ostensible party defendant. Under the terms of the contract of insurance, it cannot be said that the witness apparently called and vouched for, as to veracity and standing by the apparent defendant, is, in fact, his witness, when he is actually selected and called as the witness of the real party in interest, the insurance company, and entitled to no other vouchment. Indeed, the entire theory of legal procedure outlined in these contracts for liability insurance contemplates a proceeding carried on secretly, by a real, though unknown, party in interest, making use of concealment and deception. Its essential nature is therefore incompatible with an 'open court' and judgments publicly and openly arrived at. To compel and permit such proceeding is to countenance and participate in what is tantamount to a fraud."

The reasoning supporting the rule which permits a plaintiff to show that an insurance company is actually defending an automobile damage suit is not applicable to the facts in the instant case. It is apparent from the record that the plaintiff was satisfied that the defendant was the

real party in interest and tried his case upon that theory, and it was improper to permit the defendant to emphasize the fact that he was the real party in interest.

We come now to the instruction given by the court to the jury without notice to the parties or counsel. The matter of instructions to juries is covered by statute. Comp. St. 1922, secs. 8796, 8799. Those sections read as follows:

"Section 8796. The court must read over all the instructions which it intends to give, and none others, to the jury, and must announce them as given, and shall announce as refused, without reading to the jury, all those which are refused, and must write the words 'given,' or 'refused,' as the case may be, on the margin of each instruction."

"Section 8799. After the jury have retired for deliberation, if there be a disagreement between them as to any part of the testimony, or if they desire to be informed as to any part of the law arising in the case, they may request the officer to conduct them to the court where the information upon the point of law shall be given, and the court may give its recollection as to the testimony on the point in dispute in the presence of or after notice to the parties or their counsel."

Commenting upon these sections of the statute, this court, in the case of *McDuffie v. Bentley*, 27 Neb. 380, in an opinion by Cobb, J., said: "From the language of this section it is clear that it was the intention of the legislature to make it the duty of the trial court to read to the jury all instructions given to them on the trial of a cause; or, in other words, to make the method of giving instructions that of reading them to the jury. The statute not only imposes upon the court the duty of reading the instructions to the jury, but insures to every suitor the right to have all the instructions which he shall present, and which shall be deemed proper to be given to the jury, read to them, at length, by the court. A refusal or neglect to discharge this duty, and a denial of this right to a suitor, in any cause, are administrations without that 'due process of law' required by the Constitution of this state, and must be held to be reversible error."

The appellee seeks to justify the giving of the supplemental instruction, without notice to the parties or their counsel, on the ground that it was not an instruction but merely a communication, and cites the cases of *First Nat. Bank v. Hedgecock*, 87 Neb. 220, and *Music v. Adams*, 96 Neb. 298.

In *First Nat. Bank v. Hedgecock, supra*, the court gave an additional instruction upon the issues in controversy and the burden of proof. It does not clearly appear from the opinion whether this instruction was given in open court or sent to the jury room, and the case merely decides that "it is proper for the district court to further instruct the jury after the cause has been submitted, when upon written communication from the jury it appears that further instruction is necessary to enable the jury to correctly understand the issues submitted."

In *Music v. Adams, supra*, the communication was simply a question and answer, and in no wise attempted to state the issues or to instruct the jury as to the law concerning them, and in that case the court held the communication was not prejudicial.

If it becomes necessary to give further instructions to a jury while it is deliberating, the proper practice is to call the jury into open court and to give any additional instructions in writing in the presence of the parties or their counsel.

The supplemental instruction given in this case, however, is an erroneous statement of law. One of the most important disputed questions of fact in the case was whether or not the defendant backed his truck onto the highway. It is evident that the jury were discussing this question at the time the foreman made the request for the supplemental instruction. The instruction given by the court left it for the jury to decide what sort of a lookout, if any, the defendant should have kept for cars approaching along the highway. The highway in question is a paved highway leading into the city of Omaha, and is what is termed an "Arterial Highway." If, as the plaintiff contends, the defendant was backing his truck onto said high-

way, he would necessarily be operating it against the line of approaching traffic from the west. The law does not forbid the backing of an automobile upon the streets or highways, and to do so does not constitute negligence, but the driver of an automobile must exercise ordinary care in backing his machine, so as not to injure others by the operation, and this duty requires that he adopt sufficient means to ascertain whether others are in the vicinity who may be injured. It is his positive duty to look backward for approaching vehicles and to give them timely warning of his intention to back, when a reasonable necessity for it exists; and he must not only look backward when he commences his operation, but he must continue to look backward in order that he may not collide with or injure those lawfully using such street or highway. 42 C. J. 935; Blashfield, Encyclopedia of Automobile Law, pp. 529-533; Berry, Automobiles (4th ed.) secs. 235, 954; Huddy, Automobiles, p. 324; *Lee v. Donnelly*, 95 Vt. 121.

The supplemental instruction, being erroneous, was prejudicial, and a new trial must be granted. The judgment is therefore reversed and the cause remanded to the district court for a new trial.

REVERSED.

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JULIUS HOWARD SORENSEN, APPELLEE, V. GRAND ISLAND CLINIC ET AL., APPELLANTS.

FILED JANUARY 15, 1930. No. 27011.

1. **Trial: INSTRUCTIONS: ISSUES.** In an action for malpractice, an instruction summarizing the allegations of the petition and the answer and stating what issues are raised by the pleadings is not necessarily erroneous and prejudicial as submitting to the jury unproved charges of negligence, where the trial court in a following instruction stated the only issues on which there was proof and limited the jury to a consideration thereof.
2. **Physicians and Surgeons: MALPRACTICE: VERDICT.** In an action on behalf of a boy 14 years of age, to recover damages for the loss of his left forearm through malpractice of a surgeon who resorted to an open operation to reduce a fracture of the radius, a verdict in favor of plaintiff for $8,000 *held* sustained by the evidence.

3. Courts: RULES OF EVIDENCE. A rule of evidence adopted by the supreme court, unless overruled by it or changed by legislation, is binding on the district courts.
4. Trial: REFUSAL OF INSTRUCTION. The refusal to give a requested instruction is not erroneous, where the substance thereof is given in another instruction that is free from error.

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

*Prince & Prince* and *H. A. Bryant,* for appellants.

*Fradenburg & Matthews* and *Mayer, Kroger & Mayer, contra.*

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

ROSE, J.

This is an action to recover $50,000 in damages for malpractice. Julius Howard Sorensen, called "Howard" in the record, a boy 14 years of age, by his father, Samuel K. Sorensen, as guardian, is plaintiff. The Grand Island Clinic, a corporation, is a defendant. Winfred Woodworth Arrasmith and William H. Hombach, members of the Clinic, are the other defendants. Arrasmith and Hombach are regular practitioners of medicine and surgery at Grand Island.

Evidential facts about which there is no dispute may be summarized as follows: Between 5 and 6 o'clock in the evening, Saturday, February 11, 1928, "Howard" and a number of other boys were playing ball in a vacant lot adjoining the home of E. E. Farnsworth, a physician and surgeon, secretary and treasurer of the Clinic, and a resident of Grand Island. While Farnsworth was watching the game from a sidewalk at his residence, Howard was pushed by one of the other players and, to protect his body from the violence of a fall, struck the ground with the palm of his left hand, breaking the ulna and the radius of his left forearm at the junction of the middle and upper third. He went immediately to Farnsworth who, at his house, attempted to set the broken bones. Failing to do so with

the means at hand, he promptly took the patient in an automobile to the Clinic, called the boy's father and turned the case over to Arrasmith, who took charge about 6 o'clock the same evening, left the boy in a room at the Clinic, went for a lunch, returned, directed a nurse to administer gas, which was given, and attempted without success to reduce the fractures by manipulation and extension. Without delay the patient was taken to another room in the Clinic, where an X-ray machine was used and where the fractures were examined with a fluoroscope, an instrument employed in observing shadows cast by objects in the path of the X-rays. While the boy was again under the influence of an anæsthetic, ether having been given, Arrasmith, observing the broken bones through the fluoroscope, devoted 15 or 20 minutes to a further attempt to reduce the fractures by manipulation and extension. In this manner the fracture of the ulna was reduced. The broken ends of the radius were also put in apposition, but did not stay in place. Immediately thereafter Howard was taken to the St. Francis Hospital at Grand Island, again anæsthetized with ether and put on an operating table. Arrasmith made an open incision over the fracture of the radius, exposed the bone, drilled a hole through each of the broken ends, sewed them together with catgut, closed and dressed the wound, and encased the arm from a place above the elbow to the fingers in a rigid circular cast of plaster of Paris. The operation was completed about 11 o'clock in the afternoon on the day of the accident—Saturday, February 11, 1928. Howard spent the night in the hospital. Arrasmith called to see him there about 10 o'clock the next morning, Sunday, outlined a window in the plaster of Paris cast over the incision, and authorized the boy to go home at 3 o'clock in the afternoon of the same day. After the window outlined had been cut, Howard went home at the appointed time. Neither Arrasmith nor any one else representing him or the Clinic saw the boy until 1 o'clock in the afternoon on the following Tuesday, when he returned to the Clinic with his broken arm gangrened below the elbow. Arrasmith removed the rigid cast of plaster of Paris and

directed treatments to restore circulation in the arm below the fractures. The means employed were futile and the patient was returned to the hospital, where treatments to restore circulation were continued without success from Tuesday evening until the following Thursday. During the afternoon Arrasmith in his automobile took Howard to Lincoln, where J. E. M. Thomson and H. W. Orr, physicians and surgeons, amputated the broken arm above the elbow.

From plaintiff's standpoint, negligence in a number of particulars was pleaded at great length, and, as fully as necessary for the purposes of review, will be stated in connection with an assignment of error. In the answers of the Grand Island Clinic and Arrasmith, the history of the case and the details of the operation and treatment, as viewed by defendants, were pleaded with great particularity. They also pleaded skill, proper surgery, and careful treatment, and denied the negligence charged. Hombach adopted the answers of the other defendants and alleged further that his only connection with the case was his assistance in taking the X-ray pictures. The reply to the unadmitted allegations of the answers was a general denial.

Upon a trial of the issues the jury rendered a verdict in favor of plaintiff for $8,000. From a judgment therefor defendants appealed.

One of the assignments of error is directed to the proposition that the trial court erred in submitting to the jury many issues of negligence pleaded in the petition but having no support in the evidence. The criticism is aimed at instructions in which the district court summarized what the parties alleged in their respective pleadings, regardless of proofs. In the petition and in the answers lengthy and unnecessary allegations were inserted. The trial court in a somewhat abbreviated form recited plaintiff's allegations, making it clear that they were from the petition. The allegations in the answers were treated in the same manner. Following the recital of allegations from the petition and answers and restated in the instructions, the jury were told that, in substance, they were the issues rais-

ed by the pleadings. The issues, however, that the jury were required to consider were stated in an instruction as follows:

"You are instructed that the pleadings and claims of the parties in this case may be briefly summarized as follows: The plaintiff claims that the defendants were careless and negligent in the method adopted for the setting of his broken arm and were negligent and careless in the manner in which they set said arm and the care and attention given him after the arm was set and that said negligence and carelessness was the direct and proximate cause of the loss of his said arm whereby he has been damaged. The defendants deny that they were negligent or careless in any of said particulars and that they used due care, caution and skill in the method employed to set said arm and in manner in which said arm was set and in the care and attention given the plaintiff thereafter. These are briefly the issues which you are to consider in this case and in considering these issues you must be governed by the evidence in the light of the following rules of law. You cannot consider any acts of negligence except such as are set out in the petition."

While this quoted instruction did not conform to correct standards of English, it stated the only issues on which there was evidence and limited the jury to a consideration thereof. For days the testimony of specialists in surgery and of others was directed to those identical issues. There is nothing to indicate that the jury misunderstood them. Any juror fit for service would comprehend what he was required to determine under the instruction quoted and that he was limited to evidence on the issues submitted for the consideration of the jury, though other issues may have been raised by the pleadings. On this phase of the appeal the point is that issues of negligence on which there was no evidence in favor of plaintiff were erroneously submitted to the jury. The determination of this question required a critical examination of more than 500 pages of testimony, much of it technical in character. After performance of this judicial task, the conclusion is that every

issue of negligence submitted to the jury by the instruction quoted is supported by sufficient evidence and that the evidence as a whole sustains the verdict and judgment in favor of plaintiff.

Defendants contend also that the trial court erred to their prejudice in requiring Arrasmith as a witness to answer the following question: "Do you carry insurance protecting you against claims of this kind?" To that question the witness answered "I do."

The ruling of the court below was authorized by a rule of evidence adopted by the supreme court in *Jessup v. Davis*, 115 Neb. 1, 56 A. L. R. 1403, Good, Rose and George A. Day, JJ., dissenting. The rule thus announced, though at variance with the opinions of most of the courts in other jurisdictions, has never been judicially overruled or changed by legislation. It was therefore binding on the district court. In following the rule adopted by the state court of last resort the district court did not err.

Defendants insist further that the trial court erred in refusing to give a requested instruction, but the point is not well taken for the reason that a correct instruction given contained in a different form the substance of the one requested and refused.

Error prejudicial to defendants has not been found in the record and consequently the judgment below is

AFFIRMED.

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## IN RE HEIRSHIP OF SHERMAN C. ROBINSON. ALICE E. ROBINSON ET AL., APPELLANTS, V. W. M. CLARK, ADMINISTRATOR, APPELLEE.

FILED JANUARY 15, 1930. No. 26944.

1. **Descent and Distribution: HEIRSHIP STATUTE.** Article XVI, ch. 15 (sections 1481-1488), Comp. St. 1922, as amended by chapter 65, Laws 1925, commonly known as the act to determine heirship, examined, and its scope, intent, and purpose determined.
2. ———: ———. The above act is independent and complete within itself, and so remains, notwithstanding the amendment of 1925. Thus, the provisions of sections 1423 and 1424, Comp.

St. 1922, in so far as they infringe upon this act, were by it repealed by implication.

3. ———: ———. Such act provides for a limited and circumscribed form of administration of an estate, independent of that of an ordinary administration thereof, when more than two years have elapsed since the death of an intestate and no application for administration of the estate has been filed in this state within the interim.
4. **Statutes:** PROVISO: CONSTRUCTION. A proviso in a statute should be strictly construed, and this in the light reflected by the act or statutes of which it forms a part, not in derogation of the intent and purpose of the original, but in furtherance thereof.
5. **Descent and Distribution:** LIENS. The proviso contained in section 1484, Comp. St. 1922, construed, and *held* to include liens existent on the lands of a decedent at and prior to his death, which come within the provisions of our recording acts, and such as arise by reason of judgments, attachments and executions, and other liens of a similar nature, but does not include that which resembles liens created by reason of the death of the decedent in favor of all creditors under section 1220, Comp. St. 1922, such as the allowed Kansas claims here involved.
6. **Executors and Administrators:** GRANT OF ADMINISTRATION. "A grant of administration has, as a matter of right, no extraterritorial force or operation." *Burton v. Williams*, 63 Neb. 431.
7. **Judgment:** PROBATE COURTS. The allowance of the claims by the probate court of Douglas county, Kansas, did not affect the lands in Nebraska.
8. **Probate Courts:** JUDGMENTS: CONCLUSIVENESS. Under section 16, art. V, of the Constitution, a county court upon its probate side is a court of general jurisdiction, and, after due and legal notice has been given, its judgments upon probate matters, including that of determining heirship (as in this proceeding), unless appealed from, are final and cannot be collaterally attacked.
9. ———: JUDGMENT DETERMINING HEIRSHIP. In a proceeding in such court to determine heirship, the title to real estate is not drawn in question. The court simply determines who are the heirs, and the law of descent passes the title.

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

*Frederick J. Patz* and *Lewis C. Westwood*, for appellants.

*Jay C. Moore, contra.*

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

THOMPSON, J.

This is a proceeding lodged in the first instance in the county court of Johnson county, Nebraska, on May 9, 1928, by the petitioners, appellants herein, under sections 1481, 1482, and 1483, Comp. St. 1922, as amended by chapter 65, Laws 1925, and section 1484 of such statutes, for the purpose of having determined their heirship to lands in such Johnson county. Judgment was rendered in favor of the petitioners, appeal taken by the appellee herein to the district court, where the judgment of the county court was modified, as hereinafter indicated; to reverse which this appeal is had.

The questions involved herein are presented to this court for the first time, and, being complicated, it becomes necessary to detail both the law and the facts more than is usual.

The law applicable is as follows: Section 1481: "Where more than two years have elapsed since the death of a person residing in this state, or residing outside of the state, but owning real estate or any interest therein situated within this state, or who had made entry on any government lands and had not received patent therefor, and no application has been made in the state of Nebraska for the appointment of an administrator either by his heirs or by persons claiming to be creditors of said deceased, any heir of the deceased or other person having derived title to any real property or any interest therein from said deceased or from any of his heirs either by direct or mesne conveyances may make application by petition to the county court of the county in which the deceased resided at the time of his death, or in cases where the deceased was a nonresident of the state at the time of his death then in the county court of the county where the real estate or some part thereof belonging to the deceased in his lifetime is situated, for a determination of the time of the death of the decedent, and a determination of the heirs of said deceased, the

degree of kinship and the right of descent of the real property belonging to said deceased." Laws 1925, ch. 65, sec. 1.

Section 1482: "Upon filing such petition the county court shall fix a time for hearing said petition not less than thirty days nor more than sixty days subsequent to the filing thereof, and notice of the time and place of said hearing shall be given to all persons interested in said estate, both creditors and heirs, setting forth the filing of said petition, the date of the death of the deceased, his place of residence, a description of the real property of which he died seised, or a description of the real property on which he had made an entry but had not yet received patent, the interest in said real estate of the petitioner and the prayer of the petition. Said notice shall be published in a legal newspaper in said county for three successive weeks prior to said hearing." Laws 1925, ch. 65, sec. 2.

Section 1483: "Upon such hearing if it shall appear to the court that more than two years have elapsed since the date of the death of the deceased, that he died intestate seised of an estate of inheritance in this state, or that he died intestate having entered on government lands and not yet received a patent therefor, and that no application has been made in the state of Nebraska for the appointment of an administrator of the estate of said deceased, the court shall determine who are the heirs of said deceased, their degree of kinship and the right of descent of the real property of which the deceased died seised, or on which he had made an entry, and shall make and enter his decree accordingly." Laws 1925, ch. 65, sec. 3.

Section 1484: "Such decree, unless appealed from as provided by law, shall be binding and conclusive upon all persons including creditors and heirs, and all claims or demands against the estate of such deceased, whether due or to become due, whether absolute or contingent, shall be forever barred: Provided, however, that this section shall not be construed to effect or limit the term within which any lien against the real estate of said deceased may be enforced."

The record discloses that the petition of the applicants in both the county and district courts met every requirement of the above statutes, as did also the notice had prior to the hearing in such county court. The answer, in substance, simply challenged the right of these respective courts to enter judgment as prayed by petitioners, for the reason that claims had been filed and allowed in Kansas, as hereinafter set forth, and that they were unpaid, and that there was no other property save and except the lands here in question out of which to pay the same; further, that the claims so allowed in the Kansas court existed at the time of the death of the decedent, and were his unsecured obligations, and by his death liens were imposed on his entire estate wherever situate, and that, to the extent of bringing such claims within the proviso contained in section 1484 hereinbefore quoted. The theory at the trial was that affirmative allegations in the answer were denied.

The facts material for our consideration, admitted or left without contradiction, are as follows: That Sherman C. Robinson, a resident and citizen of Douglas county, Kansas, died on November 5, 1924, intestate, without issue, leaving as his sole and only heirs the petitioners herein; that at such time and prior thereto he was the owner of an undivided one-sixth interest in the lands here in question situate in Johnson county, Nebraska, subject to the life estate held by Alice E. Robinson, one of the petitioners herein, who had, and ever since has held, possession and control thereof, also owned lands and personal property in such Douglas county, Kansas; that more than two years had elapsed since his death, prior to the filing of the petition herein in the county court of Johnson county praying for the determination of heirship; that on November 15, 1924, appellee herein was appointed administrator of the estate of such deceased in the probate court of Douglas county, Kansas, qualified, and has been ever since, and now is, so acting; that numerous unsecured claims of indebtedness were filed in such Kansas probate court by divers and sundry creditors of the deceased, and by such court allowed;

that all of the lands and personal property in the state of Kansas were legally reduced to cash and the proceeds applied in partial payment of such allowed claims and costs of administration, leaving unpaid of such claims over $8,000; that no other property, save the lands in Johnson county, Nebraska, remains undisposed of; that shortly after the appointment of such administrator he became possessed of knowledge of the aforesaid facts in reference to these Johnson county lands, but neither he, nor any heir, nor persons claiming to be creditors of the deceased, nor other person, had applied for the appointment of an administrator in this state; that this proceeding was lodged in the county court of Johnson county, Nebraska on May 9, 1928, and answer thereto filed on June 6, 1928, on which latter date the administrator lodged a proceeding in the district court under sections 1423 and 1424, Comp. St. 1922, to obtain license to sell the lands here in question to pay the aforesaid allowed Kansas claims; the same being *Clark v. Robinson,* p. 306, *post,* a proceeding *in rem,* which was argued and submitted to us at the same time as the instant case, and action had therein as herein indicated as to this instant proceeding.

In applying the law to the issues and facts submitted in support thereof, it was determined by the county court, in substance, that the proviso which forms a part of section 1484, hereinbefore referred to, excluded from the operation of the statutes, heretofore quoted, liens which had been created prior to the death of the decedent, and not claims such as are evidenced by the administrator's answer; hence, decree was entered as prayed.

In the district court, on appeal, the holding of the county court that the claims in question were not such as were covered by the above mentioned proviso, and therefore not liens on the Nebraska lands, was held to be erroneous, in that the debts allowed by the Kansas courts are liens upon the Nebraska lands, and are such liens as are contemplated by such proviso in section 1484; and it was further held that, while the petitioners are entitled to a decree as prayed, such decree should provide that the Nebraska lands,

subject to the life estate of Alice E. Robinson, are held and possessed by them free and clear of all claims and demands against the estate, including expenses of administration, subject, however, to the debts and claims allowed by the Kansas probate court; and judgment was entered accordingly.

Thus, our attention is directed to the scope, intent and purpose of the act in question, and as to whether or not the allowed Kansas claims are liens which come within the proviso contained in the aforesaid section 1484. In this determination the act should be considered as an entirety, looking to its intent and purpose, and in this light expression should be given to its different parts. *Nebraska District of Evangelical Lutheran Synod v. McKelvie,* 104 Neb. 93. Thus, the history of the act becomes helpful, and will be noticed herein as it appears pertinent.

Considering the act as a whole, we conclude that its scope, intent, and purpose are to enable any heir of one dying intestate owning lands in this state, or to enable any other person who has derived title to such lands or any interest therein from the deceased or from any of his heirs either by direct or mesne conveyances, after two years have elapsed from the date of such death without any heir or creditor of deceased having made application for letters of administration in this state, to file a petition in the county court of the county in which the deceased resided at the time of his death, or in cases where the deceased was a nonresident of the state at the time of his death, then in the county court of the county where such lands or some part thereof is situated, for the purpose of having a determination of heirship made, and a judgment entered which shall be binding and conclusive upon all persons including creditors and heirs, and shall forever bar as to the lands in question all claims or demands against the estate of such deceased, whether due or to become due, whether absolute or contingent; and incidentally to furnish a means of procuring an otherwise unprovided for link in the chain of the record title to such lands. Thus, as we conclude, the act provides for a limited and circum-

scribed form of administration of the estate (independent of that of the ordinary administration thereof) where more than two years have elapsed since the death of the intestate and no application for administration of the estate has been filed in this state within the interim. The foregoing scope, intent, and purpose is in harmony with, and in furtherance of, the long-established public policy of this state, to provide by statute limitations, rules and regulations in respect to the title of real estate in this state so that such title may be easi'y ascertained and readily transferred.

An act independent and complete within itself, prompted by a similar purpose, but dissimilar in its wording, was enacted in 1913, which by reason of its exceptions and exclusions defeated its own purpose. Rev. St. 1913, secs. 1536-1539, inclusive. This act was repealed and supplanted by another independent and complete act in 1915, which was carried into the Compiled Statutes of 1922 as sections 1481-1484, inclusive, all of which last named sections, save 1484, were amended in 1925 (Laws 1925, ch. 65) by adding a provision in reference to government lands, and as thus amended, together with the aforesaid section 1484, are the sections hereinbefore quoted as being the law applicable here.

In section 16, art. VI, of the Constitution of 1875, it is provided: "County courts shall be courts of record, and shall have original jurisdiction in all matters of probate, settlements of estates of deceased persons, appointments of guardians, and settlement of their accounts; in all matters relating to apprentices; and such other jurisdiction as may be given by the general law. But they shall not have jurisdiction in criminal cases in which the punishment may exceed six months imprisonment, or a fine of over five hundred dollars; nor in actions in which title to real estate is sought to be recovered, or may be drawn in question; nor in actions on mortgages or contracts for the conveyance of real estate; nor in civil actions where the debt or sum claimed shall exceed one thousand dollars." This constitutional provision was amended in 1920, but the only change material here was by adding the words, "and in

such proceedings to find and determine heirship," immediately following the words, "of deceased persons." As thus amended it now appears as section 16, art. V, of the Constitution.

In *Fischer v. Sklenar*, 101 Neb. 553, careful consideration was given by us to the above provision of our Constitution, before such 1920 amendment, in connection with sections 1494 and 1495, Rev. St. 1913 (now sections 1439 and 1440, Comp. St. 1922), relating to the settlement and distribution of estates of deceased persons, and we held:

"Upon its probate side a county court is a court of general jurisdiction, and its judgment upon matters of probate and of settlement and distribution of the estates of deceased persons made upon due and proper notice is final and cannot be collaterally attacked.

"The probate court in the settlement of an estate has jurisdiction to find and determine who are the heirs of the decedent. In so doing the court does not determine the title to real estate. The statute of descent passes the title upon the fact so found."

Further, in *State v. O'Connor*, 102 Neb. 187, the above quoted holdings were approved, and authorities supporting such approval reviewed, and in the course of the opinion (page 190) we said: "But, in a case between rival heirs where the determination of title depends upon the question of heirship, the district court cannot make a final adjudication until that question has been settled by the county court."

Appellee cites sections 1423 and 1424, Comp. St. 1922 (being sections 100 and 101, ch. 17, Gen. St. 1873), as conferring authority upon him to sell these lands in Nebraska to satisfy the allowed Kansas claims, and insists that, as the act here in question did not provide for the amendment or repeal of such sections, it contravenes section 14, art. III, of our Constitution, wherein it is provided: "And no law shall be amended unless the new act contain the section or sections as amended, and the section or sections so amended shall be repealed." It is true that section 1423 provides: "When an executor or administrator shall be

appointed in any state or territory, or in any foreign country, on the estate of any person dying out of this state, and no executor or administrator thereon shall be appointed in this state, the foreign executor or administrator may file an authenticated copy of his appointment in the district court in any county in which there may be any real estate of the deceased." And section 1424: "Upon filing such authenticated copy of his appointment, such foreign executor or administrator may be licensed by the same court to sell real estate for the payment of debts or legacies, and charges of administration, in the same manner, and upon the same terms and conditions, as are prescribed in the case of an executor or administrator appointed in this state, excepting in the particulars in which a different provision is hereinafter made."

It is to be observed that the act of 1915 is an original and independent act, complete within itself, and, as such, it remains notwithstanding the amendatory act of 1925; for, as we held in *State v. Hevelone,* 92 Neb. 748: "The section of an act properly amended should be construed precisely as though it had been originally enacted in its amended form." Further, the act in question does not conflict with section 14, art. III, of the Constitution, above quoted, for where an independent legislative act does conflict with, or is repugnant to, a prior statutory enactment not mentioned, the prior law, by implication, is repealed or modified to the extent at least that the former is inimical to the latter. *State v. Hevelone,* 92 Neb. 748; *State v. Ure,* 91 Neb. 31. It therefore follows that, in so far as the above sections 1423 and 1424 infringe upon the act here in question, the same are by it repealed. Hence, so far as the procedure here involved and the rights of the parties in and to the lands in question herein are concerned, such sections 1423 and 1424 are without force or effect. They were not enacted by our legislature as a matter of right, or even of duty, but simply as a courtesy extended, which could be withdrawn in whole or in part at will.

It might also be well to mention, as indicating the policy of this state as well as more directly affecting the matters

involved herein, that section 1293, Comp. St. 1922, which provides for the appointment of administrators, was amended by chapter 73, Laws 1925, so as to prevent the appointment of a nonresident as administrator of the estate of a person dying intestate. Thus it will be seen that between the time of this amendatory act of 1925 going into effect and the appearance of the administrator in the county and district courts in this state nearly three years had elapsed.

Our attention has not been called, either by brief or oral argument, to section 1380, Comp. St. 1922, which provides: "An executor or administrator duly appointed in any other state or county may commence and prosecute any action or suit in any court in this state, in his capacity of executor or administrator, in like manner and under like restrictions as a nonresident may be permitted to sue: Provided, in case any executor or administrator shall have been appointed in this state, such person only shall be entitled to commence and prosecute actions or suits within this state in his capacity as such executor or administrator." However, it might be well to state that such section has reference to ordinary actions under the Code (*McAnulty v. McClay*, 16 Neb. 418) and not to proceedings to sell land of a deceased person for the payment of his debts, the latter being special and partaking of the nature of a proceeding *in rem* (*Miller v. Hanna*, 89 Neb. 224).

As to the proviso in section 1484: In *Lichtensteiger v. State*, 89 Neb. 356, we held: "A proviso in a statute is generally intended to except something from its operation which would otherwise be within its provisions." Further, as stated by us in the course of the opinion in *State v. Farmers Irrigation District*, 116 Neb. 373, 378: "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."

With the above holdings, the act, its scope, intent, and purpose before us, what was the legislative intent in its

use of the word "lien" in this proviso? As we have seen, the Constitution, as well before as after the 1920 amendment, in granting jurisdiction to a county court, denied such jurisdiction to it in actions on mortgages or contracts for the conveyance of real estate. The legislative body must have had, and undoubtedly did have, in mind this supreme law of our state when it framed and enacted this exception to the scope, intent, and purpose of that which preceded it, and was endeavoring to keep the act within constitutional limitations. Certainly it did not have in mind other than liens existent on the lands of a decedent at and prior to his death, which come within the provisions of our recording acts, and such as arise by reason of judgments, attachments, and executions, and other liens of a similar nature. It is our view that it did not have in mind that which resembles liens created by reason of the death of the decedent in favor of all creditors, under section 1220, Comp. St. 1922 (such as the allowed Kansas claims), for if the legislature did so intend then the proviso would defeat the vital purpose of the act, save that of determining who are the heirs of the deceased person, as did the act of 1913, the defects in which were sought to be corrected in the 1915 act. In arriving at the above conclusions we have at all times had in mind that this act is without application where the deceased died testate, and also the reason for this exclusion which is that he had in his lifetime made provision as to his properties. The act in question did not include personal property, as its situs is ordinarily that of the owner, while the situs of real property is fixed by its location. Thus, such act deals solely with real estate in this state, and is limited to lands brought in question as in this proceeding. The appellee presses the thought that his clients, by reason of their having had their claims allowed in a Kansas court, stand in a different position than creditors in this and other states, whose claims, if such there be, have not as yet been allowed, and this notwithstanding he insists that other claims may be hereafter allowed as the estate is still in process of administration in Kansas. Further, he urges, by way of his brief:

"We wish to observe one peculiarity in this statute, which is that it is wholly silent about creditors or other persons appearing to assert their rights (in this proceeding), except in section 1482 it is provided that notice must be given to them, and we believe a fair construction of the law is that any creditor or administrator who would have the right to look to this property and whose claim was not otherwise barred would be entitled to have this right enforced in this heirship proceeding. Otherwise, why notify creditors or anybody save and except those who might be heirs at law or who might be holding the property under mesne conveyance. Again, it would appear that, this being a so-called short form of administration, of necessity, the beginning of such proceedings immediately gives to those whose claims are not otherwise barred the right to have such claims allowed in the heirship proceedings." Such proposition lacks a basis. If more than the two years have passed and no administration has been taken out in this state, the limitation has run and all claims are barred by statute. The sole object of giving notice to creditors is that they may appear and contest certain of the applicant's statements, to wit: That more than two years have elapsed since the death of deceased; that the decedent died intestate, seised of real estate, or an interest therein, in this state, the whole or a part of which is situate in the county in which the proceeding is instituted; that no application has been made in this state for the appointment of an administrator of the estate of the deceased; that the application is made by an heir of the deceased, or by other person authorized. These four jurisdictional questions a creditor may contest, and no more. If these are finally found as alleged, the creditor is, as to the lands in question, without remedy. It might further be stated as an axiom: The right given to a creditor of a deceased person to subject the deceased's property to the payment of a debt owing such creditor, at best, is a conditional right, one dependent upon a compliance with conditions imposed, as imposed; and a bar arises upon a failure of such compliance, whether it be as to manner or time. The statutes provide the

method, by whom, and when pursued; as to the creditor, it is compliance or waiver of all rights.

We might add that it is a generally observed rule in such proceedings that the law of the state where the land in question is situate is controlling as to it, and is not affected by that of a foreign state or country.

In *Burton v. Williams*, 63 Neb. 431, we held: "A grant of administration has, as a matter of right, no extraterritorial force or operation; and the official character of an administrator does not, by virtue of the authority creating it, follow him beyond the limits of the state in which he was commissioned."

Hence, the allowance of the claims in Kansas could not, and did not, affect lands in Nebraska.

In *Fall v. Eastin*, 215 U. S. 1, it was held: "A court not having jurisdiction of the *res* cannot affect it by its decree nor by a deed made by a master in accordance with the decree." And further held: "The full faith and credit clause of the Constitution does not extend the jurisdiction of the courts of one state to property situated in another state, but only makes the judgment conclusive on the merits of the claim or subject-matter of the suit; and the courts of the state in which land is situated do not deny full faith and credit to a decree of courts of another state, or to a master's deed thereunder, by holding that it does not operate directly upon and transfer the property." The above rules were announced in affirming the judgment of this court reported in *Fall v. Fall*, 75 Neb. 104.

In *Vaughan v. Northup*, 15 Pet. (U. S.) 1, in the course of the opinion, Judge Story said: "Every grant of administration is strictly confined in its authority and operation to the limits of the territory of the government which grants it, and does not, *de jure*, extend to other countries. It cannot confer, as a matter of right, any authority to collect assets of the deceased, in any other state; and whatever operation is allowed to it beyond the original territory of the grant is a mere matter of comity, which every nation is at liberty to yield or to withhold, according to

its own policy and pleasure, with reference to its own institutions and the interests of its own citizens."

The determination of the county court was right, and should have been sustained. Hence, the judgment of the district court is reversed and the cause remanded, with directions to enter judgment in favor of the petitioners, Alice E. Robinson and Hattie M. Sandusky, in conformity with this opinion.

REVERSED.

GOOD, J., dissents.

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JOHN DIXON V. STATE OF NEBRASKA.

FILED JANUARY 24, 1930. No. 27252.

ERROR to the district court for Douglas county: HERBERT RHOADES, JUDGE. *Affirmed as modified.*

*J. P. Palmer* and *James Walker*, for plaintiff in error.

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

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

PER CURIAM.

Upon consideration of the oral arguments, the briefs and the entire record, no error prejudicial to the rights of plaintiff in error has been found. The judgment of conviction is therefore affirmed.

It is believed that the sentence is more severe than the record warrants, and it is therefore modified so as to vacate that part of the judgment requiring the plaintiff in error to be imprisoned, and in lieu thereof a fine of $200 is imposed; plaintiff in error to stand committed to jail until such fine and costs are paid.

As modified herein, the judgment of the district court is affirmed.

AFFIRMED AS MODIFIED.

ARCHER MAURY BUNTING ET AL., APPELLEES, V. WILLIAM M. RICHARDSON, DEFENDANT: ANNE C. BUNTING ET AL., APPELLANTS: GLADYS W. BUNTING ET AL., INTERVENERS, APPELLEES.

FILED JANUARY 24, 1930. NO. 27329.

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

*Paul F. Good* and *Otto K. Perrin,* for appellants.

*A. M. Bunting* and *A. W. Richardson, contra.*

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

PER CURIAM.

Plaintiffs brought this action seeking partition of certain real estate described as the southwest quarter of section 9, township 10, range 6, situated in Lancaster county, Nebraska. Defendants Anne C. Bunting and James M. Bunting, represented by Paul F. Good, guardian *ad litem,* are the children of plaintiff Archer Maury Bunting. Defendants William M. Richardson, Mary A. Funkhauser, A. Clark Richardson, and Mildred T. Richardson are the children of plaintiff Waneta Bunting Richardson. Defendant Mildred T. Richardson is represented by Otto K. Perrin, guardian *ad litem.*

The controversy grows out of the interpretation of the following paragraph in the will of Anna M. Bunting, deceased:

"II. I give, devise and bequeath unto my husband, William M. Bunting, the use of all my real estate and personal property, except such as I shall expressly dispose of, hereinafter during his natural lifetime, if he shall survive me.

"After his death, if he shall survive me, all said estate, excepting such as I do hereinafter dispose of shall become the property of my daughter, Waneta Bunting Richardson, and my son, Archer Maury Bunting, and their children, to be theirs forever.

"Said Waneta B. Richardson and Archer M. Bunting to receive the equal one-half share of my estate with exceptions, as herein before noted."

Testatrix' husband predeceased her.

This appeal is presented upon a case stated, and the respective contentions of the parties are quoted therefrom, together with the conclusion of the trial court:

"That plaintiffs contend that they are the sole residuary legatees and devisees under said will and the sole owners in fee simple as tenants in common of said estate, including the premises described in the petition. That Paul F. Good, guardian *ad litem* for the minor defendants Anne C. Bunting and James M. Bunting, contends that plaintiffs take but a life estate, and that the children of plaintiffs take the remainder *per stirpes*, in fee, and therefore that said minor defendants represented by him take each an undivided one-fourth of said estate in fee simple, subject only to the life estate of the plaintiffs.

"That Otto K. Perrin, guardian *ad litem* for the minor defendant, Mildred T. Richardson, contends that by the terms of said will the plaintiffs and their children take said estate in fee simple as tenants in common, and that therefore said minor defendant, Mildred T. Richardson, is the present owner in fee simple of an undivided one-eighth of said estate.

"That the foregoing contentions arise by reason of section II of the will above set forth.

"That on the issues so joined, the court found, as to title, generally in favor of the plaintiffs and that they are the sole owners in fee simple, as tenants in common of said estate including the premises described in the petition; to which said guardians *ad litem* duly excepted.

"That by agreement of the parties the question as to partition shall be suspended, and that this appeal be taken on the question of title only and presented as a case stated, as provided by paragraph c of rule 9 of the supreme court of Nebraska."

We have carefully considered the record and find the same to be free from prejudicial error. The judgment of

the district court that plaintiffs are the sole owners in fee simple, as tenants in common of the estate, is right and it is therefore

AFFIRMED.

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STATE OF NEBRASKA ET AL., APPELLANTS, V. OLIVER BROTHERS, APPELLEES.

FILED JANUARY 24, 1930. No. 26996.

1. Waters: DEPARTMENT OF PUBLIC WORKS: DISCRETION. "The department of public works is an administrative body, having quasi judicial functions, and is invested with reasonable discretion in the exercise of its supervisory powers." *In re Application of Babson*, 105 Neb. 317.
2. ———: WATER RIGHTS: ABANDONMENT. "'Abandonment' is the relinquishment of a right by the owner thereof, without any regard to future possession by himself or any other person, but with the intention to forsake or desert the right." *Union Grain & Elevator Co. v. McCammon Ditch Co.*, 41 Idaho, 216.

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

*Scott & Scott*, for appellants.

*Cordeal, Colfer & Russell, contra.*

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

DEAN, J.

F. C. Krotter, plaintiff, filed a complaint before the department of public works, hereinafter called the department, seeking to have the water rights of the defendants, Oliver Brothers, canceled. Number 1284 is the appropriation number. The application for cancelation is based on the alleged ground that the water had not been used by the defendants for more than three years immediately last past. After a hearing before the department the complaint was dismissed. Thereupon the plaintiff appealed to the district court for Hayes county and the decision of the department was there affirmed and Krotter's appeal was dismissed.

Plaintiff has brought the record to this court to have it reviewed.

Counsel for the defendants Oliver contend that the appeal was improperly taken to the district court, and that this court therefore is without jurisdiction over the appeal. It is their contention that section 8428, Comp. St. 1922, under which this complaint was filed, does not provide for a proceeding between individual claimants of water but pertains to complaints originating with the department, and that the plaintiff should have appealed directly to this court from the department's decision as provided in sections 8433 and 8434, Comp. St. 1922. Section 8428, above cited, among other things, provides for an examination and hearing by the department of the condition of any water appropriation which does not appear to have been used for more than three years. The same section also provides for an appeal from the decision of the department to the district court for the county in which the point of diversion of such water appropriation is situated. Section 8433 provides that the department shall have jurisdiction over all matters pertaining to water rights and shall have power to hold public hearings on complaints in regard thereto. And section 8434 provides for an appeal to the supreme court by any party aggrieved by the decision of the department. After the complaint was filed by plaintiff, the department appointed a time and place of hearing and served notice on the defendants, as provided in section 8428. Since the inquiry proceeded under section 8428, which provides that "an appeal may be taken from the decision of the department of public works upon said hearing to the district court of the county in which the point of diversions of such water appropriation is situated," as above noted, we think the district court did not err in overruling the special appearance of the defendants.

Application number 1284, filed by the defendants, has a priority date of April 28, 1913, and is a permit to divert 55 cubic feet of water per second from the Frenchman river near Wauneta, the water to be used in the operation of a pumping plant for irrigation purposes. The plant requires

a dam not to exceed eight feet in height and is located in the SE¼ of SW¼ of section 7, township 5 north, range 35 west of the 6th P. M., in Hayes county. In a report filed by C. E. Franklin, hydrographer, June 25, 1927, it appears that the canal has been undermined by high water in the ravine and that the dam was almost completely ruined in 1922. The defendants began repair work to fill in the channel and by means of sheet piling, between which brush, rock, and earth were placed, the channel was closed to the height of the dam, except for a small leak. It appears from the report of the hydrographer that much money has been expended by defendants for concrete work done in 1926 in an attempt to repair the dam.

From the evidence of Walter J. Oliver, one of the defendants, it appears that in the fall of 1923 new walls were constructed on the dam, and again in 1924 more work was done by the defendants, and it became necessary to "back the water about five feet to get it back over the original dam." The total cost of repair work during the summer of 1924 was $3,800. Mr. Oliver also testified that in 1925 it was necessary for them to hire men to work 75 days to fill 2,000 yards of dirt into the dam and otherwise repair it, and that $650 was expended by them for labor in this behalf. And he further testified that more dirt was used in 1926 to fill in the banks.

An engineer who had charge of the dam when it was constructed testified in respect of the effort made by the defendants to repair the dam and operate the plant since it was washed out. It appears that approximately 200 acres of land were irrigated by the plant during the years it was being operated.

It must be conceded that the department of public works is an administrative body, having quasi judicial functions, and that as such it is invested with reasonable discretion in the exercise of its supervisory powers. *In re Application of Babson*, 105 Neb. 317.

In *Union Grain & Elevator Co. v. McCammon Ditch Co.*, 41 Idaho, 216, the court held: " 'Abandonment' is the relinquishment of a right by the owner thereof, without any

regard to future possession by himself or any other person, but with the intention to forsake or desert the right."

And in *Gould v. Maricopa Canal Co.*, 8 Ariz. 429, it was held: "Abandonment of the right to water gained by appropriation is a matter of intent as such intent may be evidenced by the declaration of the party or as may be fairly inferred from his acts."

There is nothing in the record that tends to establish that the defendants intended at any time to abandon the irrigation system now here under discussion. The evidence discloses that they have done much repair work on the dam and that no effort was spared to continue the operation of the plant for irrigation purposes and that they have done all that could reasonably be required of them in the premises.

The judgment of the learned trial court is

AFFIRMED.

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STATE OF NEBRASKA ET AL., APPELLANTS, V. OLIVER BROTHERS, APPELLEES.

FILED JANUARY 24, 1930. No. 26997.

For syllabus see *State v. Oliver Bros.*, *ante*, p. 302, which is controlling herein.

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

*Scott & Scott*, for appellants.

*Cordeal, Colfer & Russell, contra.*

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

DEAN, J.

This is a companion case to *State v. Oliver Bros.*, *ante*, p. 302. In the present case it was stipulated and agreed by and between "the attorneys that the evidence at the hearing held under Application No. 1284 should be used as

the record of hearing under water appropriation Application No. 1285." Our decision in Application No. 1284 is controlling in this case and the judgment of the district court is therefore

AFFIRMED.

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W. M. CLARK, ADMINISTRATOR, APPELLEE, V. ALICE E. ROBINSON ET AL., APPELLANTS.

FILED JANUARY 24, 1930. No. 26945.

**Record** examined and found to be controlled by the law announced in *Robinson v. Clark, ante*, p. 285.

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

*Frederick J. Patz* and *Lewis C. Westwood*, for appellants.

*Jay C. Moore*, contra.

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

THOMPSON, J.

This is the proceeding *in rem* referred to in *Robinson v. Clark, ante*, p. 285. The parties, the lands, and the allowed Kansas claims involved in the two proceedings are the same. In the instant proceeding the district court found in favor of the administrator, appellee, and on November 28, 1928, entered judgment as prayed, and ordered the lands in question sold (subject, however, to the life estate of Alice E. Robinson, mother of deceased) and the proceeds applied in payment of the allowed Kansas claims, with interest and costs. Appeal is had to this court by Alice E. Robinson and Hattie M. Sandusky. The facts, as well as the issues, involved herein are disclosed in our opinion in *Robinson v. Clark, ante*, p. 285, thus rendering further detail unnecessary.

From an examination of this record, we conclude that, as to the issues and the facts, the law announced in our opinion in *Robinson v. Clark, ante*, p. 285, is controlling

herein. In *Fischer v. Sklenar*, 101 Neb. 553, cited and followed by us in *Robinson v. Clark, ante*, p. 285, we held: "The final determination of such fact (that of heirship) by the probate court is binding upon all parties interested in the estate, unless it is set aside upon appeal." This is true also as to the barring of claims under the heirship statutes as affecting the involved lands. Thus, as we have found in *Robinson v. Clark, ante*, p. 285, that the judgment rendered by the county court was right, it is binding on all interested parties, and has been from the date of its entry, to wit, June 30, 1928.

The judgment of the district court in this instant proceeding is set aside and the cause dismissed at the costs of the appellee.

REVERSED AND DISMISSED.

GOOD, J., dissents.

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HARDIN TRUST COMPANY, APPELLANT, V. J. C. WOLLARD ET AL., APPELLEES.

FILED JANUARY 24, 1930. No 26969.

1. **Bills and Notes:** HOLDER IN DUE COURSE. A payee, taking a negotiable instrument, which is not negotiated, with knowledge that certain of the apparent makers thereof are in fact sureties who signed under an agreement with such payee that certain moneys were to be applied, when received and as received, to the payment of the instrument, is not as to such sureties a holder in due course.
2. ———: ACTION: DEFENSES. Further, in an action on such instrument by the payee against the apparent makers, the defense of suretyship and agreement may be interposed by such sureties under our negotiable instruments act.
3. **Appeal:** HARMLESS ERROR. "A judgment will not be reversed on appeal, when it clearly appears that the alleged error complained of does not effect the substantial rights of the complaining party." *State v. Quimby*, 104 Neb. 590.
4. **Record** examined, and verdict of the jury found to be the only one that could, within reason, have been returned under the evidence reflected.

APPEAL from the district court for Franklin county: J. W. JAMES, JUDGE. *Affirmed.*

*D. A. Thompson, Thomas Robertson,* and *J. S. Gilham,* for appellant.

*C. P. Anderbery* and *Leon Samuelson, contra.*

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

THOMPSON, J.

The Hardin Trust Company, appellant, a banking institution, hereinafter called the bank, brought this action on a promissory note, negotiable in form, dated September 17, 1921, payable six months after date, such appellant being the payee named therein, against the defendants, appellees, they being apparent makers, to recover the sum of $5,000 with interest thereon from March 27, 1925. Trial was had to a jury, verdict returned in favor of the bank and against defendant Wollard for the full amount claimed, and in favor of each of the defendants Hevner against the bank, on which judgment was rendered. To reverse this judgment appeal is had.

The claimed errors presented, considering the brief of appellant and the "Additional Brief of Appellant," are, in substance, that the judgment is contrary to law; that the court erred in giving instructions 2 and 4, respectively; that the judgment is contrary to the evidence; and that the court erred in overruling the motion for a new trial.

The petition is in usual form, except the statement therein that the interest had been paid up to March 27, 1925, which payment is shown by the indorsement on the note to have been made by a trust deed dated February 7, 1925. The note contained the clause "and authorize extension of time by payment of interest." Each of the defendants filed a separate answer, which, being very similar, have been by us considered together, and in substance such answers alleged that defendant Wollard signed the note, and after it was signed by the Hevners later, it was delivered to the

bank at its request under the conditions hereinafter set forth; denied that there was any consideration running to either of the Hevners therefor, or that they signed the note other than as sureties, Wollard receiving the entire consideration; denied further that payment of interest had been had as alleged by the bank, or otherwise, or that the time of payment had been at any time extended, with Wollard's knowledge or consent, or that of either of the Hevners; further, that the note was barred by the statute of limitations; that such note was signed by the Hevners under a promise to them by the bank, before and at the time of their attaching their respective signatures thereto, and as an inducement therefor, that if they would sign the note with Wollard, as sureties, it, the bank, would, whenever certain lands involved were traded or sold, first apply the proceeds on the note in liquidation thereof, and not to any other or different purpose up to the time such note and interest had been paid; further, that the Hevners, relying upon the aforesaid inducement and in furtherance thereof, signed the note as such respective sureties; that, after the note was delivered to the bank under the above arrangement, moneys belonging to Wollard came into the bank's possession and under its control from the sale, exchange and rental of lands to the amount of more than $15,000; that the bank, contrary to its promise and over the protest of Wollard, and without the knowledge or consent of either of the Hevners, applied the same to the payment of other indebtedness owing to it by Wollard, as well as to indebtedness owing to and held by other banks against Wollard, and secured by the names of relatives of the cashier of the bank, and that by reason thereof the Hevners were damaged to the extent of the face of the note sued on, together with all interest thereon; further, that by reason thereof such Hevners were released as such sureties.

The reply to each of such answers, so far as material under the record before us, was a general denial; further, that the provisions in the note authorized the extension of time of payment with or without the knowledge of the Hevners, or either thereof, by payment of interest by Wollard; that

such payment of interest was made by Wollard, and thus tolled the statute of limitations. These affirmative allegations stood denied under the Nebraska rules of pleading.

On the issues as thus presented, the jury found as hereinbefore indicated.

Section 4801, Comp. St. 1922, is called to our attention as precluding the Hevners from proving that each signed as sureties and not as makers. The section, considered as a part of an independent act, as it is, does not warrant such conclusion. It 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." This does not prevent one appearing as a maker of a promissory note from alleging and proving that he signed as a surety, in a proceeding between the original parties on a note not negotiated. The section is dealing solely with the promissory note or instrument as it appears in its legal relation to the parties as by it disclosed, and does not necessarily prevent one who appears to be a maker or payor from showing by proof in a proper case his actual status. The different provisions of this act must be considered together, and if possible each of its nearly 200 sections be permitted to function in its own sphere in furtherance of the purpose and intent of the act.

The following cases will be found instructive: *Bank of Commerce & Savings v. Randell*, 107 Neb. 332; *Farmers State Bank v. Lydick*, 112 Neb. 586.

The instant case, as we have seen, is one between the original parties to the note, each acting with full knowledge of the facts, and in a transaction wherein the payee bank was the inspiring cause of the execution and delivery of the note, hence it is not, and could not be, a holder of the note in due course. While the note is negotiable in form, it has not been "negotiated" within the meaning of the negotiable instruments statutes. Hence, as we conclude, these parties are governed, as to their rights and relationship to each other, by that part of section 4669, Comp. St. 1922, which reads as follows: "In the hands of any holder other than

a holder in due course, a negotiable instrument is subject to the same defenses as if it were nonnegotiable." And they are governed further by the rule laid down by us in *Hatfield v. Jakway,* 102 Neb. 831, wherein we construed the above quoted statutory provision, and announced: "A payee who takes a negotiable instrument with knowledge that one of the signers is only signing as a surety, and who agrees that certain collateral pledged to secure the note shall first be applied before the surety shall be liable, is not a 'holder in due course' as respects such agreement with the surety."

Without going into detail, it may be said that the evidence reflected by the record fully sustains the finding of the jury. In fact, the proof is so clear and convincing that no other verdict could, within reason, have been returned. This is true as to the inducing promise made to the Hevners, their reliance thereon, the breach thereof by the bank as charged, and resulting damage to them as proved under the alleged facts. Hence, it becomes unnecessary to consider the other claimed errors presented, as under this reflected situation no substantial right of the bank can be said to have been affected by reason of these errors, if found to be such. Comp. St. 1922, sec. 8657; *Maxson v. J. I. Case Threshing Machine Co.,* 81 Neb. 546; *State v. Quimby,* 104 Neb. 590; *In re Estate of Nebel,* 106 Neb. 302; *Bryan v. Manchester,* 111 Neb. 748.

It may be added, further, that each of the aforesaid wrongful applications of moneys by the bank might be regarded as a "payment," as such wrongful use in each instance served to reduce the liability of the sureties *pro tanto.*

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

AFFIRMED.

# LOUIS BELZ, EXECUTOR, APPELLANT, V. CHICAGO & NORTHWESTERN RAILWAY COMPANY ET AL., APPELLEES.

FILED JANUARY 24, 1930. NO. 26951.

1. **Railroads:** INJURY AT CROSSING: CONTRIBUTORY NEGLIGENCE. Under the facts in this case, where a driver of an automobile on a highway failed to exercise reasonable care in looking for an approaching engine before crossing a railroad track, when his view was unobstructed, it was such negligence as will preclude a recovery, even though the engine which collided with his automobile was running behind a freight train.
2. ———: ———: INSUFFICIENCY OF EVIDENCE. The diverting circumstance of a freight train passing the deceased just previous to his being struck by a lone engine is not sufficient to justify the submission of the case to the jury, in the absence of any evidence that he could not see or hear the approaching engine before crossing the railroad track.

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

*Sanden, Anderson & Gradwohl,* for appellant.

*Wymer Dressler, R. D. Neely* and *Hugo Lutz, contra.*

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

FOSTER, District Judge.

The plaintiff, Louis Belz, executor of the estate of Alis Belz, deceased, brought this suit to recover damages growing out of an accident which caused the death of Alis Belz, and which occurred at a point in Stanton county, Nebraska, where the highway crosses the railroad track of the Chicago & Northwestern Railway Company.

It appears that the deceased was driving his automobile west on the highway and, as he was crossing the railroad track, was struck by a lone engine which was following a freight train. The accident occurred in the daytime, and the deceased had an unobstructed view to the east along the railroad for at least a mile. The highway upon which the

deceased was traveling follows the railroad to the crossing from the east for several miles.

All of the witnesses testified that they heard the engineer on the lone engine give the usual signal by whistle as he approached the crossing and most of them say that the bell was ringing.

The plaintiff claims that the defendants were negligent in operating a lone engine so close behind a train and not giving the proper signal of its approach, and that the freight train which had just passed the deceased was such a diverting circumstance as to excuse him in attempting to cross the track.

The defendants claim that the deceased was guilty of gross contributory negligence in not keeping a proper lookout for approaching trains and in not seeing and hearing the engine which struck him, when there was nothing to obstruct his view of, or prevent him from hearing, the approaching engine.

We cannot agree with the plaintiff's interpretation of the question of negligence. The deceased had a plain, unobstructed view of the railroad, and could have seen the engine in plenty of time to avoid the collision, if he had looked. The engineer gave the usual signals with the whistle. The alleged negligence of the railway company in running a lone engine so close behind a freight train is overcome by the gross negligence of the deceased in not looking and listening before he attempted to cross the track.

Our court has several times held that, where the facts show beyond reasonable dispute that the plaintiff's negligence was more than slight as compared with the negligence of the defendant, it is the province of the court to direct a verdict for the defendant. *Allen v. Omaha & S. I. R. Co.*, 115 Neb. 221; *Dodds v. Omaha & C. B. Street R. Co.*, 104 Neb. 692.

The question of whether or not the engineer rang the bell, when it is shown by nearly all the witnesses testifying that he blew the whistle, is not sufficient in itself to submit

the case to the jury, because a signal was given which the deceased could have heard if he had listened.

Where a traveler on a highway failed to exercise a reasonable care by not looking and seeing an approaching engine, where he had an unobstructed view of the railroad, it is such negligence as will defeat a recovery, even though no signal was given with bell or whistle. *Moreland v. Chicago & N. W. R. Co.*, 117 Neb. 456.

The plaintiff depends upon the case of *McGhee v. White*, 66 Fed. 502, 13 C. C. A. 608, wherein it was held that a railroad company was guilty of negligence sufficient to submit the case to a jury, where the plaintiff drove upon the track with a horse and wagon, and was struck by a train which was closely following another train. The evidence in the *McGhee* case shows that the plaintiff could not see the approaching engine until he was within 20 feet of the track, and that his view was obstructed up to that point. Such a state of facts does not exist in the case at bar. The deceased had an unobstructed view of the railroad.

It is shown beyond reasonable dispute by the testimony offered by the plaintiff and by the circumstances surrounding the collision that the negligence of the deceased was more than slight as compared with that of the defendants.

It was the duty of the court, therefore, to withdraw the case from the jury and enter a judgment for the defendant.

The judgment of the district court is

AFFIRMED.

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## IN RE ESTATE OF JOSEPH M. SIDES.
## EMMA SIDES, APPELLEE V. J. H. HUMPE, ADMINISTRATOR, APPELLEE: MARY A. GRANT ET AL., APPELLANTS.

FILED JANUARY 24, 1930. No. 26761.

1. **Gifts.** The mere reservation of interest to the donor during his lifetime does not invalidate the gift. *Novak v. Reeson*, 110 Neb. 229.
2. ———. Where a father, during his lifetime, gives money to each of his children by a former marriage and immediately thereafter takes from each a promissory note for the full amount

of the money so given, made payable to himself and bearing interest at the rate of 4 per cent. per annum, but containing the written provision that such note should be canceled on the death of the payee and not be a claim against the maker, and where such payee during his lifetime delivers the note to a third person in trust, with directions to him to collect and remit to him the interest during the lifetime of the payee and on his death to surrender the note to the maker, and where such payee thereafter never exercises any dominion or control over the note, such a transaction, after the death of the payee and as against the surviving widow seeking to hold such note as a part of the payee's estate, will be construed as an absolute gift *inter vivos* of the money so given, and not in any sense testamentary in its nature. In such a case, the note given will be regarded merely as evidence of the agreement whereby the donor reserves to himself an annuity equal to 4 per cent. of the gift during his lifetime, and the maker will not be bound beyond the plain provisions of such agreement.

3. ———. Evidence as to the alleged gift of other notes examined and discussed and *held* insufficient to show intent to make a gift.

4. **Husband and Wife:** PERSONAL PROPERTY. Under the statute, and the decisions of this court, as to his personal property, the husband, if competent, during his lifetime is wholly unrestricted in the enjoyment of all the incidents and attributes of ownership, except as limited by section 2550, Comp. St. 1922.

5. ———: GIFTS: VALIDITY. On the issue of fraud presented in this case, evidence examined and discussed and *held* insufficient to sustain the findings and judgment of the district court.

6. **Evidence** reviewed and *held* to require a reversal of the judgment of the district court.

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

*J. E. Porter,* for appellants.

*Burkett, Wilson, Brown & Wilson* and *C. C. Flansburg, contra.*

Heard before GOSS, C. J., ROSE, DEAN, THOMPSON and EBERLY, JJ., and CHARLES H. STEWART, District Judge.

STEWART, District Judge.

Joseph M. Sides died testate, a resident of Lincoln, Nebraska, on the 9th day of February, 1927. He was twice

married. His first wife died in 1890, the mother of nine children. These, as well as two grandchildren, are involved in this litigation. The second wife and surviving widow is the appellee, Emma Sides. No children were born to this marriage.

By the last will of the said Joseph M. Sides, executed on the 1st day of February, 1923, the surviving widow was given an undivided one-fourth interest in the estate, and the remaining three-fourths was divided into nine parts, one part of which went to each of eight of his children and one part was divided between a daughter and her son and daughter, grandchildren of the testator, each receiving one-third thereof. The estate left by Sides, including the homestead and excluding the notes in controversy, was of the value of $40,215.12, consisting largely of bonds, securities, etc. The notes in dispute aggregate the sum of $41,444.

The surviving widow elected to take under the statute, and not under the will.

In June, 1923, Mr. Sides turned over to his children the sum of $4,000 each. In the case of one of the children, however, the sum of $4,000 was divided between such child and her son and daughter, each receiving a one-third part thereof. There were three classes of distribution: (a) Where the full $4,000 was paid in cash or draft; (b) where part of the $4,000 was paid in draft and cash and the remainder by application upon a note owed by the particular child to the father; (c) where it was paid by the application of the $4,000 upon a note owed by the child to the father.

It is sufficient for this preliminary statement to say that in each instance a note was given by the party to whom money or credit was given. There were eight notes for $4,000 each and three notes aggregating $4,000, making a total of $36,000 of notes. These were all ordinary negotiable demand notes, drawing 4 per cent. interest, and in each note there was written the following clause: "This note to be canceled at the death of Joseph M. Sides and not to be a claim against the undersigned." This provision ap-

peared in the notes at the time they were signed by the makers.

At the time the will was drawn, there were two other notes payable to Mr. Sides. One signed by a daughter, Mary A. Grant, and her husband, on which there was a balance due of $3,000, and one signed by a son, Lawrence Sides, and his wife, on which there was a balance due of $2,400. Neither of these notes contained the provision for cancelation appearing in the notes executed in June, 1923.

This suit was commenced in the county court of Lancaster county by the filing of pleadings by the parties. These will be referred to later. From the findings and orders there made and entered, all parties appealed to the district court for Lancaster county, where a jury was waived and the case tried to the court on the original pleadings and the final report of the administrator. There was a general finding for the petitioner, and that each and all of the notes involved in the controversy were a part of the estate of Joseph M. Sides, deceased, and should be a charge against the respective makers thereof. Judgment was entered on these findings. From an order overruling separate motions for new trial the respondents have appealed to this court.

The pleadings are long and we shall refer only to such essential averments as are necessary for an understanding of the questions presented.

The widow by her petition alleges that all the notes in controversy are the property of the estate, and that the notes signed in June, 1923, notwithstanding the provision for the cancelation contained therein, should be found and held to be a part of said estate for the following reasons: (1) Because said provision for cancelation appearing in said notes was not authorized by the said Joseph M. Sides; (2) because said provision, under the circumstances of the execution, delivery and holding of each of said notes, if authorized, was testamentary in character and void; (3) because, under the laws of the state of Nebraska, the said Sides did not have the power and authority to give the amount of money represented by these notes to the signers thereof without the consent of the petitioner, his wife, for

the reason that the giving of the said notes would be a fraud upon the surviving widow and contrary to the laws of the state of Nebraska. The prayer was that all of said notes be found and decreed to be a part of the estate and owing to said estate by the respective makers thereof.

The respondents filed answer to this petition, denying generally the allegations therein contained, and affirmatively pleading that the administrator is wrongfully in possession of said notes; that the notes executed in June, 1923, were executed by the respective makers thereof upon the express condition and provision for cancelation contained in said notes, and were delivered by the said Joseph M. Sides to one John Hansen, in trust to collect the interest and pay same to the said Joseph M. Sides during his lifetime, or to credit payment of interest thereon when instructed so to do by the said Joseph M. Sides, during his lifetime, and that at his death said notes should be and become canceled and void and delivered up by said Hansen to the respective makers thereof for cancelation; that said conditional notes were executed by said respective makers upon the express understanding and agreement by and between the said Joseph M. Sides, the respective makers thereof, and the said Hansen, that said notes would be so delivered to and held by said Hansen as and for the purpose hereinbefore alleged, and that they were so held by said Hansen pursuant to said delivery to him and said agreement, and that they were surrendered to said administrator with will annexed, after the death of Joseph M. Sides, without the knowledge or consent of the said Hansen or of the respective makers thereof, and the same are void and should be ordered returned to said Hansen for cancelation and surrender to the makers in accordance with the said contract and the terms of delivery to him and the trust under which he held the same. The same allegations are made with respect to the other two notes in question, except it is admitted that these notes do not contain the written provision for cancelation. It is further alleged that said notes are not assets of said estate, but were gifts

made in good faith by said Joseph M. Sides to said respective makers.

Reply was filed by petitioner denying matters set forth in the answer.

It conclusively appears from the evidence that the provision for cancelation appearing in the notes executed in June, 1923, was placed in said notes before the signing thereof with the knowledge and by the express direction of Mr. Sides; that he actually turned over to each of the children the sum of $4,000, in cash or credit, during his lifetime and before the execution of said notes, is also fully established. The only direct competent evidence contained in the record as to what was actually done with these notes after their execution and delivery to Mr. Sides is to be found in the testimony of the witnesses, Hansen, June Sides, and Mrs. Scott Sides. Other testimony received on that subject was that of incompetent witnesses, made so by the statute as it relates to transactions and conversations with deceased persons in this class of cases.

This testimony as a whole establishes the contention of the appellants that, after the execution thereof by the Sides children, these notes were deliverd by Mr. Sides to Hansen, with directions that the interest thereon be paid to him or credited as by him directed during his lifetime, and that in case of his death the notes should be canceled and returned to the makers thereof. The testimony of Hansen further shows that he received these notes pursuant to this delivery and under these instructions, and that in obedience to his trust he held them until after the death of Mr. Sides. It appears that after the death of Sides, upon some order of court, the bank owning the deposit box containing said notes delivered them to the administrator. This was done without the knowledge or consent of either Hansen or the makers of the notes. It further is established by the evidence that Mr. Sides never had possession of any of these notes after he turned them over to Hansen. There is some evidence suggesting that the delivery of the notes by the bank to the administrator was upon some agreement or

stipulation that the notes should be held by the administrator pending final determination of court proceedings.

It thus appears clearly established by the record in this case that Sides himself, Mr. Hansen, and all the children who received the money and gave the notes did everything within their power to carry out the arrangement claimed by appellants. There is no direct evidence offered by appellee in denial of this testimony as to what was said and done concerning the notes executed in June, 1923. It is pointed out by appellee that Mr. Sides did not deliver these notes to Hansen immediately upon their execution, but took them back to Lincoln with him and did not turn them over to Hansen until some time later, and that when he did receive the notes Hansen placed them in a safety deposit box in some bank in his home town in the western part of the state, the box being one owned by Mr. Sides and one to which Sides, as well as Hansen, had access. There were no other papers in the safety deposit box. A sufficient answer to this would be that Mr. Sides never thereafter exercised any dominion over said notes and never at any time did anything inconsistent with the delivery claimed by the appellants. On the other hand, the delivery of the notes to Hansen at Lincoln for the purpose of carrying out the trust claimed by appellants was the natural and necessary thing to do if the intention of Mr. Sides, as expressed in the notes, was to be carried out.

In this state of the record, we cannot agree with counsel for appellee that anything in this entire transaction between Sides and his children was testamentary in its nature. The intention to make an absolute gift is too apparent to be seriously questioned. Sides did everything he could to carry this into effect. It must be remembered that the thing given was the money. But for the notes, this would have constituted an absolute, irrevocable and completed gift during the lifetime of Mr. Sides, with no reservation of interest therein to himself. The notes were merely evidence of the agreement whereby the father reserved to himself during his lifetime an annuity equal to 4 per cent. of the amount of the gift. As such a contract,

it created a species of life estate, and like any other trust or declaration of that nature could not bind the maker any further than the plain terms of the instrument itself provides. The delivery of the notes to Hansen during the lifetime of Mr. Sides in trust, as hereinbefore set out, was sufficient to entirely remove the transaction from that class of transfers known to the law as testamentary. *Dinslage v. Stratman,* 105 Neb. 274. The mere reservation of interest to the donor during his lifetime does not invalidate the gift. *Novak v. Reeson,* 110 Neb. 229.

We therefore conclude that, as to the conditional notes executed in June, 1923, there was an absolute and completed gift of the $4,000 to each of his children by Mr. Sides during his lifetime and that said children became fully vested with title thereto; that the said notes are no part of the estate of Joseph M. Sides, deceased, and the administrator is in the wrongful possession thereof, unless, as contended by the appellee, the gift was made by the father with the intent to defraud his surviving widow and was made under such circumstances as to amount to fraud, either constructive or actual, against her under the laws of the state of Nebraska. This branch of the case will receive our attention later.

It must be conceded that the evidence of intention to make a gift of the two remaining notes in controversy is much less convincing. In the first place, the notes themselves contain no provision for cancelation or other written words from which such intent could be gathered. Further than this, they were executed and delivered to Mr. Sides, for a consideration theretofore paid, and were in his possession prior to and at the time of the making of his will in 1923. While it is probably true that the will could affect only such property as the testator owned and controlled at the time of his death, yet we think one provision in this will is very helpful in arriving at the intent with which Sides later on delivered these particular notes to Hansen. The provision is as follows:

"From time to time heretofore I have made loans of money to several of my children, taking their notes therefor.

It is my will and I hereby direct that the sums of money so loaned shall be considered as an advancement and so constitute a part of my estate, and shall be charged to each of such children respectively as an advancement; except and unless, the notes themselves shall provide that they are to be canceled upon my death; in which event, it is my will that said notes shall be canceled; that the sums so given to said children shall not be considered an advancement, but as a gift, and shall not be or become a part of said estate."

These considerations lead us to the conclusion that it was never the intention of Mr. Sides to make a gift of these two notes, or the debt thereby evidenced, to the makers thereof. The matter of the distribution of his property received the careful thought and attention of this man. He consulted counsel with regard to these transactions and apparently took a long and no doubt tedious trip to the western part of the state to make sure that every detail of his proposed bounty was carried out according to his wishes. It is inconceivable that at this time the matter of making definite arrangements for the gift of these two notes was overlooked if he had any such intention. It is more probable that these notes were delivered to Hansen merely to facilitate the collection and indorsement of interest thereon.

From the record before us as to these two notes, we conclude that neither of them was ever lawfully transferred by Mr. Sides during his lifetime, or that he ever had any intention of making a gift of them to the makers thereof; that they are a part of the Sides estate, and, as such, properly in the possession of the administrator thereof, valid and enforceable obligations of the makers thereof.

Finally, we are called upon to consider the issue of fraud presented.

On the question of the effect of the transfer of personal property by a husband during his lifetime which operates to diminish the distributive share the wife would otherwise have in the estate, there is some slight conflict in the decisions of the several states. This is due, no doubt, to the statutory provisions of the several states covering the matter of the wife's right to an interest in the property of the

husband. However, substantially all authority is to the effect that the question of good faith is controlling. If the transfer of personal property by the husband during his lifetime is a mere device and means by which he retains to himself the use and benefit of the property during his lifetime, and at his death seeks to deprive the widow of her distributive share, it is to be regarded as fraudulent as to the wife. No more favorable statement of the rights of the wife in this state is warranted either by our statute or the decisions of this court. As to his personal property, the husband, if competent, during his lifetime is wholly unrestricted in the enjoyment of all the incidents and attributes of ownership, except as limited by section 2550, Comp. St. 1922. No cases directly bearing on this question are cited in the briefs and we have been unable to find any case decided by this court where the precise question has been determined. However, a reading of the Nebraska statute on the subject removes all question as to the correctness of the rule just announced. In the case of *Allen v. Henggeler*, 32 Fed. (2d) 69, the circuit court of appeals for this district, in passing upon the Nebraska statute, in an opinion by Judge McDermott, states the rule substantially as here stated.

On the issue of fraud presented, the burden of proof is upon the surviving widow to establish by a preponderance of the evidence that, in making these gifts to his children, the father was actuated by bad motive and fraudulent intent, and that the entire transaction was a mere device by which he sought to defraud her. *Krull v. Arman*, 110 Neb. 70. It is the general rule that fraudulent intent is not presumed, but must be proved by the party asserting it.

Upon a careful study of all the testimony, we are unable to see where any finding of fraud is supported by the record in this case. In arriving at this conclusion, we have taken into consideration the relationship of all the parties; the amount of the Sides estate and its history as shown by the evidence; the value of the gifts; the time and manner of making them and the extent to which the children participated. It is important to remember that here a father was

dealing with his wife and children, both having legitimate claim to his affections. It is not denied, and the evidence clearly shows, that the first wife and her children made large contribution to this estate. To the one it represented patient self-denial; to the other, denied opportunity. It is not strange, as shown by the evidence, that this mother, about to say goodbye to her loved ones, should remind the husband of his duty to her children in the matter of the final disposition of his property. Common fairness would prompt him to respect her wishes. It nowhere appears from the evidence that this father bore toward these children anything other than natural love and affection. It is but natural to assume that in the closing days of his life this old man, in memory, returned often to the scene of his early struggles and lingered long with the devoted young wife who so willingly surrendered herself to every demand of poverty and young romance. Here again, no doubt, were rekindled the smoldering fires of parental devotion. Inspiration was not lacking, and these gifts appear to have been prompted by generous motives arising naturally from the relationship of parent and child. Under all the circumstances, it cannot be said that these gifts were unreasonable, but rather they appear to have been in complete accord with the natural inclinations of the human heart. In the absence of positive fraud, such disposition of property will not be disturbed. It is not for the courts to say how a man shall bestow his bounty, so long as he acts in entire good faith with those having legitimate demands upon him. In the present case, the widow cannot complain because she did not receive more, so long as she is given that portion of her husband's property to which, at the time of his death, she is entitled under the Nebraska statute.

The evidence is insufficient to support the findings and judgment of the district court. The judgment of the district court is therefore reversed and the cause remanded for further proceedings.

REVERSED.

# INTERNATIONAL MILLING COMPANY, APPELLANT, V. NORTH PLATTE FLOUR MILLS ET AL., APPELLEES.

FILED JANUARY 30, 1930. No. 26925.

1. **Sales:** UNIFORM SALES ACT. The "Uniform Sales Act" of Nebraska prescribes rules of law which must govern any case coming within its provisions. It was passed in response to a general desire for substantial uniformity in the legislation of the different states in all branches of commercial law, and its provisions must be enforced and its principles must be recognized as wholly independent of and to the exclusion of inconsistent descisions and doctrines declared by the courts of this state prior to its enactment. This act expressly provides that, "where any right, duty or liability would arise under a contract to sell or a sale by implication of law, it may be negatived or varied by express agreement" of the parties to such transaction.
2. ———: ———: CONSTRUCTION. It is mandatory that this act shall be so interpreted and construed as to effectuate its general purpose to make uniform the laws of those states which enact it.
3. **Damages:** CONTRACT: BREACH: LIQUIDATED DAMAGES. Under the terms of the Nebraska "Uniform Sales Act," where it appears from the provisions of the contract for the sale of flour that the parties did not contemplate that the seller had the flour on hand but that he should manufacture it in the future for delivery within a period named in the contract from wheat to be purchased by him for the purpose, it was competent for them to stipulate, on the basis of the transaction contemplated, what the measure of damages should be in the event of a breach by the buyer.
4. **Evidence** examined, and *held* to support a recovery of damages by plaintiff in accordance with the terms of the contract set forth and in the amount as therein provided.
5. **Appeal.** The question as to the effect of unconscionable, inequitable, or unjust stipulations in contracts of sale relating to the measure of damages in the event of breach is not presented by this record, either by pleadings or evidence, and hence not determined.

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

*H. L. Hoidale* and *William E. Shuman,* for appellant.

*Beeler, Crosby & Baskins, contra.*

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

EBERLY, J.

This was an action brought in the district court for Lincoln county by the plaintiff, appellant, against the defendants, appellees, to recover damages claimed to have been sustained by reason of the breach of a written contract of sale between the parties dated September 18, 1926. The pleadings disclose that the parties entered into a contract of sale at that time whereby the plaintiff agreed to sell the defendants 1,000 barrels of flour at $7.45 a barrel to be delivered at North Platte "on or before May 1, 1927, on directions to be furnished by the buyer." It is also conceded that the defendants ordered out and received 250 barrels of this flour. However, they failed and neglected to furnish shipping directions for the remaining 750 barrels of flour as required by the contract and thus prevented the performance thereof by the plaintiff, seller. This written contract of sale included an agreement by the parties thereto as to the manner in which the amount of damages suffered, in the event of a breach of the contract by either of them, should be determined. The express terms of this instrument covering this subject are as follows:

"Paragraph 3. As to any of the above wheat flour remaining unshipped by reason of buyer's breach or default, seller shall recover from buyer liquidated damages as follows: (a) A sum equal to 4¢ multiplied by the number of bu. of wheat required to make such unshipped flour, figuring 4¾ bu. to the bbl. of flour; plus (b) a sum equal to 1¢ multiplied by the said number of bu., which sum shall be calculated for each 30 days, or fraction thereof, intervening between date hereof and date of breach; plus (c) amount of decline, if any, per bu., from date hereof to date of breach, in highest closing price, at Mpls., of number 1 Northern Spring wheat, multiplied by said number of bu. In case of a rise in such price of such wheat between said dates, instead of a decline, seller shall recover the sums at (a) and (b), above, less a sum determined by

multiplying amount of such rise, per bu., by said number of bu. such prices on date hereof and date of breach being taken to ascertain amount of decline or rise per bu. Any carrying charges paid by buyer to seller on such wheat flour only shall also be deducted from seller's said recovery. If there is neither rise nor decline in such price seller shall recover the sums at (a) and (b) above, less such carrying charges paid, if any."

"Paragraph 6. But if specifically written on face hereof that buyer shall furnish shipping directions, buyer shall be obligated to notify seller of date, or dates, for shipment, which shall not be later than 'shipping date;' also quantity and (if within style of package, if any specified, is not desired) package, or assortment, wanted, and he shall take out (without previous request) all of within goods as aforesaid, and his failure or refusal so to do shall give seller right, as to any of within goods remaining unshipped by reason thereof, to either: * * * (c) treat contract as broken by buyer and cancel contract (as to such unshipped goods only), at 5 o'clock p. m., Central time on 'shipping date,' and recover, on such unshipped goods, damages as set out in paragraph 3, construing date of such cancelation to be date of breach."

An analysis of the pleadings of the parties herein, and of the record made at the trial in the district court, discloses that the real issue presented in this case is the contention on behalf of the plaintiff, seller, that the provisions of the contract quoted are valid and enforceable as constituting liquidated damages; while the defendants, buyers, in their argument in this court, contend that these provisions amount to and constitute a penalty and as such are unenforceable. The defendants' pleadings, however, present even a narrower issue. Therein they admit the execution of the contract sued on, the continued ability and readiness to perform the same on the part of the plaintiff, the breach thereof by themselves, which they do not attempt to justify, save and except as they deny that damages were occasioned thereby in excess of nominal damages, one cent, which they expressly admit. On this issue the trial

was had in the district court. At the conclusion of the plaintiff's evidence, the defendants, without offering any evidence in support of their contentions, moved for an instructed verdict in their favor. The plaintiff thereupon made a like motion. The court then discharged the jury and entered judgment for the plaintiff, but limited the recovery to nominal damages, viz., one cent. To review this determination the plaintiff now submits the cause to this tribunal.

The record discloses that ample competent evidence was tendered by the plaintiff to support the allegations of the petition and to justify a recovery as prayed, should the legal question involved be determined in its favor. It will be noted that the district court, as a matter of law, expressly held the contractual provisions quoted unenforceable as being a penalty.

The Nebraska "Uniform Sales Act," which is carried in the Compiled Statutes for 1922 as sections 2470 to 2549, inclusive, duly adopted and approved April 25, 1921, is the controlling legislation on this subject. As a valid enactment by our legislature, its terms supersede any conflicting principle in our judicial decisions previously pronounced. It may be said that the original source of this legislation is the "Sale of Goods Act" which was duly adopted by the parliament of Great Britain in the year 1893. The provisions of this act, it may be noted in passing, while containing exceptions and variations, are substantially similar to our present statute on that subject. As a result of this British legislation a movement in the United States toward uniformity of laws relating to commerce, which was national in its scope, resulted in the adoption of uniform sales acts, in terms identical with our own, in the following of our sister states on the dates named: Alaska, January 2, 1914; Arizona, April 1, 1907; Connecticut, July 17, 1907; Idaho, January 1, 1920; Illinois, June 29, 1915; Iowa, April 25, 1919; Maryland, June 1, 1910; Massachusetts, January 1, 1909; Michigan, April 22, 1913; Minnesota, June 1, 1917; Nebraska, April 25, 1921; Nevada, April 1, 1915; New Jersey, May 7, 1907; New York, September 1, 1911;

North Dakota, March 10, 1917; Ohio, January 1, 1909; Oregon, February 22, 1919; Pennsylvania, January 1, 1916; Rhode Island, July 1, 1908; South Dakota, March 3, 1921; Tennessee, July 1, 1919; Utah, June 15, 1917; Vermont, April 1, 1921; Wisconsin, January 1, 1912; Wyoming, February 20, 1917. Our own sales act, passed and approved in 1921, thus adopted an enactment which, in many of its precise terms, had previously been construed by the courts of our sister states. The rule of construction under this situation is, where the legislature reenacts laws of other states, it thereby adopts the judicial constructions which have been placed thereon by the highest courts of such sister states. *Coffield v. State,* 44 Neb. 417; *Forrester v. Kearney Nat. Bank,* 49 Neb. 655; *State v. Cornell,* 54 Neb. 647; *Kendall v. Garneau,* 55 Neb. 403; *Goble v. Simeral,* 67 Neb. 276; *Fadanelli v. National Security Fire Ins. Co.,* 113 Neb. 830. With this principle of construction in view, it may be said that it was determined in New York in 1916 and 1918 that by the New York act on this subject, which is identical with our own: "It was the design as far as possible to make our law uniform with the legislation and laws on this subject existing throughout the country. To this end changes were made in what had been previously here the law." *Rinaldi v. Mohican Co.* (1918) 225 N. Y. 70, affirming (1916) 157 N. Y. Supp. 561. The supreme court of Ohio had likewise determined, with reference to their sales act, identical in terms with our own: The act prescribes rules of law which must govern any case coming within its provisions. *State v. Bayer,* 93 Ohio St. 72. And again with reference to this same act the supreme court of Ohio in 1917 declared: "This is 'an act to establish a law uniform with the laws of other states on sales.' It was passed in response to a general desire for substantial uniformity in the legislation of the different states on all branches of commercial law. It is of high importance that everyone should know his rights and his obligations at all times and all places in connection with every transaction in which he engages. Every law that has been passed in furtherance of that object should have its provisions en-

forced and its principles recognized wholly independent, and to the exclusion, of inconsistent decisions and doctrines previously declared. In this way only can the desired uniformity be sustained." *Sheffield-King Milling Co. v. Domestic Science Baking Co.*, 95 Ohio St. 180. Not only do the requirements of the ordinary rule of construction heretofore announced by this tribunal require that the enactment now under consideration be construed in harmony with the previous decisions rendered by the courts of our sister states prior to its adoption here, but the terms of the act itself disclose that such was the express mandate of the legislature adopting the same, for in section 2543, Comp. St. 1922, we find the following clause: "This act shall be so interpreted and construed, as to effectuate its general purpose to make uniform the laws of those states which enact it."

In substance, all of the terms of the contract of sale here in dispute were before the supreme court of Ohio in the case of *Sheffield-King Milling Co. v. Domestic Science Baking Co., supra.* That court cited as controlling in the case before it sections 8444 (3) and 8451 of their Code, which are identical with sections 2533 (3) and 2540, Comp. St. 1922, which are as follows:

Section 2533 (3): "Where there is an available market for the goods in question, the measure of damages is, in the absence of special circumstances, showing proximate damages of a greater amount, the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept."

Section 2540: "Where any right, duty or liability would arise under a contract to sell or a sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by custom, if the custom be such as to bind both parties to the contract or the sale."

The Ohio court in the case last above referred to sustained the contract and a recovery thereunder on behalf of

the seller against a defaulting purchaser, computed in like manner as provided in the contract presented in our instant case. Similar contracts were sustained and like recoveries permitted in the following cases: *International Milling Co. v. Reierson,* 55 S. Dak.—; *Christian Mills v. Berthold Stern Flour Co.,* 247 Ill. App. 1; *Shane Bros. & Wilson Co. v. Striglos,* 228 Ill. App. 397; *New Prague Flouring Mill Co. v. Hewett Grain & Provision Co.,* 226 Mich. 35; *H. H. King Flour Mills Co. v. Bay City Baking Co.,* 240 Mich. 79. It will be further noted that each of the decisions above cited were made in states which had prior thereto adopted the uniform sales act and each were made while that act was in full force and effect and though this legislation may not have been referred to by the judges writing the opinions, still the decided harmony with the principles of the uniform sales act, characterizing the language of these decisions, supports the conclusion that the terms of that legislation must be deemed at least presumptively controlling. But it is also true that in no state having adopted this legislation, so far as we have been able to ascertain, has a recovery on this class of contracts ever been denied. Indeed, if the words of this statute, "This act shall be so interpreted and construed, as to effectuate its general purpose to make uniform the laws of those states which enact it," are to be given their natural force and effect, it would seem that the requirement of a similar construction of our own "Uniform Sales Act" in the present case cannot be avoided.

It is to be noted that the terms of our statute expressly authorize the parties to a sales contract, or agreement to sell, "where any right, duty or liability would arise under a contract to sell or a sale by implication of law, it may be negatived or varied by express agreement." It may be said "to vary" means to change to something else. In determining the force and effect of this statute it is to be noted that similar language, when standing alone and applied to other subjects, has been held to justify and authorize almost any change without limitation. *Merchants Loan & Trust Co. v. Northern Trust Co.,* 250 Ill. 86. So far as

we have been able to ascertain, courts in applying this statute to actual transactions have not disclosed any tendency to modify or restrict the natural import of the language thus employed. *Renne v. Volk,* 188 Wis. 508. However, the issues presented in the instant case do not require a definition of the scope of the statutory language under consideration. The pleading of the defendants admits that a situation existed which was created by their default and imposed a liability upon them to respond in damages therefor. The defendants do not affirmatively allege that the provisions of the contract quoted are as a matter of fact "unconscionable." We can give force and effect to the statute referred to only if it be conceded that this liability of defendants, whatever its extent, was subject to be varied by express agreement, and that such agreement existed was pleaded on the part of the plaintiff in its petition and admitted on the part of the defendants in their answer. The defendants' defense to recovery is based upon the rule of damages which existed prior to the adoption of our sales act, but to sustain this contention is to, by construction, invalidate the express terms of the statute which provided that the question of measure of damages was a matter of contract between the parties. The validity of the contract, it will be noted, is unchallenged by the pleadings or otherwise, save and except the assertion of an existing rule of damages which is contrary to the provisions agreed upon by the parties. Indeed, the pleadings in themselves do not advise us whether it is claimed that the provisions of the contract quoted involve a recovery of more or less than would arise in a case where the rule of law contended for by the defendants was applied. In fact, the conclusions of the district court are expressly based on its finding that there is no evidence in the record as to what the damages computed under the rule contended for by the defendants would amount to. This by fair implication denied to the parties to the contract where any right, duty or liability arose thereunder, the right to negative or vary such liability by express agreement. On this subject the Ohio court in 1917, having then under consideration a contract con-

taining provisions similar to the one here presented under the terms of its sales act, employed the following language:

"It must be noted that this contract was not silent on the subject. It contained an 'express agreement' touching the 'liability.' It provides that the basis of settlement shall be 'the actual difference between the highest closing price of No. 1 Northern wheat in Minneapolis on the date of sale and date of cancelation as shown by the "Minneapolis Market Record," figuring four and one-half bushels of wheat for every barrel of flour, the buyer to reimburse the seller for carrying the wheat at the rate of one cent per bushel per month from date of sale to date of cancelation, plus two cents per bushel for buying and reselling the wheat, and two cents per bushel to cover loss of profit, *if any,* and inconvenience to seller resulting from failure of buyer to take out flour as per contract.'

"It is apparent from this language that the parties themselves contemplated that the plaintiff should not be required to speculate upon the price of wheat, whose fluctuating character must have been well known to both, but that the transaction should proceed on the idea that the plaintiff should purchase a sufficient quantity of wheat on the day of sale. Not only this, but it is apparent from the contract that the parties themselves contemplated that this wheat should not be at once manufactured into flour, but should be held or 'carried' until near the time when the plaintiff would be required to manufacture the flour from it. Otherwise the provision as to the highest closing price of No. 1 Northern wheat on the date of sale, and the provision to reimburse the seller for carrying the wheat at one cent per bushel per month and two cents for buying and *reselling* the wheat, would be wholly unnecessary and meaningless. Under the clause, 'and two cents per bushel to cover loss of profit, *if any,*' the plaintiff waived any claim.

"We think that a consideration of the whole instrument forces the conclusion that the contract did not provide for, and the parties did not contemplate, a direct sale of the flour as an ordinary commodity, as it might have done if the parties had so desired; but it provided for, and they

contemplated, the purchase of the wheat at once and the future manufacture and delivery by the plaintiff of the amount of flour within the period covered by the terms of the contract. With these steps in contemplation the parties contracted that defendant should reimburse plaintiff for any loss on account of the purchase of the wheat in case defendant refused to take the flour, or 'fails to furnish directions for shipment.' The parties in this case were fully competent to contract. Each was fully able to consider and provide for his own interest. It is not claimed that there was any fraud or circumvention in connection with the negotiation, and we can conceive of no injustice, or inequity, in the enforcement of the terms of a contract thus made, which contemplated the purchase by the seller of sufficient wheat to supply the commodity to be manufactured and delivered thereafter during a period of a number of months. The parties agreed that wheat, the thing from which the flour was to be made, should be the basis upon which to calculate damages. They could, of course, have agreed that the flour should be such basis, but they did not do so. That was a matter for them to agree about. They did not fix an arbitrary lump sum which might turn out to be wholly inequitable, but fixed a method, the chief element of which was the price of wheat from which the flour was to be made, a matter not within the control of either. In this situation when the plaintiff proved it had performed the terms of the contract on its part, had purchased the necessary wheat, and showed the damages that had accrued on the basis agreed on, it was entitled to recover." *Sheffield-King Milling Co. v. Domestic Science Baking Co.*, 95 Ohio St. 180.

This language is applicable to the proceedings in this case and we adopt it as controlling. In so doing we follow, not only the dictates of reason, but the express commands of our statute which directs uniformity, and the object of it was to secure for everyone the possibility of knowing his rights and obligations at all times and all places in connection with every transaction in which he engages which pertains to or is governed by the "Uniform Sales Law."

We do not overlook the fact that the defendant relies upon the case of *Russell Miller Milling Co. v. Bastasch*, 70 Or. 475. This case, it will be noted, was decided at a time when Oregon had not adopted the "Uniform Sales Act," hence, it could have no application here. It may be said, however, that this case was also considered by the supreme court of Ohio in the case of *Sheffield-King Milling Co. v. Domestic Science Baking Co., supra,* in which that court employed the following language, which we adopt:

"In *Russell Miller Milling Co. v. Bastasch,* 70 Or. 475, relied on by defendant in error, it is held: 'In an action for a breach of contract to purchase flour, a custom of the plaintiff on purchases for future delivery of setting aside a quantity of wheat sufficient to be manufactured into the flour ordered cannot be considered, where the parties are not shown to have contracted with reference to it and no knowledge of it is imputed to the defendants in either pleadings or evidence.' That was an ordinary suit for damages and did not involve the question made here as to liquidated damages or penalty. In the case we have here, it will also be noted, the plaintiff does not assert a 'custom' but an express contract, in which the parties *are* 'shown to have contracted with reference' to the basis of settlement."

It follows therefore that the district court, in denying plaintiff recovery of liquidated damages grounded by the contract in suit, erred. The judgment of the district court is therefore reversed and the cause remanded for further proceedings in harmony with this opinion.

REVERSED.

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STATE, EX REL. O. S. SPILLMAN, ATTORNEY GENERAL, v. DUNBAR STATE BANK ET AL., APPELLANTS: C. L. KELLY, COUNTY TREASURER, INTERVENER, APPELLEE.

FILED JANUARY 30, 1930. No. 26941.

1. **Banks and Banking:** DEPOSITORY BOND: EXPIRATION. Where a depository bank gives a bond to the county under the law as existing previous to the amendment of 1927, as in this case, to

secure public funds deposited by the county treasurer in its bank, such bond expires with the term of the county treasurer and does not apply to funds deposited by his successor, even though under the terms of such bond it runs for a period beyond the term of the outgoing treasurer.

2. ———: ———: ———. The bond given by the depository bank in this case did not apply to the funds deposited by the incoming county treasurer, and, therefore, could not be considered as funds otherwise secured, within the meaning of section 12, ch. 30, Laws 1925, nor could such funds be considered as deposited by reason of a collateral agreement under section 39, ch. 191, Laws 1923.

3. ———: GUARANTY FUND: LIABILITY. "Where a county treasurer deposits public funds in a state bank in excess of 50 per cent. of the paid-up capital stock of said bank, the entire deposit is within the protection of the depositors' guaranty fund." *State v. Peoples State Bank*, 111 Neb. 136.

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

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

*George H. Heinke, contra.*

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

FOSTER, District Judge.

It appears that D. G. McAllister was county treasurer of Otoe county, Nebraska, from January 4, 1923, until January 7, 1927, and that on the latter date C. L. Kelly succeeded him. On January 4, 1923, McAllister designated the Dunbar State Bank of Dunbar, Nebraska, as a depository for county funds, and on the same date the board of county commissioners approved such bank as a depository for a term of four years.

McAllister, during all of his term, kept a deposit in the bank. On March 3, 1925, a depository bond was filed in the office of the county clerk of Otoe county for $25,000. This bond was approved by the commissioners on March 3, 1925. It is recited in this bond that it is for a period of two years, beginning on the 2d day of March, 1925, and ending on the 22d day of March, 1927; that thereafter, and

on the 24th day of December, 1926, the same bank filed an application to become a depository for a period of four years, beginning January 7, 1927. The board of county commissioners approved this application on January 7, 1927. No depository bond, however, was given at this time.

In pursuance to such approval, Kelly, then county treasurer, received the money on hand in the bank from McAllister, and transferred the account to his own name and continued to deposit and draw out money from such account during the months of January, February, March, and part of April, 1927. On April 6, 1927, Kelly had on deposit in the bank, as treasurer, the sum of $28,023.53. On April 6, 1927, the department of trade and commerce took charge of the property and affairs of the bank and remained in possession until April 23, 1928, at which time Dempster was appointed receiver by the court. While Dempster was in charge as agent of the state, a dividend amounting to 22 per cent. of the deposits was paid to the various depositors. The dividend check of $6,175.17, being 22 per cent. of the deposits held by the bank in the name of Kelly, as county treasurer, was held by Kelly to be delivered in case the court should so determine. Upon this state of facts, trial was had in the district court, and judgment entered to the effect that the 22 per cent. dividend on the deposit of Otoe county, amounting to $6,175.17, be paid to Kelly, and that the remainder, amounting to $21,848.36, be allowed as a preferred claim against the depositors' guaranty fund. The receiver appeals from this finding of the district court.

The state claims that the bond originally given was continuing and covered the funds deposited in the bank in Kelly's name, as well as those held under the name of McAllister, and such bond constitutes other security than the guaranty fund, under section 12, ch. 30, Laws 1925, and was a collateral agreement under section 39, ch. 191, Laws 1923; that this would place the deposit in a class where it would not be on the basis of other deposits, and would not receive dividends until the county had exhausted its resources against the bond.

The state further claims that the bond was given contrary to the statutes, in that the deposits made thereunder were for more than 50 per cent. of the capital stock and surplus of the depository bank, and was an illegal act on the part of the authorities of Otoe county, and, therefore, they cannot recover in a court of equity.

The intervener claims that the bond given was only for the term of county treasurer McAllister and could in no wise be considered a bond for his successor, county treasurer Kelly; that the funds were transferred from McAllister to Kelly upon the expiration of McAllister's term; that no bond, other securities, or collateral agreements were given or made to secure or induce Kelly or Otoe county to deposit funds in the Dunbar State Bank; that the intervener is entitled to the dividend already paid by the bank, and to the allowance of the balance of the claim as preferred against the depositors' guaranty fund.

It seems that, under the statutes of the state of Nebraska, bonds given by depositories cover only the term of the official and a new bond should be required for each official term. The time is definitely fixed by section 6193, Comp. St. 1922, and reads, in part, as follows:

"The bonds hereby required shall cover one term only and new bonds shall be required for each and every official term."

This section was amended by section 1, ch. 96, Laws 1925, as follows:

"The bonds hereby required shall cover one term of the county treasurer only and new bonds shall be required for each and every official term."

This law was further amended by section 4, ch. 34, Laws 1927, to read as follows:

"All bonds given to secure deposits of public money shall expire January 1st of each year."

The last amendment above quoted does not apply to the case at bar, because it was not in force until July of 1927.

It is evident under the law that the bond given in this case expired with the term of McAllister as county treasurer, and this would be January 7, 1927. The liability

under the bond ceased when McAllister retired and the funds were turned over to Kelly.

It is argued that the giving of a check by McAllister to Kelly was not a proper transfer of funds, and, therefore, the deposit in the Dunbar State Bank could not be considered as having been received by Kelly. We do not agree with this contention. The transfer was made upon the books of the bank, and checks honored by the bank, signed by Kelly. This court has passed upon the question of transfer of funds in the case of *Paxton v. State*, 59 Neb. 460, saying:

"One to whom a certificate of deposit, or other evidence of money in the custody of a solvent bank, has been transferred is as effectually invested with control and dominion of such money as though there had been a manual delivery of it to him."

We are of the opinion that there was a valid transfer of funds from McAllister to Kelly.

It is strongly contended by the state that the bond given is other security and also constitutes a collateral agreement and, therefore, takes the deposit in question out of the class of general depositors. We have already held that the bond in this case had expired and did not apply to the public funds deposited and held by county treasurer Kelly. It would necessarily follow that it would not be other security or a collateral agreement.

It is contended that the county treasurer violated the statutory provision in making a deposit of public funds in excess of 50 per cent. of the paid-up capital stock of the bank, and the deposit, not being a legal deposit, was not protected. This court has passed directly upon this question in the case of *State v. Peoples State Bank*, 111 Neb. 136, as follows:

"Where a county treasurer deposits public funds in a state bank in excess of 50 per cent. of the paid-up capital stock of said bank, the entire deposit is within the protection of the depositors' guaranty fund."

We think that this rule is applicable to the case at bar,

and that the public funds deposited by the county treasurer were protected by the depositors' guaranty fund.

A bond given to secure public funds deposited in a bank by a county treasurer expires with the term of such official and does not apply to deposits made by the new treasurer. Such bond, not being in force, could not be considered security for such funds, nor could it be considered a collateral agreement. The funds, being public moneys, receive the protection of the depositors' guaranty fund, regardless of the fact that such deposit was in excess of 50 per cent. of the paid-up capital stock of the depository bank.

The decree of the district court should be affirmed and judgment entered accordingly.

AFFIRMED.

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ERNEST DODSON V. STATE OF NEBRASKA.

FILED JANUARY 30, 1930. No. 26950.

1. **Criminal Law: RAPE: EVIDENCE: RES GESTÆ.** While in a case of assault with intent to ravish, committed upon a 14 year old girl, only her complaint of the outrage shortly thereafter is ordinarily competent in evidence, and not her statement of the particular facts or of the name of her assailant, still, if said statement be within such time and under such circumstances as to be a part of the *res gestæ*, it may properly be received.
2. **Rape: IDENTIFICATION OF ACCUSED.** *Held* in this case that, though the witness could not positively and without a doubt identify the defendant, his evidence was sufficiently certain to go to the jury, and it was for the jury to determine as to the weight to which it was entitled.

ERROR to the district court for Adams county: J. W. JAMES, JUDGE. *Affirmed.*

*J. E. Willits*, for plaintiff in error.

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

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

SHEPHERD, District Judge.

Plaintiff in error, hereinafter called defendant, a man of about 23 years of age, was charged with assault with intent to ravish a 14 year old girl, and was convicted. He assigns as reversible error that the court permitted the prosecuting witness to detail in her testimony what she told others of the alleged assault, and permitted one of such others to likewise detail what she said, and permitted a third witness for the state to express his opinion as to the identity of the defendant; all over his objections duly made.

The act occurred at the home of Mrs. Roberts, a sister of the defendant, whither the prosecuting witness had been sent with defendant to get some dishes for a wedding supper which defendant's mother was preparing to grace the nuptials of a younger daughter. The prosecuting witness lived with Mrs. Roberts, who was at the time assisting her mother at the latter's home.

The girl told a straightforward and convincing story of the assault, stating what occurred with great clearness and particularity: Arrived at the Roberts house and safe from observation within, the defendant seized her with one arm between her legs and the other about her waist and carried her kicking, screaming and fighting into a bedroom, where he laid her upon the bed, extended himself upon her and attempted to ravish her. By dint of superior strength he was able to, and did, overcome her, despite her most strenuous and continued resistence. Before he accomplished his purpose, however, and before he had proceeded to the point of penetration, she pretended to be about to faint and persuaded him to let her get a drink. From the kitchen, where he gave her a glass of water, she ran to the front door of the house and then to the back, seeking escape. In each instance he was too quick for her. Besought by him to "come on and be a good little sport," and again seized as before, she suggested that they first get a box from the cellar for the dishes. To this he finally assented and they started for the cellar, going out onto the back porch together and then, as he stooped to raise the trap-door at her direction, she sprang from the porch and ran to a nearby

grocery store, flinging herself down with head on the counter and weeping and declaring that a man was after her. She told the groceryman and his wife, who endeavored to reassure her, all that had happened, with many details that need not be set forth here. This story she repeated upon the stand; and the groceryman also detailed it when he was examined as a witness for the state.

Counsel for the defense made timely objection to this recapitulation by the girl and by the storekeeper, taking due exceptions, moving to strike the testimony and availing himself of every means to convince the court that the said testimony was as incompetent and prejudicial as a thorough knowledge of the criminal law and long experience in the practice could suggest.

The ordinary rule in cases of this kind is that the prosecuting witness may testify that she made complaint after the assault, and when, to whom and under what circumstances; but she may not detail the story that she told in making such complaint. And the person to whom she made complaint may also testify that she complained, and may state the time, place and circumstances of the complaint, but not what she said concerning the circumstances and details of the assault. The rule is well stated in *Oleson v. State,* 11 Neb. 276, and *Krug v. State,* 116 Neb. 185.

But these authorities recognize an exception in the case of words or statements which are of the *res gestæ;* and the court is of unanimous opinion that what the prosecuting witness said when she fled from her assailant, declaring that a man was after her and sobbing out her story to gain protection, was a part of the *res gestæ.*

Undoubtedly, the trial judge so considered in receiving the testimony; and he was right. The time was immediate, the girl was in tears and fear, was in the course of escape, and was in such state of mind that her words had all of the spontaneity that they would have had if she had been struggling in the grasp of the defendant and calling for help from bystanders—shrieking out the story of her assault to enlist sympathy and to secure succor. *State v. Gandel,* 173 Minn. 305; *Fields v. State,* 107 Neb. 91; *Sulli-*

*van v. State,* 58 Neb. 796; *Hewitt v. Eisenbart,* 36 Neb. 794; *Juckett v. Brennaman,* 99 Neb. 755.

The defendant denied the assault and denied that he was at the Roberts house on the day in question. A next door neighbor, a Mr. Perdew, testified in substance that upon coming home at noon of the day in question he saw a man at the rear of the Roberts home; that the man was getting into a car and leaving as he drove in, and that he was of opinion that said man was the defendant, whom he, Perdew, afterwards learned to know. He stated in his testimony that he could not tell positively because his attention was somewhat engaged by another car near at hand, but that he saw him sufficiently to give a description of him, and that his candid opinion was that he was Ernest Dodson, the accused.

The defendant objected to this testimony, though he did not move to strike it out.

The evidence is far from certain. But the rule is that one who knows another and has opportunity to identify him may testify as to his opinion, even though he states that he cannot testify positively, and that it will be for the jury to determine the weight of the testimony. In the case of *People v. Rolfe,* 61 Cal. 541, the witnesses expressed the belief that the defendant was the person they had seen, but did not positively and beyond doubt identify him. The testimony was received and the court held that the evidence was sufficiently certain respecting the identity of the defendant to go to the jury, and that it was for the jury to say what weight it was entitled to. This was in a robbery case and is quite directly in point.

In a Pennsylvania case, *Udderzook v. Commonwealth,* 76 Pa. St. 340, a nonexpert witness was permitted to testify to the handwriting of three letters charged to be written by one A. C. Wilson, though one of them was signed by another name. She testified concerning one: "I know this handwriting; it is that of A. C. Wilson to the best of my knowledge." As to another she testified: "This is also the character of A. C. Wilson's writing; I think it is his handwriting." As to the third she stated: "This also looks like

his, but it is not so distinct; to the best of my knowledge, it is his." This testimony was received, the weight of it being left to the jury. In the *Udderzook* case also, witnesses were permitted to testify to their opinion in identifying the mutilated remains from photographs in evidence. In the article in 16 C. J. 750, sec. 1536, is to be found a discussion, citing cases in support of the doctrine and justifying the ruling of the trial court in the case at bar. See, also, 1 Jones, Evidence (2d ed.) sec. 361.

The defendant seems to have had a fair trial. His rights were well guarded by able counsel, and there appears to be no reversible error in the record. The judgment and sentence of the district court must therefore be affirmed.

AFFIRMED.

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## IN RE ESTATE OF ALMIRA WHEELER. DOANE COLLEGE, APPELLEE, V. FILLMORE COUNTY, APPELLANT.

FILED JANUARY 30, 1930. No. 26816.

**Taxation:** INHERITANCE TAX: PLEDGES. Whether a pledge of money, payable at death of pledgor from his estate, is subject to an inheritance tax must be determined by the nature and character of and consideration for the pledge. If the pledge is not based upon a fair and valuable consideration but is, in effect and character, beneficent and donative, it is subject to the tax.

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

*Guy A. Hamilton,* for appellant.

*Perry, Van Pelt & Marti, contra.*

Heard before GOSS, C. J., DEAN, GOOD and EBERLY, JJ., and RHOADES, SPEAR and TEWELL, District Judges.

SPEAR, District Judge.

Mrs. Almira Wheeler on February 2, 1926, made a pledge in the sum of $20,000 to Doane College. The pledge was in writing and is here set out:

"The Greater Doane Fund Estate Pledge.

"In consideration of my interest in Christian education, and the promises of like tenor and effect made by other subscribers to the funds of Doane College, I hereby pledge to Doane College at Crete, Nebraska, and will pay to its treasurer the sum of twenty thousand dollars ($20,000) upon the following terms and conditions:

"The interest on $5,000 to apply on a scholarship to aid worthy students; the balance of $15,000 to apply on endowment.

"1. This pledge shall be due and payable at the time of my decease and shall be paid out of the proceeds of my estate.

"2. It is understood and agreed that at any time convenient to myself, I may pay in full any unpaid balance of the principal sum of this subscription, after which I shall have no further obligation under this contract.

"Witness: Edwin B. Dean. Almira Wheeler.

"Witness: Chas. C. Smith.

"Date 2-2-26. Fairmont, Nebraska."

She died October 14, 1927, and the pledge was allowed as a claim against her estate. An inheritance tax was, by proper authority, assessed and paid under protest, and this is an action to recover the tax under the theory that it was unlawfully levied. The district court decided in favor of plaintiff, and the county appeals.

Doane College is a Nebraska corporation conducting an educational institution at Crete, Nebraska, having no capital stock, and is supported in the main by contributions. The statute under which the county seeks to assess the tax reads in part as follows:

"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 seized 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." Laws 1923, ch. 187.

The county argues that this was a gift intended to take effect in possession or enjoyment after the death of the donor and therefore is subject to the inheritance tax. The college stoutly denies this, and says that the pledge constitutes a transfer for a valuable consideration, and is not taxable under the inheritance statute. Counsel for appellee further, by an ingenious process of elimination, arrives at the conclusion that this is neither a deed, grant, sale, or gift, and therefore not subject to the tax.

The contentions of each side must be measured by a single principle of law so all will be considered together. We must decide whether a contribution, such as this, passes when the pledge is signed and is therefore not subject to the tax, or whether the possession and enjoyment of the money takes effect after the death of the donor, and by that token it is subject to the tax. We have not been favored with any citations which are exactly in point, and no case has been decided by this court on the subject, so we must reason the case upon principle.

This court held in the case of *In re Estate of Griswold*, 113 Neb. 256, 38 A. L. R. 858, that a pledge similar to the one in question was supported by a consideration and collectible from the estate. Does this decision preclude the collection of the inheritance tax?

The books are full of cases from other states on this subject, and although helpful to us in deciding this case because of the principles therein stated, these cases are simply opinions of the various courts interpreting statutes. We are called upon to interpret the legislative meaning of our own statute. As we before remarked, no case involving the same circumstances has been called to our atten-

tion. The cases cited support the contentions of the respective parties by analogy only. *Blair v. Herold,* 150 Fed. 199, affirmed, 158 Fed. 804, is probably the classic example of the view taken by appellee. The circuit court of appeals said:

"A testator, his son and others entered into a partnership in 1890, the partnership agreement providing *inter alia* that, in consideration of a sum paid the testator by his son and other considerations moving from the other parties, in case of the testator's death during the existence of the partnership, it should not thereby be dissolved, but his interest therein should pass to and become vested in his son, and should remain in the business, his son taking his place. Testator died in 1899, during the partnership term, leaving a will, by which he made the son his residuary legatee. Held, that his interest in the partnership property passed to the son by a contract based on a sufficient consideration, and not by the will, and became vested in the son on the making of the contract subject to defeasance only in case testator lived beyond the partnership term, and that the property was not taxable under the war revenue act of June 13, 1898, c. 448, sec. 29, 30 Stat. 464 (U. S. Comp. St. 1901, p. 2307), as property 'transferred by deed, grant, bargain, sale, or gift made or intended to take effect in possession or enjoyment after the death of the grantor or bargainer,' the purpose of which provision was to prevent the evasion of the tax imposed on legacies and distributive shares, which purpose could not be imputed to a contract made so long before its enactment."

The district judge said that, as a valuable consideration was expressed in the contract, it was immaterial whether or not this consideration was adequate, and the property was not taxable. He remarked, however, that in any event it could not be said that the consideration was inadequate. He further said:

"My conclusion upon this branch of the subject, therefore, is that the partnership agreement was an irrevocable, self-executing contract; but whether self-executing or not, upon its delivery DeWitt C. Blair had vested rights there-

under in the interest of John I. Blair in the partnership property, defeasible only upon the survivorship of John I. Blair beyond the partnership period, which rights could not be divested by him by will or otherwise."

It is interesting to note that the circuit court of appeals, while approving the opinion of the district court, felt called upon to add:

"The purpose of which provision (in the statute) was to prevent the evasion of the tax imposed on legacies and distributive shares, which purpose could not be imputed to a contract made so long before its enactment."

*In re Estate of Oppenheimer,* 75 Mont. 186, 44 A. L. R. 1470, perhaps best expresses the opposite view, and was a case where, under an antenuptial contract, the wife, after the husband's death, was to be paid certain sums out of his estate. The court, in holding this property taxable, apparently takes the view that consideration is immaterial, and cites the following from *State v. Pabst,* 139 Wis. 561, as the view of the Montana court upon the subject:

"The statute was not intended to restrict persons in their right to transfer property in all legitimate ways, but it clearly manifests a purpose to tax all transfers which are accomplished by will, the intestate laws, and those made prior to death which can be classed as similar in nature and effect, because they accomplish a transfer of property under circumstances which impress on it the characteristics of a devolution made at the time of the donor's death."

Montana thus apparently holds that, regardless of consideration, if the transfer is intended to take effect in possession or enjoyment at or after death, it is taxable.

The middle ground is best expressed in the case of *Matter of Orvis,* 223 N. Y. 1, 3 A. L. R. 1636 (1918), wherein the court say, reviewing the former decisions of that court:

"The legislature did not intend that a purchaser who had paid full value for the property transferred should directly or indirectly pay the tax besides. We have not decided, however, that subdivision 4 of the section which we have quoted is applicable only to voluntary transfers or gifts which are within its conditions. *Matter of Keeney,*

194 N. Y. 281, 286. Its language does not permit that conclusion. It makes taxable a transfer by bargain or sale, when made in contemplation of the death of the grantor or vendor, or intended to take effect in possession or enjoyment at or after such death. The provision discloses a distinction in the legislative mind between a transfer by gift and a transfer by bargain or sale. It enacts, moreover, that transfers by bargain or sale should be taxable, or should not always and indiscriminately be nontaxable. The meaning of that enactment must be ascertained from the context and the object sought to be accomplished by the statute. The statute was not intended to restrict or burden the right of persons to transfer property in all legitimate ways and for all the usual and manifold purposes and objects of trade, commerce and purchase, or of voluntary transfers or gifts not made in contemplation of the death of the transferor, or intended to take effect in possession or enjoyment after such death. It was intended to tax all transfers which are accomplished by will, the intestate laws of this state, and those made or incepted prior to the death of the transferor in contemplation of or intended to take effect in possession or enjoyment after his death which are in their nature and character instruments or sources of bounty or benefaction and which can be classed as similar in nature and effect with transfers by wills or the intestate laws, because they accomplish a transfer of property, donative in effect, under circumstances which impress on it the characteristics of a disposition made at the time of the transferor's death. In all cases in which the value of the consideration for the property transferred, under the statutory conditions, is so disproportionately less than the value of the property transferred that the transfer is, in the light of reason or of ordinary intelligence and judgment, beneficent and donative, the transfer is taxable. The taxability does not depend upon fraud, or an attempt to evade the statute; nor does it depend upon the purpose or inducement of the transfer; nor does it depend upon the form given the transfer. The law searches out the reality, and is not halted or controlled by

the form. *Matter of Gould,* 156 N. Y. 423. The measure determining the liability or freedom from liability to the tax is the nature, the essence, the effect of the transfer. If, in truth, it, in effect, bestows, under the statutory conditions, a bounty or benefaction, and is not a transfer for money's worth, it is taxable.

"The application of the statute in the instant case leaves no ground for discussion. The mind does not hesitate in determining that the transfer was in essence and effect beneficent and donative, or in classing it as similar in nature and effect with transfers by wills."

In the above case the court held that, while the agreement rested upon a mutual and equal consideration and was enforceable, an inheritance tax could be assessed.

The above cited cases were decided upon statutes almost identical to ours as regards the point in issue. What did the Nebraska legislature intend? It seems to us that, without question, our legislature intended the middle ground adopted by the New York court. It must have intended that, while transfers effective upon death are not taxable when resting upon a valuable and adequate consideration, in all cases in which the value of the consideration for the property transferred, under the statutory conditions, is so disproportionately less than the value of the property transferred that the transfer is, in the light of reason or of ordinary judgment and intelligence, beneficent and donative, the transfer is taxable. We so declare the legislative intendment.

Having so found, let us proceed to the case at bar. The donor made the pledge payable at her death. She retained dominion over her property, and could have spent every cent of it before her death. She paid the taxes on it, and could have made 50 different pledges and all would have prorated in her estate, if her property was insufficient to pay all. She simply signed an agreement to pay $20,000 at her death. What did she receive as consideration? She received the satisfaction of having done a good deed. The college did not agree to keep its doors open or to do anything else. Without doubt everyone connected with the

transaction considered it a simple donation, payable at her death, and it would be illogical for us to hold otherwise. To say that the transaction rested upon such adequate and sufficient consideration as to preclude the assessment of an inheritance tax is to defeat the intention of the legislature. To say this, would open the doors to defraud the state. Any slight consideration would support a note payable at death and property used to pay the note could not be taxed. It has been said that the present case is analogous to this situation. If A owes B $1,000, and gives B a note, payable upon the death of A out of his estate, B should not be required to pay the tax. This is a false analogy, because A had a right to sue B, and, obtaining a judgment, levy upon B's property, then and there depleting B's estate. By taking the note he simply postponed the time of payment.

In the instant case Mrs. Wheeler owed the college nothing, and consequently the college had no right to deplete her estate. Not having that right, and being unable to enforce the pledge except out of her estate, and there being no adequate consideration, we think the college must pay the tax. In thus deciding we do no violence to the *Griswold* case, *supra*. In that case, in an opinion by Judge Redick, this court held that there was a consideration, and partially based its decision upon *Irwin v. Lombard University*, 56 Ohio St. 9, without reference to the case of *Ricketts v. Scothorn*, 57 Neb. 51, 42 L. R. A. 794, wherein Judge Sullivan, in discussing the *Lombard University* case, expressed the opinion that the true rule is that in such cases the defendant is precluded from denying the consideration under the doctrine of estoppel. Be that as it may, we in this case hold that, although the pledge was enforceable, the transfer of the money upon her death was donative, and therefore the college is subject to the tax.

For the above reasons, the judgment is reversed and the cause dismissed.

REVERSED AND DISMISSED.

STATE, EX REL. SAMUEL R. LOOMIS ET AL., APPELLANTS, V. CITY OF LINCOLN ET AL., APPELLEES.

FILED FEBRUARY 4, 1930. No. 27265.

1. **Municipal Corporations**: ACTIONS OF CITY COUNCILS: CONSOLIDATION. Where a petition is submitted to a village board and contains the statutory signatures of 20 per cent. of the electors of such village, and the proposition therein contained is subsequently voted upon and carried by a majority of the voters at an election held therefor, the action of the city council, in the absence of fraud or mistake, in passing upon the validity of the proceedings should be considered final.
2. ———: ———. The trend of both recent legislation and decision has been toward a relaxation of the rule in respect to the procedure before official bodies chiefly political in their character and powers and only occasionally exercising judicial functions. *Wolfskill v. City Council of Los Angeles*, 178 Cal. 610.
3. ———: ———. "The rule of law is that, where any official body or tribunal, such as a city council, is given authority to hear and determine any question, its determination is, in effect, a judgment having all the properties of a judgment pronounced by a legally created court of limited jurisdiction." *People v. Ellis*, 253 Ill. 369.

APPEAL from the district court for Lancaster county: FREDERICK E. SHEPHERD, JEFFERSON H. BROADY and ELWOOD B. CHAPPELL, JUDGES. *Affirmed.*

*Halleck F. Rose, George A. Adams* and *Herman Ginsburg*, for appellants.

*Frank A. Peterson* and *Lloyd E. Chapman, contra.*

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

DEAN, J.

College View is located in Lancaster county and adjoins the city of Lincoln which has a population of more than 40,000 and less than 100,000 inhabitants. At an election holden April 2, 1929, the question of the consolidation of College View with Lincoln was submitted and voted upon by the electors of College View and the official returns disclosed that the consolidation carried by a majority of the

votes cast at the election. Thereupon the Lincoln city ordinance was duly amended so as to include College View within its boundaries as a part of the city.

Samuel R. Loomis, Charles A. Williams, Alfred C. Gourley, and Albert Hickman, relators herein, are members of the College View board of village trustees, and on June 14, 1929, as such officials, they filed an information in *quo warranto* in the district court for Lancaster county, directed against the city of Lincoln and certain of its public officers, as respondents, namely, Don L. Love, as mayor, and Ernest M. Bair, William Foster, William Schroeder, and Frank Harm, as members of the Lincoln city council, wherein the relators alleged that less than 20 per cent. of the qualified electors of College View, which the law requires, signed a petition for the submission of the question of proposed consolidation with Lincoln and that the subsequent election is therefore void and of no effect. The relators thereupon prayed that the respondents "be ousted and altogether excluded from the exercise of any authority or power of municipal government in and over the village of College View and the territory comprised within the territorial boundaries of said village as the same existed on and prior to April 29, 1929; that the relators be adjudged to be lawful incumbents and entitled to hold and exercise their offices as village trustees of the village of College View, and be restored to all their functions, rights and powers as such officers."

Three of the Lancaster county district judges, namely, the Honorables Frederick E. Shepherd, Jefferson H. Broady, and Elwood B. Chappell, sitting *en banc,* upon regular submission of the suit now before us on appeal, found that the petition contained the names of at least 20 per cent. of such qualified electors, as required by law, and that the election "was without fraud or mistake either on the part of the board of trustees or the election board." From the judgment so rendered the relators have appealed to this court.

The proceeding herein comes under the provisions of section 3790, Comp. St. 1922, which reads:

"Whenever a city of the second class or village adjoins a city of the first class having a population of more than forty thousand (40,000) and less than one hundred thousand (100,000), as well as other villages adjoining such city of the second class or villages or supplied in whole or in part with gas or with electric light or with street car service or supply from manufacturing or power plants and systems mainly located in and maintained and operated mainly from chief headquarters or offices within such city of the first class having a population of more then forty thousand (40,000) and less than one hundred thousand (100,000), then it shall be the duty of the officers of such cities of the second class and villages twenty days prior to such general city or village election to submit to the electors thereof at the first general city or village election after this act takes effect, and thereafter at any general city or village election whenever petitioned so to do by twenty per cent. of the qualified electors thereof, the question of the consolidation of such adjoining cities or villages with the city of the first class having a population of forty thousand (40,000) and less than one hundred thousand (100,000). Such question shall be submitted in substantially the following form, to wit:

" 'Shall the city of ——— be consolidated with the city of ——— having a population of forty thousand (40,000) and less than one hundred thousand (100,000)' or as the case may be 'shall the village of ——— be consolidated with the city of ———.'

"The ballot shall provide in the usual manner for a 'yes' and 'no' vote on the question."

On behalf of the relators a resident of College View testified that he was present when the petition for consolidation was submitted to the members of the village board and that at the time he informed the board that more than 67 of the persons whose names were written on the petition did not themselves sign the petition but that their names were written thereon, in some instances, by their wives, or by some other person without their knowledge or consent. This witness also testified that in his opinion the voting

population of College View at the time in question here consisted of about 2,500 persons and that the number of names on the petition was insufficient in that it was less than 20 per cent. of the qualified electors. He further testified that at the time the votes were counted he was ordered from the room and that, although the polls were closed at 8 o'clock, people were turned away from the polling booths at 7 o'clock and only those already in line were permitted to vote. Another witness, called by the relators, testified that at the election he made no objection to any of the proceedings nor did he hear any other person taking exceptions thereto.

From the evidence of the chairman of the board of trustees, who was called on the part of the respondents, it appears that, when the petition was considered, there was no objection made by any member as to its sufficiency. To substantially the same effect is the evidence of four or five others who were present at the board meeting. And the village clerk of College View certified that the petition contained 324 genuine signatures, and that such signatures represented 20 per cent. or more of the qualified electors of College View and that the petition was presented more than twenty days before the election as required by the statute.

An election judge who has been a resident of College View eight years testified that, as such election judge, he was present from the time the polls opened until they closed; that no ballots were misplaced nor were any destroyed; that when the polls closed the votes were counted and that 1057 votes were cast and the tally was correct and that, although the polls were closed at 7 o'clock, the line of people already there at the time were still voting at 8 o'clock. In respect of an incident wherein one witness complained that he was ordered from the room, this election judge testified that the witness was merely asked to step behind a railing so as not to interfere with the board in the counting of the ballots. And he denied that the election board, as charged, went away at any time and left the ballots uncounted at the polling place. Other members of

the election board testified to substantially the same facts. And one member of the board testified that about fifty people were present and watched the counting of the ballots and that no complaint was made at the time by anyone of any irregularities in the proceedings.

The relators offered in evidence an exhibit which purports to be a list of over 2,300 names of qualified College View electors, but on rebuttal this exhibit was withdrawn and another offered on which only 1,878 names were listed. The respondents, however, offered exhibits wherein it is clearly shown that there was only a total of 1,268 adult inhabitants resident in College View, at all times material to this suit, and without regard to their qualifications as voters. There is evidence tending to prove that a considerable number of fictitious signatures appeared on the relators' list of submitted names. To illustrate: One witness testified that his daughter was listed as a voter when in fact she had been away from College View four years and had never voted there. And it was disclosed that the names of school children and some deceased persons were all listed thereon as voters. The census taken by the respondents, however, discloses that a house to house canvass was made and, according to the evidence of the resident citizens who made the canvass, every adult inhabitant of the village was recorded and the total number, as noted above, disclosed only 1,268 adult inhabitants. In respect of the relators' list of inhabitants it totaled a much larger number, as above noted, inaccuracies occurred therein and in some instances names were duplicated and in others the names of persons who were deceased or had moved away were noted as voters.

In the decree rendered and subscribed by the three sitting judges to whom the case herein was submitted, *State v. Houston*, 94 Neb. 445, is therein cited wherein this language is used:

"The city clerk is required to ascertain and declare whether the requisite number of qualified signers have signed the petition for a recall election, and, in the absence of fraud or mistake, his determination thereof is not subject to review."

"The rule of law is that, where any official body or tribunal, such as a city council, is given authority to hear and determine any question, its determination is, in effect, a judgment having all the properties of a judgment pronounced by a legally created court of limited jurisdiction." *People v. Ellis,* 253 Ill. 369.

It does not appear to us that, in cases that may be pronounced political in trend or character, the extreme ultraniceties of technical rules of construction should be applied. In a somewhat similar case in California, the court said:

"We are of the opinion that the trend of both recent legislation and decision has been toward a relaxation of this rigid rule in respect to the procedure before official bodies chiefly political in their character and powers and only occasionally exercising judicial functions." *Wolfskill v. City Council of Los Angeles,* 178 Cal. 610.

The cited rule appears to be applicable to the facts in the present case. Where a petition is submitted to a village board and contains the statutory signatures of 20 per cent. of the electors of such village, and the proposition therein contained is subsequently voted upon and carried by a majority of the voters at an election held therefor, the action of the city council, in the absence of fraud or mistake, in passing upon the validity of the proceedings is final.

"Municipal corporations are created for the public good; are demanded by the wants of the community; and the law, after the long continued use of corporate powers, and the acquiesence of the public in them, will indulge in presumptions in support of their legal existence." *Jameson v. The People,* 16 Ill. 257.

In respect of the objections urged by the relators, it appears to us that they were properly passed upon by the three learned trial judges at the hearing, and we are unable to discover reversible error in the conclusions at which they arrived and the judgment rendered pursuant thereto.

The judgment is

AFFIRMED.

AK-SAR-BEN EXPOSITION COMPANY, APPELLEE, V. C. A. SORENSEN, ATTORNEY GENERAL, ET AL., APPELLANTS.

FILED FEBRUARY 7, 1930. No. 27172.

1. **Injunction:** SETTING ASIDE. A default and a resulting perpetual injunction may be set aside upon a motion supported by the tender of an answer stating a complete defense to the petition and sufficient evidence that defendant's failure to plead on or before the answer day was the result of excusable neglect on his part.
2. **Appeal:** DEFAULT: ABUSE OF DISCRETION. A final order that is the result of a district court's abuse of discretion in overruling a motion to set aside a default may be reversed on appeal to the supreme court.
3. **Injunction:** DEFAULT: ABUSE OF DISCRETION. Evidence outlined in opinion *held* sufficient to show an abuse of discretion by the trial court in overruling a motion to set aside a default and a resulting perpetual injunction.

APPEAL from the district court for Douglas county: JAMES M. FITZGERALD, JUDGE. *Reversed and cause retained until further order.*

*Irvin A. Stalmaster,* for appellants.

*Mullen & Morrissey, Herman Aye* and *Gaines, McGilton, Van Orsdel & Gaines, contra.*

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

ROSE, J.

This is a suit in equity for an injunction. Plaintiff is the Ak-Sar-Ben Exposition Company, a Nebraska corporation organized to promote agriculture, to improve the breeding of live stock, to develop dairying, and to conduct expositions, stock shows, fairs and other forms of public entertainment, including horse races. Plaintiff maintains exposition grounds and buildings and a race track in Douglas county, at Omaha. Defendants are C. A. Sorensen, attorney general of Nebraska, whose residence and public office are in Lincoln, Lancaster county, and Henry J. Beal,

county attorney of Douglas county, whose residence and public office are in Omaha, Douglas county.

The petition describes the Ak-Sar-Ben Exposition Company, its incorporation, its purposes, its powers, its property, its obligations, its sources of income and its means of serving and entertaining the public without profit to itself, and contains other allegations to the following effect: Plaintiff is conducting horse races at its track in Douglas county. The present race meeting opened May 31, 1929, and plaintiff planned to continue it on week days up to and including July 4, 1929. To procure horses therefor plaintiff obligated itself for purses aggregating $165,000 and requiring daily disbursements of approximately $5,500. In raising and disbursing funds for purses and in conducting the races plaintiff alleges that it conforms to chapter 159, Laws of 1921, a Nebraska statute authorizing horse races, creating the state racing commission and providing, among other things:

"Any association or corporation, person or persons, or the owners of the horses engaged in such races, or others may contribute to purses or funds that shall be distributed on the basis of the result of the races, or prizes or stakes that are to be contested for, subject to the rules and regulations as fixed by the commission governing such contests. The intent and purpose of this act is that all horse racing held in the state shall be subject to the rules, regulations and control of said racing commission." Laws 1921, ch. 159, sec. 3; Comp. St. 1922, sec. 194.

In addition to the foregoing allegations, as outlined from the petition, plaintiff states in substance: Its sources of revenue are gate receipts, concessions and contributions to the purses and funds that are to be "distributed on the basis of the result of the races," the latter being the principal source of revenue. Contributions are made and disbursed pursuant to law under the rules, regulations and control of the state racing commission. Allegations summarized are followed by a paragraph of which the following is a copy:

"That the defendant, C. A. Sorensen, is the duly elected, qualified, and acting attorney general of the state of Nebraska; that the defendant, Henry J. Beal, is the duly elected, qualified and acting county attorney of Douglas county, Nebraska; that, notwithstanding the provisions of the laws of the state of Nebraska, and in particular the provisions of chapter 159 of the Laws of Nebraska for 1921, and the facts heretofore alleged in this petition, the defendants are severally threatening and intending to proceed against the plaintiff, its officers, servants and agents, and by criminal prosecutions, by injunctions and other legal proceedings, to interfere with, impede, and prevent the plaintiff from carrying on its business and, in particular, to prevent the plaintiff from conducting its business in so far as relates to the raising of purses and the distribution of the proceeds of the contributions, made by patrons in the manner that it is now doing, and, in this way, to prevent the plaintiff from receiving revenue from those contributing to purses or funds that are to be distributed on the basis of the result of the races; that the defendants have notified the officers and agents of the plaintiff that, if they do not immediately stop the present method of raising purses and distributing the proceeds on the basis of the result of the races, criminal proceedings will be commenced against the officers and that injunctions and other legal proceedings will be commenced against the plaintiff and its officers; that this action on the part of defendants is based on the assumption that the Act of 1921 is unconstitutional and that the method adopted by the plaintiff, with reference to accepting contributions and distributing purses to those who win the races, is in violation of the provisions of the Constitution, in that, it is either a lottery, a gift enterprise or a game of chance. The plaintiff alleges that the method adopted by it is not a lottery, a gift enterprise, or a game of chance."

To prevent defendants from carrying out their alleged threats and from interfering with plaintiff's methods of raising and disbursing funds in connection with horse racing, relief by restraining order and by injunction was prayed.

Plaintiff's petition was filed in the district court for Douglas county June 6, 1929. On that date a summons commanding service on defendant C. A. Sorensen, attorney general, was directed to the sheriff of Lancaster county and another summons commanding service on defendant Henry J. Beal, county attorney, was directed to the sheriff of Douglas county. The same day, June 6, 1929, Honorable James M. Fitzgerald, one of the judges of the district court for Douglas county, allowed a restraining order conforming to the prayer of plaintiff's petition and fixing June 10, 1929, as the date for the hearing of an application for a temporary injunction. The summons for defendant Sorensen and the restraining order were served in Lancaster county June 6, 1929, and the summons for defendant Beal and the restraining order were served in Douglas county on that date. The answer day fixed by the summons issued to the sheriff of Lancaster county was July 8, 1929. July 9, 1929, the day next following the answer day, there being no pleading on behalf of either defendant on file, Judge Fitzgerald entered a default against both defendants, made findings in favor of plaintiff to the effect that the facts stated in the petition are true, and "that it is not a violation of the law of Nebraska to bet on the results of horse races," and granted a perpetual injunction conforming to the prayer of plaintiff's petition. At the same term of court, four days later, July 13, 1929, defendant Beal filed a motion to set aside the default and the perpetual injunction and to permit a defense to the suit. The motion was accompanied by a showing in favor of opening the judgment and by an answer stating a complete defense to the petition. The motion was overruled by Judge Fitzgerald. Defendant Beal appealed to the supreme court.

The appeal presents for review the order overruling the motion to set aside the default, to open the decree granting the perpetual injunction and to permit a defense. Did the trial judge abuse his discretion and err to the prejudice of defendants? The determination of the question requires consideration of the petition, the motion, the showing, the

answer tendered with the motion, the entire proceedings resulting in the entry of the decree in equity and the evidence adduced on both sides of the controversy arising from the default.

According to the motion the delay in pleading to the petition on or before the answer day was attributable to plaintiff's failure to comply with a mutual understanding among counsel to take up the cause by agreement. Plaintiff resisted this ground of the motion, insisting that there was no agreement to postpone the hearing on the merits of the case and that there was no consent for delay that did not apply alone to a hearing on the application for a temporary injunction at the time fixed therefor by the district court, which was June 10, 1929. Two of plaintiff's counsel testified in effect that there was no agreement or mutual understanding to postpone a hearing on the merits of the case. Accepting this testimony without question, the evidence nevertheless tends to prove the following facts: By telephone at different times before answer day counsel for plaintiff conversed with the attorney general about the case. Neither plaintiff nor defendants asked for a hearing on the application for a temporary injunction June 10, 1929—the date fixed by the preliminary restraining order. The effect of such inaction on that date was to postpone the hearing for a temporary injunction. The nature of the pleading to be filed by the attorney general was mentioned in one of the conversations by telephone. By this means one of the counsel for plaintiff learned that the attorney general was undecided whether to demur or to answer and remarked that plaintiff could meet a demurrer without delay, but that an answer might require evidence and further time. By telephone these matters were subjects of conversation between counsel for plaintiff and the attorney general and were thus discussed before the default was entered. In one of the conversations by telephone the attorney general was informed there might be a contingency in which plaintiff itself would desire a brief postponement. The conversations by telephone, therefore, were not confined to the application

for a temporary injunction but extended beyond to pleadings relating to the merits of the case. No preliminary injunction was granted. While there was nothing in the conduct of plaintiff or its counsel to indicate bad faith on their part or an intention to mislead defendants into a failure to plead on or before the answer day, there were reason and authority to excuse the delay, when all the circumstances are considered.

The petition for a permanent injunction indicated the attorney general was of the opinion that plaintiff was operating a criminal lottery in connection with horse racing. In that petition plaintiff did not specifically explain to the court its principal method of raising and disbursing funds for the horse races. In the petition, however, plaintiff did make it clear that the attorney general did not agree to the alleged legality of the Ak-Sar-Ben's principal method of raising and disbursing money to support the horse races. The evidence before Judge Fitzgerald on the application for a perpetual injunction by default showed that the attorney general asked plaintiff to abandon that method, and, in the event of its failure to do so, expressed a purpose to interfere by invoking the processes of the law. A defense to plaintiff's suit in equity would be in harmony with the avowed purpose of the attorney general to enforce the laws against lotteries and gambling, as the chief law officer of the state understood those laws. A premise on which the petition for a perpetual injunction was based was the intention or threat of the attorney general to put a stop to the Ak-Sar-Ben's principal method of raising and disbursing money to continue the horse races. Equity may recognize a valid excuse, therefore, for the failure of defendants to plead to the petition on or before the answer day. Counsel for defendants, with convincing reason, as the record is viewed by the appellate court, relied in good faith, though mistakenly, upon what he supposed was an understanding that the case would not be taken up in his absence without his knowledge. A salutary precept has been stated in this form:

"Equity may relieve a party from a judgment taken against him through his excusable neglect." 34 C. J. 464, sec. 730.

This is a rule of equity in Nebraska. *Klabunde v. Byron Reed Co.*, 69 Neb. 126; *Arnout v. Chadwick*, 74 Neb. 620; *State v. Omaha Country Club*, 78 Neb. 178; *Johnson v. Samuelson*, 82 Neb. 201. Under all the circumstances, as they are presented by the record, it seems clear that the attorney general was convinced the suit would not be taken up in his absence without his knowledge, though a specific agreement to that effect had not been closed.

Counsel for plaintiff argued on appeal that it is lawful in Nebraska to bet on horse races and reminded the reviewing court that it is a serious matter to interfere with legitimate methods of raising and disbursing money to meet lawful obligations created by contract. It may be added that it is another serious matter to grant a perpetual injunction to prevent the attorney general of the state from enforcing the laws against gambling and lotteries—laws affecting the morals and pecuniary interests of the public as well as of the plaintiff in equity. When both of those propositions are, in good faith, involved in the same equitable controversy, it is important for the chancellor to discover the real meaning of the law and also the particular facts that control the issues. In granting the perpetual injunction Judge Fitzgerald heard one side only.

In rendering a final decree on an application for a perpetual injunction in a momentous cause affecting both public and private interests, the conscience of a chancellor will generally be better prepared to respond wisely to the promptings of equity and justice after listening attentively to forensic expositions of the law and to deliberate discussions of proved or conceded facts from the standpoint of each side of the controversy.

In the present instance the door to a defense was erroneously closed against defendants. The conclusion is unanimous that they were entitled to an order setting aside the default and the perpetual injunction on the ground of ex-

cusable neglect. The failure to set aside the default and the resulting decree was a manifest abuse of discretion for which the judgment below must be reversed.

It was further insisted by defendants that the default and the perpetual injunction should have been set aside because the petition of plaintiff did not state facts sufficient to constitute a cause of action; because the summons served in Lancaster county was void, leaving the district court without jurisdiction over the attorney general; because defendant Beal was a nominal defendant who never made any of the threats pleaded in the petition; because Judge Fitzgerald, contrary to the rules of the district court, took the cause away from Judge Dineen, to whom it had been regularly assigned for trial. Discussion of these additional grounds is unnecessary for the reason that the default and the decree granting the perpetual injunction must be set aside on the ground already considered.

The default and the decree granting the perpetual injunction are reversed and the cause will be retained in the supreme court to await the final judgment in *State v. Ak-Sar-Ben Exposition Co.*, 118 Neb. 851; the two cases having been consolidated by a former order.

REVERSED.

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CARL C. PETERSON, APPELLEE, V. AUGUST MILLNITZ, APPELLANT.

FILED FEBRUARY 7, 1930. No. 27008.

1. Negligence: COMPARATIVE NEGLIGENCE. Where it is disclosed in an action for personal injuries that the plaintiff was guilty of contributory negligence, he cannot recover unless his negligence is shown to be slight in comparison with that of the defendant.
2. ———: AUTOMOBILES: STREET INTERSECTIONS: DUTY OF PEDESTRIANS. A pedestrian, attempting to cross diagonally an intersection of public streets where motor vehicles may be expected to approach from four different directions at the same time, is required to look in every direction.

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

*Brown, Fitch & West* and *G. F. Nye,* for appellant.

*George M. Harrington* and *M. F. Harrington, contra.*

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

DEAN, J.

Carl C. Peterson, plaintiff, sued in the district court for Pierce county to recover damages for personal injuries sustained when he was struck by an automobile which he alleges was negligently driven by August Millnitz, defendant, July 20, 1927. The jury returned a verdict for $3,750 for plaintiff, upon which a judgment was rendered. Defendant has appealed.

Plaintiff was a man of middle-age at the time. He testified that at or about noon of the day in question here, he was walking toward his home in Plainview, accompanied by Howard Shacklett, a Burlington section foreman. It appears from plaintiff's evidence that he and Shacklett were walking north and that when they reached the street intersection Shacklett continued to walk to the north, but that the plaintiff started to walk across the street in a diagonal direction, and that he looked up just as he started to go across and saw defendant's automobile approaching. On the cross-examination, the plaintiff testified in respect of the accident: "Q. It (the car) was coming toward you and zigzagging and you started to walk diagonally northwest and never thought of it from that time on. Is that right? A. Yes. Q. You did not see this car that went north? A. No. Q. You did not hear the horn blow, did you? A. No. Q. And you were well out in the intersection when you were hit, were you not? A. About five or six steps out, so far as I know. Q. Well, you heard Mr. Shacklett testify here that, when he left, you turned and went due west and then started to cut the corner? A. Yes; but I don't think I did. Q. You say that you started to go kitty-

cornered immediately? A. Yes, sir. Q. You did not go west and then start? A. No. * * * Q. There was nothing about the speed of the car as it came toward you that attracted your attention, was there? A. No, sir. * * * Q. Where was his (defendant's) car when you first saw it with reference to that north and south street a block east? A. About over in the other street. Q. That is a block east? A. Yes."

From plaintiff's evidence it appears that the collision threw him under the car and that he was dragged about half the width of the street intersection and for a time he was rendered unconscious. He was removed to a hospital where he remained five or six weeks and afterward he got about on crutches.

Defendant testified that when the accident happened he was driving a Ford coupé at the rate of 10 or 12 miles an hour, and that he saw plaintiff near the center of the intersection and Shacklett on the sidewalk at the time. Defendant was driving west on the north side of the street until he approached the intersection. According to his evidence, in order to avoid a collision with a car approaching from the west, which turned north at the intersection, defendant was compelled to turn toward the south side of the street. He testified that no signal was given by the driver of the other car as to which direction he intended to turn. Defendant testified that he honked his automobile horn when he was fifty feet from the point of the accident and that plaintiff then turned toward the south and jumped backward and was struck by his car. Due to a recent rain, the record shows that the road was soft and muddy, and the impression of plaintiff's body which was dragged a considerable distance by defendant's car was plainly to be seen in the road. It may be noted that the condition of the road would have something to do with the required time for stopping the car.

From plaintiff's evidence it appears that he saw the defendant's car while it was yet a block away. At the time he was struck plaintiff was not on a crosswalk but was in

the intersection a short distance therefrom. And the evidence also discloses that, but for the approach of another car from the west, which suddenly turned to the north, defendant would have continued driving toward the west and would not suddenly have turned south to avoid a collision with the north-bound car. From the facts before us it appears that defendant was justified in making this turn. Plaintiff, however, was himself guilty of negligence in that he did not look both east and west to find out whether an automobile or other vehicle was approaching before he began walking diagonally out into the street. Plaintiff should have exercised even greater care and caution in crossing in this manner than in crossing at a pedestrian's crosswalk thereon.

The rule appears to be well settled in respect of actions for personal injuries in that, if the plaintiff is guilty of contributory negligence, he cannot recover damages unless his negligence is shown to be slight in comparison with that of the defendant. But where plaintiff's negligence is gross in comparison with the negligence of the defendant, such negligence will defeat a recovery. *Morrison v. Scotts Bluff County*, 104 Neb. 254; *Haffke v. Missouri P. R. Corporation*, 110 Neb. 125; *Allen v. Omaha & S. I. R. Co.*, 115 Neb. 221.

In one of the instructions the court informed the jury that the undisputed evidence disclosed that when the plaintiff was struck by defendant's car he, the defendant, was running his car on the south half of the street and some distance from the sidewalk, and that under such condition it was the duty of the plaintiff to be on the lookout for automobiles from the west, "but it was not his duty as a matter of law to be looking for an automobile coming from the east. He had the right to assume that automobiles coming from the east would be traveling on the north half of the street and not the south half." The foregoing instruction does not appear to us to be a correct statement of the law. In this day of high-powered automobiles, which traverse every village and every city street, a pedestrian cannot be said to be justified in failing to look in all directions for the

approach of automobiles before attempting to cross a street. And in this connection we think the court erred in giving the instruction of which complaint is made by the defendant.

In view of the facts and the law applicable thereto, we conclude that the judgment herein must be and it hereby is

REVERSED.

Note (2)—See 9 A. L. R. 1248; 44 A. L. R. 1299; 3 L. R. A. n. s. 345; 20 L. R. A. n. s. 232; 38 L. R. A. n. s. 488; 42 L. R. A. n. s. 702; 2 R. C L. 1186.

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PORTER D. ASKEW ET AL., APPELLEES, V. C. R. SEXSON ET AL., APPELLEES: OSCAR H. HAHN, APPELLANT.

FILED FEBRUARY 7, 1930. No. 27017.

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

*Stiner & Boslaugh, Edmund Nuss* and *Walter M. Crow,* for appellant.

*James E. Addie, Bernard McNeny* and *O. E. Bozarth, contra.*

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

GOOD, J.

This is a proceeding to revive a dormant judgment. The pleadings, the evidence and the order of revivor entered are in all respects similar to those disclosed in *Orchard & Wilhelm Co. v. Sexson,* p. 370, *post,* save that the order of revivor was against but two defendants and for an aliquot part of the judgment as to each of the two.

For the reasons given in *Orchard & Wilhelm Co. v. Sexson, supra,* the judgment of the district court is reversed and the cause remanded, with directions to enter an order reviving the judgment in its entirety, as it existed at the time of the assignment thereof to the applicant Hahn.

REVERSED.

ORCHARD & WILHELM COMPANY ET AL., APPELLEES, V. C. R. SEXSON ET AL., APPELLEES: OSCAR H. HAHN, APPELLANT.

FILED FEBRUARY 7, 1930. NO. 27018.

1. **Judgment:** REVIVOR. Section 8982, Comp. St. 1922, authorizes a proceeding to revive a dormant judgment to be instituted at any time within ten years after dormancy occurs.
2. ———: CONTRIBUTION. Where a judgment is rendered against two or more defendants and wherein it is adjudicated that, as between or among them, each defendant is primarily liable for an aliquot part of the judgment, and, as to the remainder, is a surety for the other defendants, any one of such defendants may pay to the judgment creditor the amount of the judgment and take an assignment thereof for the purpose of enforcing his adjudicated rights as against his codefendants. Under such circumstances, the payment of the judgment by one of the defendants does not operate to extinguish the judgment except in so far as the judgment creditor's rights are concerned.
3. ———: REVIVOR. Where, after assignment of a judgment, no part thereof has been paid, and the assignee is entitled to a revival thereof, it should be revived in its entirety as it existed at the time of the assignment.

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

*Stiner & Boslaugh, Edmund Nuss* and *Walter M. Crow*, for appellant.

*James E. Addie, Bernard McNeny* and *O. E. Bozarth, contra.*

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

GOOD, J.

This is a proceeding to revive a dormant judgment rendered against eight defendants. The proceeding was instituted by one of the judgment debtors who, before dormancy of the judgment, had paid the amount thereof to the judgment creditor and taken from the latter an assignment of the judgment. In this proceeding one of the judgment debtors had died and another was not served, so that the

proceeding was as against five of the judgment debtors. Of the five, one made default and four filed answers, alleging, as defenses, the statute of limitations, satisfaction of the judgment, and that payment by Hahn, the applicant for revivor, was a discharge of the judgment. A trial of the issues resulted in a judgment of revivor as to three of the defendants, each being held liable for one-fifth of the judgment. The applicant for revivor has appealed.

The original judgment was based upon a promissory note, executed by nine individuals, and represented money borrowed by them to be used in a common enterprise. It was agreed among the makers of the note that each should pay one-ninth thereof, and prior to the beginning of the suit on the note four of the makers had each paid his one-ninth part thereof. In the action upon the note all of the makers were named defendants. For some reason not appearing in the present record, judgment was rendered in favor of the holder of the note against only eight of the makers.

In the original judgment, among others, are the following findings: "That the signers of the note set out and described in the petition herein, and who are the defendants in this case, contracted and agreed *inter alia* that each should pay an equal aliquot part of said note and the indebtedness represented thereby, and that said agreement, contract and obligation of the parties should be recognized and enforced as between them, and that the defendants O. H. Hahn, A. J. Boren, F. B. Muffley and C. R. Sexson have each made such payments. That plaintiff is entitled to recover of and from each and all of the defendants herein said total amount found due the plaintiff as aforesaid, and the costs of this action, and the defendant or defendants paying and satisfying the judgment made, rendered and entered herein should and may have contribution between themselves and from the other defendants," etc. The judgment on the findings contains the following: "That the defendant or defendants paying said amount should and may have contribution from the other defendants or defendant, and that there should be contribution herein be-

tween the defendants in the event that any defendant pays more than his one-ninth part of said indebtedness."

After the judgment was rendered, execution was issued and was levied upon the lands of defendant Hahn. To prevent his property from being sold, he paid the amount of the judgment and took an assignment from the judgment creditor. This was done in December, 1922. Hahn apparently took no steps to enforce contribution under the judgment and permitted the judgment to become dormant; hence, the institution of this proceeding by him. It is apparent that, as agreed among the defendants, each was a principal to the extent of one-ninth part of the note, and surety for the other defendants as to the remaining eight-ninths thereof.

With reference to the defense, urged against revivor, that the judgment had been satisfied by a settlement and arrangement between Hahn and the other defendants, the evidence was somewhat conflicting, and the trial court found against the defense. An examination of the record convinces us that the finding is fully sustained by sufficient evidence and should not be disturbed.

With reference to the statute of limitations, section 8982, Comp. St. 1922, provides: "If a judgment become dormant, it may be revived in the same manner as is prescribed for reviving actions before judgment: Provided, no judgment shall be revived unless action to revive the same be commenced within ten years after such judgment became dormant." Prior to the enactment of this statute there was no limitation as to the time in which a judgment might be revived. Clearly, the statute gives a period of ten years after it becomes dormant in which to revive a judgment. The revivor proceeding here was begun within a few months after dormancy occurred and was not barred by the statute of limitations.

We next come to a consideration of the principal question raised, and that is whether or not, where two or more persons are liable, jointly upon a judgment, but where, as between or among the judgment debtors, each is a principal

for an aliquot part of the judgment and as to the other part is a surety for the other judgment debtors, one may pay the judgment and take an assignment thereof and keep the judgment alive so as to enforce contribution from his codefendants.

It has long been a rule that where a judgment was rendered against two or more defendants, who were jointly liable, a payment of the judgment by one of the debtors satisfied and extinguished the judgment, and if a right to contribution existed it could be enforced only in an independent action brought for that purpose. This rule is not applicable where the judgment pronounced, pursuant to statutory authority, determines the rights of the defendants *inter se* as to subrogation and contribution, in the event one of them is compelled to pay more than his proportionate part of the judgment. In the latter case, payment of the judgment to plaintiff, or his assignee, by one of the defendants operates to extinguish the judgment only in so far as it pertains to the rights of the judgment plaintiff. It does not operate to extinguish or satisfy the judgment in so far as it pertains to the adjudicated rights of defendants *inter se*. In fact, such a judgment is two-fold in character. It determines and adjudicates the rights between the plaintiff, on the one hand, and all the defendants, on the other. It also determines and adjudicates the rights of the several defendants as against each other. In such case, payment to the plaintiff by one of the defendants operates to extinguish the rights of plaintiff only. The judgment remains alive as a basis for the adjustment of the adjudicated rights of the defendants *inter se*. *Drexel v. Pusey*, 57 Neb. 30; *Nelson v. Webster*, 72 Neb. 332, 68 L. R. A. 513; *Danker v. Jacobs*, 79 Neb. 435; *Kramer v. Bankers Surety Co.*, 90 Neb. 301; Comp. St. 1922, sec. 8936; 32 Cyc. 34.

It follows that defendant Hahn, who had paid the judgment and taken an assignment thereof, was entitled to have it revived in its entirety, as it existed at the time he took the assignment. The trial court, in ordering a revival of part of the judgment as to certain of the defendants, did not

accord him the full relief to which he was entitled. It may be remarked that in this proceeding the extent to which Hahn may enforce his rights against his codefendants is not involved and is not here decided.

The judgment of the district court is reversed, and the cause remanded, with directions to enter an order reviving the judgment in its entirety, as it existed at the time of its assignment to Hahn.

REVERSED.

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STATE, EX REL. JAMES V. CHARVAT, APPELLEE, V. ANTON SAGL ET AL., APPELLANTS.

FILED FEBRUARY 14, 1930. No. 27144.

1. **Mandamus.** "A mandamus proceeding in Nebraska is an action at law." *State v. Farrington*, 86 Neb. 653.
2. **Corporations: INSPECTION OF BOOKS: RIGHT OF STOCKHOLDER.** At common law a stockholder has the right to inspect the books of a corporation at reasonable times and for proper purposes. The Nebraska statutes are silent on that subject. Therefore, the common-law rule is in effect here and a stockholder has a right to inspect the books of a state bank at reasonable times and for proper purposes.
3. **Mandamus** is the proper form of remedy to enforce the right of a stockholder in a state bank to inspect the books and records of the corporation.
4. **Costs: ATTORNEYS' FEES.** "It is the practice in this state to allow the recovery of attorneys' fees only in such cases as are provided for by law, or where the uniform course of procedure has been to allow such recovery. As a general rule of practice in this state, attorneys' fees are allowed to the successful party in litigation only where such allowance is provided by statute." *Higgins v. Case Threshing Machine Co.*, 95 Neb. 3.

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

*Richard O. Johnson* and *Charles E. Matson*, for appellants.

*George I. Craven, contra.*

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

GOSS, C. J.

Respondents appeal from a final order, made May 11, 1929, allowing a peremptory writ of mandamus in favor of James V. Charvat, the relator. This writ commands the respondents to allow relator, "accompanied by an attorney and an accountant, or either or both," to examine all books and records of the bank since May 7, 1923, in any way relating to certain specified matters.

Relator's connection with the Farmers & Mechanics Bank of Havelock began in 1922. He was its president until the spring of 1926, when another Havelock bank was consolidated with it. He then became vice-president and director of the bank but ceased to be an active executive and moved to Milligan, Nebraska. About the middle of April, 1928, the bank became impaired and was closed until about May 1, 1928, and reorganized. Relator had owned about three-fifths of its 250 shares of stock. By the reorganization plan all of the shares were canceled and fresh money to the amount of $50,000 was paid in, partly by the former stockholders and partly by new ones, each furnishing two dollars for one of the par value. Relator paid in $1,000 and thereafter and at the time of trial owned five shares but ceased to be an officer. Incidentally, we were told by counsel on the oral argument that the bank was again taken over by the banking department late in June, 1929, and is now under the control of a receiver.

While relator was an officer of the bank, certain real properties were taken by the bank from time to time as security. Some of the titles, at least, were taken in relator's name and the property dealt with as to third parties as if it were his, but most, if not all, of the accounts kept on the bank records; so that, particularly as between the bank and himself, he was concerned as to the status of such accounts and in the securing and preservation of evidence to show that he was not acting for himself but as trustee for the bank in connection with these items. At the time of

the trial some, but not all, of these properties were in litigation.

It seems from the evidence that the bank gave him permission personally to examine the records and accounts of the bank, but when, on November 17, 1928, he orally requested to examine them with the aid of his attorney, and when, on November 23, 1929, a very complete written demand, shown in the evidence, was made on the bank to allow an examination, not only as to the specified trust items, heretofore referred to, but also "to ascertain and determine the true condition of the affairs of said Farmers & Mechanics Bank, Havelock, Nebraska, a corporation, and of the management of its business, the value and nature of said stockholder's interest thereon, and the manner, skill and fidelity with which his interests as a stockholder are and have been guarded and protected," the demands, in the terms in which they were put, were refused. The officers of the bank felt that, in the current nervous state of the customers of banks, an examination participated in by others than the relator might embarrass the bank. This suit followed upon its refusal and was tried on the pleadings supported by evidence.

"A mandamus proceeding in Nebraska is an action at law." *State v. Farrington*, 86 Neb. 653; *State v. Porter*, 90 Neb. 233; *State v. Farmers Irrigation District*, 116 Neb. 373. So a defeated party, in a mandamus proceeding, must file a motion for a new trial in the trial court in order to review facts upon which he was refused relief. Respondents duly filed their motion for new trial in the district court and it was overruled. The judgment of the district court from which respondents appealed carefully limited the right of inspection of the bank's records by relator, accompanied by an attorney and accountant, to those records having to do with the so-called trust matters. It specified the particular properties so involved. Indeed, it provided that any other information so obtained "which has no relation to said property and said causes of action shall not be disclosed to any person or persons whatsoever for any

purpose." The record shows no exception taken by the relator to this order by motion for a new trial or otherwise and shows no cross-appeal by him. So, while much of the briefs and oral arguments were devoted to the legal right of relator as a stockholder to an inspection of the records of the bank to ascertain the condition of the bank and the manner, generally, with which its officers have discharged their duties, we cannot give the relator any relief as to that part of the judgment which excluded him from an examination of the records of the bank generally. We shall consider that phase of the law only as to its effect on the relief the trial court actually granted him.

In some states the statutes provide specifically for inspection of the records of a corporation by a stockholder. Our statutes are silent on that subject.

At common law a stockholder has the right to inspect the books of a corporation at reasonable times and for proper purposes. Cook, Stock and Stockholders (3d ed.) sec. 511; 6 Thompson, Corporations (3d ed.) sec. 4525; cases in notes in 45 L. R. A. 446, and 20 L. R. A. n. s. 185; *Varney v. Baker*, 194 Mass. 239; *Klotz v. Pan-American Match Co.*, 221 Mass. 38; *Guthrie v. Harkness*, 199 U. S. 148; *Woodworth v. Old Second Nat. Bank*, 154 Mich. 459.

In *Guthrie v. Harkness, supra*, the United States supreme court affirmed a judgment of the supreme court of Utah, ordering a national bank to allow a stockholder of the bank to inspect the books, saying: "The possibility of the abuse of a legal right affords no ground for its denial, and while an examination of the books of a corporation should not be granted for speculative or improper purposes, it should not be denied when asked for legitimate purposes;" and "There can be no question that the decisive weight of American authority recognizes the common-law right of the shareholder, for proper purposes and under reasonable regulations as to time and place, to inspect the books of the corporation of which he is a member;" and, again, "The right of inspection rests upon the proposition that those in charge in the corporation are merely the agents of the stockholders who are the real owners of the property."

We are of the opinion that the common-law rule that a stockholder has the right to inspect the books of a state bank at reasonable times and for proper purposes is in effect here.

It is suggested that, because the trial court refused to allow relator to inspect all the books of the bank and limited the inspection to those involved or to be involved in questions arising out of his relations with trust properties where the interests of the bank and of third parties were concerned, the trial court erred. Under the common-law rule he might, under certain circumstances, have been entitled to see all the books. We are not deciding that point here. But it would seem reasonable to say that, if he were entitled to all that was in fact allowed him, he ought not to be penalized for asking more than the district court found he was entitled to. The late Judge Deemer stated this to be the rule, and we adopt it: "The fact that a stockholder, in demanding permission to inspect the books of the corporation, asked for some that he was not entitled to see, does not justify a refusal to permit him to see any of the books." *Ellsworth v. Dorwart*, 95 Ia. 108.

It is also argued that the trial court erred in ordering that relator's attorney and accountant might aid him. On that point the case last cited announced: "A stockholder is entitled to have his attorney and stenographer accompany him and aid him when he decides to examine the books of a corporation." Assuming the good faith and conduct of the relator and of his attorney, as found by the district court, and that the examination would so proceed as not to interfere with the business of the bank, we think the order of the court was proper in that respect.

One of the chief points stressed by the bank is that mandamus is not the proper remedy. Under section 9224, Comp. St. 1922, the writ may issue to any "corporation, board or person, to compel the performance of any act which the law specially enjoins as a duty resulting from an office, trust or station." Long ago the law progressed past the point where the writ was exercised only against

those engaged in governmental affairs. It is necessary to refer only, among a multitude of cases that might be cited, to those cases, heretofore quoted, where mandamus was the form involved. Section 9225, Comp. St. 1922, provides: "This writ may not be issued in any case where there is a plain and adequate remedy in the ordinary course of the law." It is argued that the relator had an adequate remedy at law in his power to take the depositions of those in charge of the records of the bank and in the power granted under section 8901, Comp. St. 1922, and following sections, relating to the inspection and copy of books and papers. But these remedies are of value only in a pending case and between the parties thereto. Even there their practical adequacy is often demonstrably ineffective. For the purposes of discovering the true status of the accounts of the bank and of enabling the relator to allege or to prove them with certainty, the method by deposition or by section 8901 is inadequate. The remedy afforded by a bill of discovery is no longer in use in this state. The statutory procedure for the perpetuation of testimony would not avail in the circumstances involved here. There was no plain and adequate remedy at law, as contemplated in the statute, so as to prevent relator from resorting to mandamus.

Respondents cite *Cincinnati Volksblatt Co. v. Hoffmeister*, 62 Ohio St. 189, as authority that mandamus is not the proper remedy here but that injunction should have been used, as it was there. The Ohio mandamus statute is like ours; but the court held: "Injunction is the proper form of remedy to enforce the right of a stockholder in a private corporation, given by section 3254, Revised Statutes, to inspect the books and records of the corporation." The court thereupon affirmed a judgment enjoining the publishing company from preventing its stockholders from inspecting its books. We have no such statute as that of Ohio, expressly granting such inspection. It might be noted that the court in that case held further that "as incident to such right is the right to have such inspection by a proper agent, and to take copies from such books and records,"

although such right was not expressly set forth in the statute.

On the trial, under the authority of section 9233, Comp. St. 1922, the court took evidence as to damages and the peremptory writ contained a judgment for relator against respondents for $1,040 damages, "$1,000 of which is allowed as a reasonable attorney's fee for plaintiff's attorney, and $40 of which is other damages which plaintiff has sustained." There is evidence to justify both of these amounts; but the item for the damages on account of the fee for the attorney is challenged by the respondents on the ground that the law does not permit it to be considered as an element of damages.

It has been repeatedly held in this court that, since the attorney fee law was repealed by an act in effect as of June 1, 1879, a provision in a note for such a fee is invalid. *Security Company v. Eyer*, 36 Neb. 507, and cases there cited. In tort actions, except where specifically provided by statute, attorney's fees are not recoverable. *Winkler v. Roeder*, 23 Neb. 706. In *Higgins v. Case Threshing Machine Co.*, 95 Neb. 3, Reese, C. J., said for the court: "It is the practice in this state to allow the recovery of attorneys' fees only in such cases as are provided for by law, or where the uniform course of procedure has been to allow such recovery. As a general rule of practice in this state, attorneys' fees are allowed to the successful party in litigation only where such allowance is provided by statute." Relator has cited no statute or decision of this court, nor do we know of any, authorizing the allowance of the fee in the instant case. In that respect the judgment of the district court is erroneous.

For the reasons stated, the judgment of the district court is modified to the extent of eliminating the attorney fee of $1,000 allowed the relator therein, and as thus modified the judgment is affirmed.

AFFIRMED AS MODIFIED.

ELLEN MARIE ANDERSON ET AL., APPELLANTS, V. HELEN ANDERSON ET AL., APPELLEES.

FILED FEBRUARY 14, 1930. No. 26989.

Wills: DEVISE: CONSTRUCTION. The words "I give and bequeath to my beloved wife Helen Anderson all my property of which I may be possessed real and personal after my death as long as she shall remain widow, if she should marry my property is to go to my children share and share alike except as to her dower of which I have no control," under the circumstances of this case, vest in the devisee a determinable fee and not a conditional life estate.

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

*Frank S. Howell, O'Brien & Powers, Perry, Van Pelt & Marti* and *Richard S. Horton,* for appellants.

*Carl E. Herring, contra.*

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

EBERLY, J.

The controlling question in this case is whether a life estate or a determinable fee is created by the following language employed in the last will of Gustave Anderson: "I give and bequeath to my beloved wife Helen Anderson all my property of which I may be possessed real and personal after my death as long as she shall remain widow, if she should marry my property is to go to my children share and share alike except as to her dower of which I have no control."

Gustave Anderson died October 2, 1911, leaving him surviving his wife, the devisee named above, and two sons, William G. Anderson and George O. Anderson. On December 22, 1924, the son William G. Anderson died intestate, without issue, leaving his widow, Ellen Marie Anderson, who is plaintiff herein, and his mother, Helen Anderson. The city of Omaha in widening Twentieth street appropriated a portion of the land thus devised, and thereupon

the plaintiff brought an action enjoining the city of Omaha from paying the proceeds of the condemnation proceedings to the widow, Helen Anderson, as the sole owner, contending that the widow's estate under the terms of the will already quoted was limited to a life estate only, and that the fee title at the death of Gustave Anderson vested in the children, William G. Anderson and George O. Anderson, subject to the widow's life estate. After the commencement of this action Helen Anderson died testate, without having remarried. The district court, so far as the controlling question presented here is concerned, found in favor of the widow, adjudging that she took a determinable fee. The reasoning of the district court in support of this conclusion is as follows:

"The essential question in this case is whether Helen Anderson took a conditional life estate as plaintiffs assert, or a determinable fee in her husband's real estate by the following terms in the latter's will: (Already set forth herein.) Nebraska law (Comp. St. 1922, secs. 5590, 5591) provides that no technical words of inheritance shall be necessary to create an estate in fee simple, and every conveyance of real estate shall pass all the grantor's interest, unless a contrary intent can be reasonably inferred from the terms used. The words of the will would carry a conditional fee estate. To limit the devisee's interest to a life estate, under the construction called for by the above mentioned statute, would require either an express devise for life only or that the limitation over apply in terms in 'devisee's death' as well as on her marriage. Neither appears in the will unless it could be found in the words 'as long as she shall remain widow.' In view of the limitation over it cannot be said that the testator meant that in any event these words should limit her to a life estate. The court finds that testator intended a conditional fee should pass to the wife, subject to be defeated if she should marry."

It is to be noted that the trial judge in arriving at the conclusion stated follows the course of reasoning pursued by Chief Justice Maxwell in *Little v. Giles*, 25 Neb. 313. In

the case last referred to, the will, among other provisions, contained the following: "To my beloved wife, Editha J. Dawson, I give and bequeath all my estate, real and personal, of which I may die seised, the same to remain hers * * * so long as she shall remain my widow." It is also to be noted that this will by its terms vested full powers of disposition and conveyance in the widow, so the question here controlling was necessarily coupled with that fact in the case now under consideration. In discussing the effect of the language "so long as she shall remain my widow" Chief Justice Maxwell stated:

"At common law, in order to devise lands to another in fee, it was necessary to use words of inheritance, or equivalent words, showing an intention to give such estate; and a mere devise of real estate without words of inheritance gave the devisee only a life estate.

" 'The proper and technical mode of limiting an estate in fee simple is to give the property to the devisee and his heirs, or to him, his heirs and assigns forever; but such an estate may, even under a will made before 1838, be created by any expressions, however informal, which denote the intention.' 3 Jarman, Wills (5 Am. ed.) p. 30 *et seq.* See *Dew v. Kuehn,* 64 Wis. 293. The presumption at common law is, that only a life estate was intended to be devised, unless words of inheritance or words of like import were used.

"The construction of the will in question by the United States supreme court (*Giles v. Little,* 104 U. S. 291) under the common law, had that controlled the case, therefore, no doubt was correct.

"The common-law rule, however, has been changed in this state in two important particulars: First, 'The term "heirs," or other technical words of inheritance, shall not be necessary to create or convey an estate in fee simple.' Comp. St., ch. 73, sec. 49. And second, 'Every devise of land in any will hereafter made shall be construed to convey all the estate of the devisor therein which he could lawfully devise, unless it shall clearly appear by the will that the

devisor intended to convey a less estate.' Comp. St. ch. 23, sec. 124.

"The first of these sections is not referred to in the opinion of the United States supreme court, and probably the court's attention was not called to it, and the latter section was by mistake, no doubt, copied incorrectly, the word 'clearly' being omitted. *Giles v. Little,* 104 U. S. 291, 299. Mr. Justice Wood, therefore, in writing the opinion, gave no weight to the section whatever."

After a discussion of the decisions relating to the terms of the statute, heretofore quoted, Chief Justice Maxwell then states that the application of these statutory rules rendered necessary the conclusion that "no one will contend that it clearly appears from the above language that the testator did not intend to devise the fee." The point is covered in the syllabus of the case in the following language: "At common law a devise of real estate, in order to convey the fee, must contain words of inheritance or perpetuity, but under the statutes of this state such words are not necessary to convey the fee, and every devise of land is to be construed to convey all of the estate of the devisor therein, unless it shall clearly appear by the will that the devisor intended to convey a less estate." It is to be remembered that in the case of *Giles v. Little,* 104 U. S. 291, the supreme court of the United States had construed the identical will under consideration by this court in *Little v. Giles,* 25 Neb. 313, and announced its conclusion in the following language: "We have no doubt about the true construction of this will. Edith J. Dawson took under it an estate for life in the testator's lands, subject to be divested on her ceasing to be his widow, with power to convey her qualified life estate only. Her estate in the land and that of her grantees determined on her marriage with Pickering."

In point of time the case of *Little v. Giles,* 25 Neb. 313, was followed and approved when the identical will again came before the supreme court of the United States in the case of *Roberts v. Lewis,* 153 U. S. 367, wherein the United States supreme court overruled their former decision in

*Giles v. Little,* 104 U. S. 291, and announced its conclusion, so far as it related to the nature of the estate vested under the terms of the will in the widow, in the following language:

"By the statutes of Nebraska, 'Every devise of land in any will hereafter made shall be construed to convey all the estate of the devisor therein which he could lawfully devise, unless it shall clearly appear by the will that the devisor intended to convey a less estate;' and 'the term "heirs," or other technical words of inheritance, shall not be necessary to create or convey an estate in fee simple.' Nebraska Comp. St., ch. 23, sec. 124; ch. 73, sec. 49.

"In the opinion delivered by this court in a former case between different parties, and concerning other land, the second of those sections was not referred to, and the first was imperfectly quoted (omitting the word 'clearly' before 'appear') and was treated as of no weight; and it was held, reversing the decision of Judge McCrary in 2 McCrary, 370, that by the true construction of the will the widow 'took under it an estate for life in the testator's lands, subject to be divested on her ceasing to be his widow, with power to convey her qualified life estate only;' and that 'her estate in the land and that of her grantees determined on her marriage with Pickering.' *Giles v. Little,* 104 U. S. 299, 300.

"The supreme court of Nebraska, in a subsequent case (referring to *Little v. Giles,* 25 Neb. 313), considered those sections of the statute as controlling the construction of the will, and making it clear that the widow took an estate in fee."

It cannot be denied that one of the cardinal rules of construction, with respect to the will of Gustave Anderson now before us, is that all parts of the will are to be construed in relation to each other, and, so far as possible, to form one consistent whole. And it is also true that where two modes of construction are possible, as applied to a testamentary instrument, that is to be preferred which will prevent a total or even a partial intestacy. In fact,

this rule of construction is fully embodied in the Nebraska statute, already quoted, and the form of the will here presented also suggests the additional accepted rule of construction that the law favors early vesting of estates and prefers the first to the second taker.

A conclusion which is also fairly consistent with the terms of the Nebraska act quoted, on the subject of the proper construction of the language "as long as she shall remain widow," is discussed in Thompson, Construction of Wills, sec. 382, p. 515:

"The event of contingency which may be provided for the defeat of the qualified or defeasible fee may be the marriage of the first devisee. Thus, a devise in fee simple to testator's wife 'so long as she shall remain my widow' creates a condition subsequent, upon the happening of which the fee simple title is divested. Where a widow is given an estate defeasible by and in the event of her remarriage, her conveyance of the property so devised does not pass a fee to the grantee, but he takes subject to the liability that his estate will be cut down by the subsequent happening of the condition. Death of the widow without having remarried renders the condition ineffective, and the fee passes to her heirs. * * * Where the devise was to the wife of the testator with a provision that she should remain unmarried, but no provision was made for the disposition of the remainder after her death, she took a fee subject to the condition; but where the devise is to the wife 'so long as she remains my widow,' with a limitation over of the remainder 'after the remarriage' and also 'after the death' of the wife, she takes a life estate only."

The reasons above stated are consistent with the Nebraska cases of *Schminke v. Sinclair,* 100 Neb. 101, and *Worley v. Wimberly,* 99 Neb. 20, as it is to be noted in both of these cases there is a defeasance based upon the fact of the death of the devisee in addition to remarriage. This conclusion is also supported by the reasoning which appears in the cases of *Staack v. Detterding,* 182 Ia. 582, and *Jones v. Clyman,* 193 Ia. 1248.

It therefore follows that, under the terms of the Nebraska statutes and in view of the canons of construction applicable, we arrive at the conclusion in the instant case that the estate vested in the wife, under the terms of the will quoted, was a determinable fee, and that, as the devisee never married, the plaintiffs herein have wholly failed to establish a source of title which would vest them with an interest sufficient to maintain their action. The disposition of the case made by the district court is in all things correct and is

AFFIRMED.

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## GUARANTY FUND COMMISSION, APPELLANT, V. FRED TEICHMEIER ET AL., APPELLEES.

FILED FEBRUARY 14, 1930. No. 26870.

1. **Appeal: JUDGMENT: SUPERSEDAS: LIENS.** The general rule is that the effect of a supersedeas bond is to suspend proceedings, and preserve the *status quo* pending the determination of an appeal. This is true, in an equity case appealed to this court, wherein a reversal and not the supersedeas vacates the judgment. If, however, such a case is affirmed upon appeal, the judgment is a lien upon the lands and tenements of the debtor within the county wherein it was rendered, from the date of its rendition.
2. **Banks and Banking: INSOLVENCY: LIENS.** When the department of trade and commerce takes over a state bank, under the provisions of section 8033, Comp. St. 1922, as amended by section 12, ch. 30, Laws 1925, it impresses the assets of the bank with a statutory first lien for the benefit of the depositors and holders of exchange. Such action by the department of trade and commerce fixes the date of the lien, which is subject to valid existing liens upon the property of the bank.
3. **Appeal: INJUNCTION: FINAL ORDER.** A temporary injunction, continuing during the pleasure or judgment of the court, or until the happening of a future contingency, is not a final order and is therefore not appealable.

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

*H. G. Wellensiek* and *Perry, Van Pelt & Marti,* for appellant.

*T. T. Bell, contra.*

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

DAY, J.

This is an action in equity brought by the guaranty fund commission of the state of Nebraska to restrain the sale of property of the Farmers State Bank of Boelus, Nebraska, under an execution issued on a judgment rendered in favor of the defendant Teichmeier against said bank. From an adverse judgment, plaintiff appeals to this court.

There is no dispute as to the material facts in this case, and the record justifies the findings of fact of the trial judge, which are hereinafter set out in substance, since they so well explain the issues involved in this case. The court found that on October 26, 1926, Fred Teichmeier recovered a money judgment against the Farmers State Bank of Boelus, Nebraska, which was at that time a banking corporation, doing business at Boelus, in the state of Nebraska; thereafter, within the time provided by law, an appeal to the supreme court of the state of Nebraska was duly perfected by said bank and a supersedeas bond given; that thereafter such proceedings were had in said supreme court that said judgment was in all things affirmed, and a mandate was issued to the district court for Howard county, commanding said court to enforce said judgment; that said mandate was entered in the district court on March 26, 1928; that during the pendency of said appeal, to wit, on the 13th day of July, 1927, said Boelus bank was taken over by the department of trade and commerce of the state of Nebraska, and an agent of the state placed in charge thereof, all in accordance with section 7989, Comp. St. 1922; that said agent at all times since said 13th day of July, 1927, has been and is now in possession of said bank and its assets, as agent of the guaranty fund commission of the state of Nebraska; that on April 13, 1928, an execution,

issued out of the district court for Howard county, Nebraska, was placed in the hands of the sheriff of said county, and by him levied upon some real estate, the same being the banking house of said Farmers State Bank, and at the time of the bringing of the suit said sheriff was about to sell said real estate to satisfy said judgment. The court further found that more than a reasonable time had expired from the date the said bank was taken over by the guaranty fund commission to the date of the levy of the execution, to enable the guaranty fund commission to determine whether the bank should be turned back to the bank's officers or closed.

The court further found as a matter of law: "That upon the entry of the judgment against said bank on October 26, 1926, the defendants acquired a lien upon all the real estate of the Farmers State Bank of Boelus, Nebraska, in the county of Howard; that upon the perfecting of an appeal in the supreme court and giving of a supersedeas bond, said lien was suspended, but was not vacated; that, during all the time of the pendency of said cause in said supreme court, the defendants had a subsisting lien upon all of the real estate of said bank in Howard county, Nebraska, and now has such a lien; that any rights acquired in said real estate by any person or corporation, including the creditors of said bank and the department of trade and commerce of the state of Nebraska and its agents in charge during the pendency of said appeal, are subject and inferior to the defendants' said lien; that while said real estate is in the possession of the agent of the department of trade and commerce, under the provisions of said section 7989 of the 1922 Compiled Statutes of Nebraska, the defendants should not be permitted to sell said real estate."

In conformance to the above findings of fact and law, the court decreed that the defendant had a valid lien upon the real estate of the bank, situate in Howard county, Nebraska, superior to the rights of creditors of said bank; "that the temporary injunction heretofore issued herein restraining the sale of the banking house upon execution

to satisfy said judgment be continued until such time as the department of trade and commerce shall turn said bank and its assets over to its officers and directors;" that a permanent injunction is denied. From this decree both parties appeal.

The first question presented in this case is whether a judgment entered in an equity action from which an appeal is taken and a supersedeas bond given, which case under the statutes is to be tried *de novo,* continues as a lien against the judgment debtor's property. The rule is well settled in this state that a judgment rendered against a state bank while in the hands of the guaranty fund commission is not a lien against the real estate of said bank, and execution cannot be issued on said judgment. *Brownell v. Svoboda,* 118 Neb. 76. Therefore, if in this case the judgment does not attach to the land as a lien prior to the taking over of the bank by the guaranty fund commission, it is not superior to the statutory lien created thereby. However, the judgment having been rendered on October 26, 1926, the lien attached to the real estate of the bank prior to the taking over by the guaranty fund commission, unless the filing of a supersedeas bond and an appeal in an equity action vacates said judgment. The plaintiff cites the case of *Riley Bros. Co. v. Melia,* 3 Neb. (Unof.) 666, to support its contention. We are of the opinion that that case does not sustain such a theory. It is said in that case: "The perfecting of an appeal to this court from a decree of the district court in a suit in equity, together with the filing and approval of a supersedeas bond, operates to suspend such decree, and the case is thereupon pending here for trial *de novo.*" In the above case, the judgment had been recovered and upon appeal vacated by reversal of the action by the court, and the question involved was whether or not the decree that was entered by stipulation was in fact the decree of this court.

In so far as the language of *Riley Bros. Co. v. Melia, supra,* seems to hold that the filing of a supersedeas vacates the judgment of the trial court, which is afterwards affirmed

by this court, it is expressly overruled. We are of the opinion, however, that the above case was correctly disposed of and that the disposition was not in conflict with this opinion.

The only other cases cited to support this contention are cases involving an appeal from the county or justice courts to the district court. A trial *de novo* in this court means that the case will be tried upon the same pleadings and evidence upon which it was tried in the district court. There is a distinction between appeals from the county and justice courts to the district court and appeals from the district court to the supreme court. The former are governed by section 9406, Comp. St. 1922, which provides that the parties "shall proceed, in all respects, in the same manner as though the action had been originally instituted in this court." In *Oliver v. Lansing*, 57 Neb. 352, this court said: "When a judgment of the district court is reversed in an appellate proceeding it ceases, from the date of the reversal, to be a lien on the lands of the judgment debtor." And it is further said therein: "A person who purchases real estate burdened with the lien of a judgment will hold it discharged of such lien in case the judgment be afterwards reversed." The general rule is that the effect of a supersedeas bond is to suspend proceedings and preserve the *status quo* pending the determination of the appeal. It suspends all further proceedings on the judgment or decree appealed from, but does not, like a reversal of the judgment by this court, annul the judgment itself. If the case is affirmed, it is a lien, and if the case is reversed, it is not a lien. Under section 8986, Comp. St. 1922, as amended by chapter 59, Laws 1927, this judgment was at least a lien upon the lands and tenements of the bank located in Howard county from the date of its entry.

The second proposition for our consideration is whether or not section 8033, Comp. St. 1922, as amended by section 12, ch. 30, Laws 1925, gives depositors a first lien against the assets of the failed bank at the time of its closing as against the lien of a judgment creditor, which judgment

was secured prior to the taking over of the bank by the guaranty fund commission. This statute, so far as applicable to this case, reads as follows: "The claims of depositors, for deposits, not otherwise secured, and claims of holders of exchange, shall have priority over all other claims, except federal, state, county and municipal taxes, and subject to such taxes, shall at the time of the closing of a bank be a first lien on all the assets of the banking corporation from which they are due and thus under receivership, including the liability of stockholders, and, upon proof thereof, they shall be paid immediately out of the available cash in the hands of the receiver." We are unanimously of the opinion that it is clearly apparent that the legislature intended to give the claims of depositors and holders of exchange priority over all other claims and to fix them as a lien against the assets of the bank. It provides a statutory lien that attaches to the assets of the bank upon the taking over of the bank by the department of trade and commerce and the guaranty fund commission. The lien so acquired dates from the taking over, which in this case was July 13, 1927, and subsequent to the attaching of the judgment lien on October 26, 1926. Under this provision the guaranty fund commission act fixes a lien upon the assets of the bank for the depositors and holders of exchange upon the assets of the bank at the time of such taking over. We have held that the receiver of an insolvent bank takes and holds the assets, as to liens, rights, and liabilities, as they exist at the time of his appointment. *State v. Farmers & Merchants Bank*, 114 Neb. 378. The statutory lien provided for herein, therefore, attaches to the assets of the bank and the assets of the bank are limited to its interest in the property. Its interest in real estate is decreased by the amount of the valid subsisting liens upon the property. A mortgage upon its property given while a going concern limits the bank's interest in the real estate. It could not be said that the guaranty fund commission would take the property free of the lien of such a mortgage. Neither could it be said that a bank, while a going concern, which built a building

to be used as a banking house, could be taken over free of the liens of mechanics and material-men. Nor, if a bank, while a going concern, borrowed money upon a pledge of security, could the guaranty fund commission recover the security free of the lien created by such pledge. Yet all of these things would be true if we followed logically the reasoning of the plaintiff in this case. The department of trade and commerce and the guaranty fund commission took the assets of the Farmers State Bank of Boelus and impressed them with a lien for the benefit of depositors and holders of exchange, subject to and junior to the valid subsisting liens against said assets. The judgment of the defendants was, as the trial court properly held, such a lien.

The question presented to this court by the cross-appeal of plaintiff is whether the trial court should have decreed "that the temporary injunction heretofore issued herein restraining the sale of the banking house upon execution to satisfy said judgment be continued until such time as the department of trade and commerce shall turn said bank and its assets over to its officers and directors." This order was entered by the trial judge, on the theory that, while the real estate was in the possession of the department of trade and commerce and the guaranty fund commission, under the provisions of section 7989, Comp. St. 1922, the defendants should not be allowed to sell the property. It is elementary that in order to entitle one to appeal there must have been a final order or judgment rendered in the cause. This court has without exception held to this rule. Is the above order final? In *Huffman v. Rhodes*, 72 Neb. 57, this court said: "An order is not final when the substantial rights of the parties involved in the action remain undetermined and when the cause is retained for further action. In such a case, the order is interlocutory. When no further action of the court is required to dispose of the cause pending, the order becomes final and from which an appeal or proceedings in error will lie." In *Einspahr v. Smith*, 46 Neb. 138, this court said: "An order continuing in force during the pleasure of the court a temporary injunction theretofore

issued is not final, and is therefore, not appealable." The order complained of in this case is such an order continuing the temporary injunction during the pleasure of the court or upon the happening of a contingency. We cannot determine from the record whether or not this contingency has occurred. For aught the record discloses, this bank may have been returned to its officers or directors. It is an order continuing in force until a future changed condition or during the pleasure of the court, and is therefore not appealable. It leaves matters for further judicial determination of the trial court, and is therefore not a final order from which an appeal may be taken.

We have carefully examined the assignments of error and the record in this case; we find no reversible error, and the judgment of the trial court is therefore in all respects

AFFIRMED.

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FIRST NATIONAL BANK OF ALLIANCE, APPELLEE, V. WILLIAM NEWTON, APPELLANT: KEITH L. PIERCE ET AL., APPELLEES.

FILED FEBRUARY 21, 1930. No. 27048.

1. Trial: REQUEST FOR DIRECTED VERDICT. In a civil trial by jury where, at the close of the evidence, both plaintiff and defendant move the court to direct a verdict in their favor, they thereby submit the case to the court upon the issues of law arising upon the facts as the court finds those facts from the evidence.
2. Sales: CONDITIONAL SALE CONTRACT: RECORDING. A vendor or his assignee is not required to file a conditional sale contract in order to render it valid as against the vendee, who is a maker thereof; the purpose of filing the same when required by section 2464, Comp. St. 1922, is to make it valid as against "purchasers in good faith or judgment or attaching creditors without notice."
3. Bills and Notes: NEGOTIABILITY. A promissory note, regular in form, is not rendered nonnegotiable under the negotiable instruments law by the mere fact that, accompanying it and executed on the same sheet of paper by the maker of the note, there was a conditional sale contract, showing that the note was given by the maker to the payee for an automobile purchased by the maker from the payee and that the title, ownership and right of possession should not pass until "the above note" should be fully paid.

4. Venue: SUMMONS TO ANOTHER COUNTY. Where, in a suit brought in one county, a defendant residing and served with summons in another county is not rightly a party thereto because not jointly liable on the cause of action sought to be enforced against others, the service of summons on such a defendant in such other county is not authorized by section 8570, Comp. St. 1922; the quashing of service on such a defendant, on his timely special appearance for that purpose only, is proper.

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

*John E. Gilmore, Allen G. Fisher* and *Charles A. Fisher,* for appellant.

*Mitchell & Gantz* and *Harry R. Ankeny, contra.*

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

GOSS, C. J.

The bank brought suit in Sheridan county against the defendant Newton to replevy two automobiles. Each car was the subject of a separate cause of action. Newton filed an answer and cross-petition making Pierce and Jenkins, who lived and did business in Box Butte county, defendants. The defendants Pierce and Jenkins were served individually in their home county. They appeared specially and moved to quash the service. Their motion was sustained. The case proceeded to trial as between the bank and Newton. At the close of the evidence both parties moved for directed verdicts. The court sustained the motion of defendant as to the first cause and of plaintiff as to the second cause and entered judgment awarding the possession of the automobile to plaintiff. Plaintiff did not appeal. Defendant appealed and therefore we have to consider errors assigned by defendant Newton as to the second cause of action, which involved an Oakland sedan.

The chief errors assigned are that the court erred in quashing service on Pierce and Jenkins and in rendering judgment against Newton on the second cause of action. The latter point goes to the question whether Newton was

entitled to defend the suit of the bank on grounds as between him on the one hand and Pierce and Jenkins on the other. His cross-petition alleged and prayed as against them on account and for damages for a sum far in excess of the value of the car as pleaded by plaintiff.

Keith L. Pierce and George M. Jenkins, a copartnership, of Hemingford, Box Butte county, were what is called in the evidence direct dealers, and William Newton of Hay Springs in Sheridan county was an associate dealer, who obtained his cars through them in 1927. On or about November 10, 1927, he bought the car in question and in the settlement gave Pierce and Jenkins his note for $1,079.05. This note was renewed December 15, 1927, by a new note for $1,089.55. The first note had been sold to plaintiff and the renewal was likewise turned over to plaintiff. The note was made out on a printed form furnished by a Lincoln supply house and the form is entitled "Conditional Sale Contract—with Note." Both the note and contract are filled out on the inside of the blank. In evidence, omitting immaterial printing, it is as follows:

"1089.55 December 15th, 1927.

"For value received, I promise to pay to the order of Pierce & Jenkins the sum of ten hundred eighty-nine and 55-100 dollars, with interest at the rate of 10 per cent. per annum from date until paid, payable with exchange, at Citizens National Bank Hemingford, Nebr., in instalments, as follows, to wit: $1089.55 on the 15th day of Jan. 1928.

"Wm. Newton.

"The express condition of the sale and purchase of one Oakland four-door sedan Motor number 193939 Serial number 188234, for which the above note is given is such that the title, ownership and right of possession does not pass from Pierce & Jenkins to the signer hereof until the above note, original or renewed, and the instalments referred to therein and interest thereon, as therein provided, are fully paid; and further, that in event of nonpayment of the note or any of the above debt, original or renewed, or any interest thereon, or any of the instalments therein provided for,

at the time or times when the same shall, by the terms thereof, become due and payable, or of the sale, incumbrance or removal without the written permission of the said Pierce & Jenkins of the said automobile from the present place of business or residence of the signer in Town ——— County Sheridan State Nebraska the said Pierce & Jenkins or the endorser or owner of this instrument is hereby authorized and given full power to declare the note and the debt herein referred to, due and payable at once, even before maturity of the same, and in that case said Pierce & Jenkins or assigns may sell said automobile at public or private sale and retain all payments I have made in lieu of the use thereof, and as charges and damages on the same.

"Wm. Newton."

The paper was indorsed: "Pierce & Jenkins by G. M. Jenkins."

At the close of the evidence both parties moved for directed verdicts. The rule in such event is that, where both plaintiff and defendant in a civil trial by jury move the court to direct a verdict of the jury in their favor, they thereby submit the case to the court upon the issues of law arising upon the facts as the court finds those facts from the evidence. *Segear v. Westcott,* 83 Neb. 515; *Dorsey v. Wellman,* 85 Neb. 262; *Henton v. Sovereign Camp,* W. O. W., 87 Neb. 552; *Davison v. Land,* 89 Neb. 58.

Laying aside the questions of law arising by reason of the sale contract executed and delivered along with the note, there is ample evidence to support the judgment of the trial court that the bank was the holder of the note in due course. It was regular on its face, it was taken in good faith and for full value within a day or two after it was made, and the bank had no notice of any defect or infirmity in the note or defect in the title of Pierce and Jenkins, all as required by section 4663, Comp. St. 1922, which is a part of our uniform negotiable instruments act, effective August 1, 1905 (Laws 1905, ch. 83). The bank likewise at the same time became the owner and holder by delivery and by assignment of the contract which was printed and

was signed by defendant on the same form as the note and which contract referred to "the above note."

It is claimed by defendant that this sale contract was void and could never convey the right of possession to the bank because it was not recorded until after the maturity of the note. The note became due January 15, 1928. The evidence shows that a copy of the note and contract with such an affidavit as is required by section 2464, Comp. St. 1922, was filed for record in the office of the county clerk of Sheridan county, where defendant resided, on February 23, 1928. The defendant then had possession of the car. No rights of purchasers or creditors had intervened. The purpose of the section just cited is to protect "purchasers in good faith or judgment or attaching creditors without notice." There were none such. Only as to them is such a contract invalid if not filed. *McCormick v. Stevenson,* 13 Neb. 70; *Campbell Printing Press & Mfg. Co. v. Dyer,* 46 Neb. 830; *Osborne Co. v. Plano Mfg. Co.,* 51 Neb. 502; *Wilson v. Lewis,* 63 Neb. 617.

There was satisfactory evidence before the trial court that the bank had no notice of any claim on the part of Newton against Pierce and Jenkins that might be asserted as a defense against them, though of course it had notice of whatever was contained in the contract attached. But Newton claims that, as a matter of law, the conditional sale contract put the bank upon notice so as to destroy the negotiability of the note.

It may be noted that we held, in *Peterson v. Kuhn,* 110 Neb. 372: "A promissory note, secured by a real estate mortgage which provides that the mortgagor shall pay the taxes levied against the mortgage or debt secured thereby, is negotiable, notwithstanding the fact that the note and mortgage are parts of a single transaction." This decision was bottomed on certain changes in the statutes relating to mortgages and thus did away with the effect of certain prior decisions cited in the opinion; but the opinion took note of the negotiable instruments law and argued that the conclusion was not affected thereby. The decision

was followed in a similar case. *Lindstrom v. Beacom,* 110 Neb. 607.

This court held in an early opinion written by Judge Cobb that a promissory note, otherwise negotiable, is not rendered nonnegotiable by reason of containing a recital in these words: "The express condition of the sale and purchase of this Ohio reaper and mower No. ——— is such that the title, ownership, or possession does not pass from the said McDonald & Co. until this note and interest is paid in full. That the said McDonald & Co. have full power to declare this note due and take possession of said machine at any time they may deem themselves insecure, even before the maturity of the note." *Heard v. Dubuque County Bank,* 8 Neb. 10. Pound, C., in an opinion cited the foregoing case and said: "A note otherwise negotiable is not rendered nonnegotiable merely by a provision for or reference to collateral security." *Roblee v. Union Stock Yards Nat. Bank,* 69 Neb. 180. These cases have never been overruled. It is true that they arose prior to the adoption of the uniform negotiable instruments act. It is to be said on the other hand, also, that in the case at bar the conditions relating to the security afforded by the contract as to the automobile were not embodied in the note itself but were evidenced by a separately signed contract. No particular section of the law has been pointed out in the argument as contravening the holding in these cases.

A somewhat similar case arose in the state of Washington, although under the first paragraph of what is our section 4614 of the negotiable instruments act, defining what is an unconditional promise. After a note which was negotiable in form, the parties signed the following written agreement on the same paper: "It is herein provided and agreed that the above note is to be paid from the proceeds obtained from the sale of lots in the town of Vanora, * * * and that one-fourth of the proceeds of all sales of the lots * * * are to be applied to the payment of said note and interest until the same is paid." Plaintiff, an indorsee, sued the maker of the note. It appeared that all the lots

had been sold and the proceeds were not sufficient to pay the note in full. Held, that the promise to pay was unconditional and that plaintiff could recover. *Van Tassel v. McGrail*, 93 Wash. 380.

While differing from this case in the fact that the recital was in the note rather than in a separate instrument, one of the best cases we have seen is from Delaware, decided in 1922, to the following effect: "A recital in a note that it was given covering deferred instalments under conditional sales contract for motor vehicle does not render it nonnegotiable under uniform negotiable instruments act (Rev. Code 1915, secs. 2646, 2647, 2649, 2650), and suit may properly be brought in the name of the indorsee thereof." *Continental Guaranty Corporation v. Peoples Bus Line*, 31 Del. 595.

The retention of title and the right of possession in the vendor appeared in the facts in *Heard v. Dubuque County Bank*, 8 Neb. 10, as it does in the instant case. The rule in that respect is stated in 3 R. C. L. 917, as follows: "It seems to be a settled rule that the negotiability of a note is not destroyed merely because, in addition to the promise to pay, it contains a statement that the title to the property for which the note is given is not to pass until the note is paid."

We are of the opinion that the note sued on was negotiable and that, as between the plaintiff and the defendant Newton, any counterclaim or set-off he may have had against Pierce and Jenkins could not, in the circumstances disclosed by the pleadings and evidence, be a proper defense as against the note in the suit of the bank against the defendant.

There being no joint liability of Pierce and Jenkins and of plaintiff to Newton for such accounting and damages as he claimed against Pierce and Jenkins, the court did not commit any prejudicial error in sustaining the motion of Pierce and Jenkins to quash the service secured upon them in Box Butte county. The action was not rightly brought against them and hence there was no statutory right to

obtain jurisdiction over them by serving them with summons in another county than the one in which the suit was brought. Comp. St. 1922, sec. 8570.

Finding no errors in the proceedings and trial, we are of the opinion that the judgment of the district court should be and it is AFFIRMED.

Note—See Bills and Notes, 8 C. J. 129 n. 52; 43 L. R. A. 277; 43 L. R. A. n. s. 945; 28 A. L. R. 699; 3 R. C. L. 917; R. C. L. Perm. Supp. 919.

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GUY SPURRIER ET AL., APPELLEES, V. MITCHELL IRRIGATION DISTRICT ET AL., APPELLANTS.

FILED FEBRUARY 21, 1930. No. 27096.

1. Waters: IRRIGATION: LIABILITY FOR SEEPAGE. In this state the owner of an irrigation canal or ditches is not liable to one whose land is injured by seepage from said canal or ditches, not intentionally caused by him, unless he is negligent in the construction or operation of the works. Therefore, the owner of an irrigation canal or ditch is not an insurer against seepage therefrom, but is liable only for negligence and intentional wrongdoing.
2. ———: ———: ———. Since it was not alleged or proved in this case that the seepage of plaintiffs' land was caused by the negligence or the wilful acts of the Mitchell Irrigation District or the Gering and Ft. Laramie Irrigation District, there can be no recovery based upon the seepage from their canals or ditches.
3. ———: IRRIGATION DISTRICTS: COMMON CARRIERS. Irrigation districts were created by legislative enactment to serve a public interest, and section 8477, Comp. St. 1922, designates them as common carriers.
4. ———: ———: FURNISHING WATER. As common carriers, irrigation districts are required to furnish water to those entitled to the same under the appropriation at a reasonable and uniform price, provided, of course, such charges are paid.
5. ———: ———: LIABILITY. Since section 2926, Comp. St. 1922, makes an irrigation district liable for failure to deliver water to a landowner entitled under the water appropriation, said district, having no discretion but to deliver the water, is not liable in damages for injury resulting from the lawful application of said water to the land by the owners thereof.

6. ———: IRRIGATION. Since the artificial application of water is a necessity for agriculture in a large area of our state, irrigation has been recognized and encouraged by the framers of our Constitution, as well as by our legislators.

7. ———: ———: LIABILITY. In localities where irrigation is beneficial or necessary for successful agriculture, the owner of land has a right to use his own land for such appropriate purpose. In such use he may improve his land by the lawful artificial application of water, provided he does it in a reasonable and careful manner. He will not be answerable to an adjoining landowner unless guilty of some negligent or wilful act which is the proximate cause of damage to another, although he may thereby cause water to seep upon the premises of the latter.

8. ———: ———: ———. In such a case, the artificial application of water being necessary in the interest of good husbandry, if the lawful application of water, an incident to the ownership of the land, is applied without negligence and in a proper manner, the subterranean drainage therefrom is a burden the lower land must bear.

9. ———: ———: ———. The owner has the undoubted right to cultivate and plant his land. Having planted it, there can be no question but that he has the right to irrigate to grow and mature his crop. In the reasonable exercise of this right, although damage may be occasioned to another proprietor, he is responsible only for injuries resulting from his negligence or wilfulness.

10. ———: ———: DRAINAGE. Section 2887, Comp. St. 1922, does not absolutely require irrigation districts to drain all nearby land seeped by percolating subterranean water. This section provides for the drainage of lands within the district, and the remedy provided by this section for the drainage of such lands is exclusive.

11. **Eminent Domain**: IRRIGATION DISTRICTS: SEEPAGE. In order to recover damages under section 21, art. 1 of the Constitution, for the taking or damaging of private property for public use, there must be an invasion of a lawful property right. The defendants in this case, in the absence of negligence or wilfulness in their irrigation operations, being entitled to subterranean drainage, have violated no property right.

12. **Waters**: IRRIGATION DISTRICTS: NEGLIGENCE: PROXIMATE CAUSE. The Mitchell Irrigation District by its operation for a long period of years had raised the water table under plaintiffs' land without injury. The Gering and Ft. Laramie District commenced operations and plaintiffs' land seeped, the Mitchell district applying the same amount of water as for years before.

*Held*, that even if the Mitchell Irrigation District was negligent, recovery could not be had against it because its negligence was not the proximate cause of the injury.

13. ———: ———: ———: QUESTION FOR JURY. Whether or not the failure of an irrigation district to construct drainage ditches to take care of seep and percolating water is negligence or wilfulness depends upon the facts and circumstances of each particular case, and is a question of fact to be determined from the evidence by the jury.

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

*Morrow & Morrow, Wright & Wright* and *Mothersead & York*, for appellants.

*Raymond & Fitzgerald, contra.*

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

DAY, J.

This action was brought to recover damages for injuries to land by seepage from several irrigation districts. In the trial court plaintiffs recovered for temporary damages, that is, for the loss of the use of the land for two certain years.

The plaintiffs' land lies within the Mitchell Irrigation District and has been irrigated under said district since its organization in 1896. The Gering and Ft. Laramie Irrigation District was organized in 1918, for the irrigation of land of higher levels than the plaintiffs' and higher than the land under the Mitchell ditch. Neither ditch crosses the land involved and no compensation has been paid the plaintiffs as a result of the construction of said irrigation works. The land in question was irrigated for years under the Mitchell ditch, without damage from seepage, and it was not until after the Gering and Ft. Laramie ditch was placed in operation that the seepage appeared. The plaintiffs allege in their petition that their land was damaged by the seepage or percolation of the water caused by the operation of the defendants, Mitchell Irrigation Dis-

trict, the Gering Irrigation District, and the Gering and Ft. Laramie Irrigation District. In fine, they contend that the percolating waters contributed by the Gering and Ft. Laramie district and the seepage and percolation of the Mitchell and the Gering district combined to cause the damage. The Gering and Ft. Laramie district and the Mitchell district irrigate lands, the drainage of which percolates through the subsoil of the plaintiffs' land. The Gering district does not irrigate any such land, but about 1900 enlarged the Mitchell Irrigation District canal to a capacity sufficient to carry its requirements for water for the irrigation of lands within its district, which district lies beyond the Mitchell Irrigation District, the subterranean drainage of which does not reach the plaintiffs' land.

The Mitchell Irrigation District, by its answer, admits most of the facts which are alleged by the plaintiffs in their petition, except that it caused the seepage. For a further defense they allege in their answer that there was a misjoinder of parties, in that there was no joint act of the several defendants, but that each was operating a single enterprise and that any damage which may have occurred was not the result of the joint act of the defendants. This defendant also urges by way of defense that the lands under the Mitchell irrigation ditch had been irrigated for many years without any seepage, and that the damage to the plaintiffs' land was caused by the irrigation of lands under the Gering and Ft. Laramie canal. For a further defense, the Mitchell district claims that, having irrigated the lands under its ditch since prior to 1898, which was more than 10 years prior to 1926, openly and notoriously, when it was a matter of knowledge that the irrigation of lands raised the water table, they acquired a right to continue to so operate the canal and distribute water for irrigation of said land, and that the plaintiffs' land would never have been damaged except for the construction and operation of the Gering and Ft. Laramie canal. They insist also that, since their works were constructed in 1896 and have been in continuous operation from that date, the

statute of limitations has run against the plaintiffs. The Gering and Ft. Laramie Irrigation District admits in its answer the organization of the irrigation district, and alleges that it does not own the irrigation works but only acts as the fiscal agent for the United States of America, for the part of the Ft. Laramie division of the North Platte project located within the state of Nebraska, which is the irrigation canal, works and improvements mentioned in the plaintiffs' petition and referred to as the Gering and Ft. Laramie canal. It alleges that it merely operates and maintains the canal laterals and irrigation works constructed by the United States under the direction and control of the secretary of the interior; that in the construction and operation of the works every reasonable precaution and care has been taken to prevent water seepage therefrom, other than by lawful diversion for the irrigation of the lands lawfully entitled to irrigation therefrom; that the seepage on the plaintiffs' land occurred prior to the time this defendant took over the operation and maintenance of the canal and irrigation works; that any damages to, or appropriation of, said land occurred prior to the operation and management of said defendant. Their position is that since they did not construct the works and do not own them, there can be no recovery against them for appropriating or damaging. And inasmuch as they have operated the works in a careful and prudent manner without negligence, there can be no recovery against them on that theory. The answer of this defendant also alleges that any damage occurring to the land or capacity of the plaintiffs by reason of seepage, percolating waters or excessive moisture was caused by the irrigation of lands within the Mitchell Irrigation District above those of plaintiffs, together with the irrigation of the plaintiffs' land by plaintiffs.

To the several answers of the defendants, the plaintiffs reply as follows: That as to the Mitchell Irrigation District, the seepage did not appear until 1925, and their cause of action accrued then, and not at the time of the construction

of the works. With reference to the answer of the Ft. Laramie district, they allege the Ft. Laramie district was organized prior to 1919 for the purpose of acquiring irrigation works or causing the same to be constructed for the improvement of lands within the district, and for said purpose they entered into a contract with the United States of America in 1920; that all the works and canals referred to were built for the benefit of the defendant district, and by reason thereof the district is liable for the acts occasioned by said improvement. This extended summary of the pleadings has been made in order that the issues involved might clearly appear.

The case was submitted to the jury by the court on the theory that the building and operation of the Mitchell district with the Ft. Laramie district, together with the breaking out and cultivation by irrigation of lands thereunder, caused the seepage of plaintiffs' land and resulted in damage or taking thereof under the Constitution of the state of Nebraska. This was done upon the theory that the irrigation districts were liable for seepage caused by the irrigation of lands by the owners thereof within their districts, and that the defendant Gering and Ft. Laramie district was liable for damage and taking, if any, caused by the building of the canal by the United States of America, before control was turned over to it.

At the close of the testimony, upon the motion of the defendant Gering Irrigation District, the trial court withdrew from the consideration of the jury the liability of the Gering Irrigation District. There was no appeal from this order and no question is presented with respect thereto. The only possible basis of liability upon which the Gering district could be held was for the seepage from its canal which ran at some distance from plaintiffs' land. The situation of the Mitchell Irrigation District, in so far as its canal was concerned, was exactly the same as that of the Gering canal, with the exception that the Mitchell Irrigation District had certain laterals running out through the land irrigated, each of which carried relatively smaller

amounts of water than the main canals. The situation of the Gering and Ft. Laramie district, in so far as the operation of its irrigation canal and laterals, is the same as the Mitchell district, except that they are located at a greater distance from the plaintiffs' land. There is no allegation of negligence in this case on account of improper construction of the works, and in the absence of negligence the irrigation district is not liable for seepage from its canals and laterals.

In *Mackay v. Breeze,* 269 Pac. (Utah) 1026, it was said: "The rule of law announced in the leading English case of *Fletcher v. Ryland,* 1 E. R. C. 235, where it is held that the defendant was under an absolute duty to keep water which he had collected in a reservoir from doing injury to others, has not generally been applied to ditches and canals. One who constructs a ditch or canal and conveys irrigation water through the same must use ordinary care in the construction, maintenance, and operation of such ditch or canal. The degree of care required to prevent the escape of water is commensurate with the damage or injury that will probably result if the water does escape. Such is the rule of law repeatedly announced in this jurisdiction and generally established in America and England when applied to ditches and canals." Numerous Utah cases, as well as cases from other jurisdictions, together with other authorities, are cited to support this view, some of which we will mention.

The owner of an irrigation ditch is not an insurer against damage by seepage as a result of the construction and maintenance of said ditch, but is only required to use reasonable skill and care in the building of his works, and the operation thereof. He is only liable for injuries resulting from negligent construction and operation. *Howell v. Big Horn Basin Colonization Co.,* 14 Wyo. 14, 1 L. R. A. n. s. 596. The foregoing view is supported by the great weight of authority. We cite only a few of the many cases from the various states wherein the rule has been applied to irrigation ditches and canals. *Longmire v. Yelm Irrigation District,* 114 Wash. 619; *Nahl v. Alta Irrigation Dis-*

*trict,* 23 Cal. App. 333; *Fleming v. Lockwood,* 36 Mont. 384, 14 L. R. A. n. s. 628; *Calvert v. Anderson,* 73 Mont. 551; *Jeffers v. Montana Power Co.,* 68 Mont. 114; *Grand River Ditch Co. v. Ruane,* 82 Colo. 333; *Anderson v. Rucker Bros.,* 107 Wash. 595. See, also, 1 Wiel, Water Rights in the Western States (3d ed.) sec. 461, p. 489. While not stating the rule in clear, concise, and controlling language, our court in *Kearney Canal & Water Supply Co. v. Akeyson,* 45 Neb. 635, examined the record to determine whether, in a case for damage resulting from water escaping from an irrigation canal, the verdict was supported by proof of negligence. We may logically infer that the view of the court at that time was such as to require proof of negligence to recover. At a later date this court said in substance that an irrigation district in construction of its drainage ditches incurs no liability in the absence of negligence. While not strictly applicable to the instant case, it is indicative of the tendency of the prevailing view of this court upon the subject.

It therefore follows that in this state the owner of an irrigation ditch or canal is not liable to any one whose land is injured by seepage from said ditch or canal, not intentionally caused by him, unless he is negligent in the construction or operation of the works. The owner of such an irrigating canal or ditch is not an insurer, but is liable for damage caused by seepage caused by his wilful acts, and his negligence in constructing, maintaining, and use of such ditch. In the absence of negligence in this case, neither the Mitchell Irrigation District nor the Gering and Ft. Laramie Irrigation District are liable on account of the seepage caused by the water conducted through their canals or ditches.

The foregoing discussion is illuminative of the general theory of the law applicable to irrigation districts, and the question of their liability relative to the construction, operation and use of their works. It is a matter of common knowledge that thousands of acres of arid or semi-arid land in the western part of this state have either been re-

claimed or improved by means of irrigation. Here, as in the other states wherein irrigation is practiced extensively, the rules of the common law and the statutory law, and the decisions of the courts applicable to waters and water courses have been found inimicable to the public interest, so dependent upon productive agriculture, made possible by the development of irrigation projects. Our Constitution, our statutes and the decisions of our courts all challenge our attention to the desirability as well as the necessity for the modification of these rules. Indeed, so different are the problems and so different are the conditions, that in the western states the rules regulating irrigation have a prevailing tendency toward practicalism.

Irrigation districts are creatures of the statute to serve a public purpose, and were created for specific and certain purposes, namely, to convey water from the place of appropriation at the stream to the owners of the land entitled to the use of said water for irrigation. In its operation, the carrying of water from the point of appropriation at the stream to the place of delivery to the landowner for the benefit of whose land the appropriation was made, the irrigation district is a common carrier. Comp. St. 1922, sec. 8477; *Dundy County Irrigation Co. v. Morris*, 107 Neb. 64. Having undertaken the project, it is required to furnish water to the owners of the land and cannot refuse to so deliver, even if it should appear that in the lawful use of the water by the landowner the percolating waters of subterranean drainage should damage another landowner, such as the plaintiffs in this case. To so refuse would render the irrigation district liable to respond in damages for the failure or refusal to furnish water. Comp. St. 1922, sec. 2926; *Clague v. Tri-State Land Co.*, 84 Neb. 499; *Six v. Bridgeport Irrigation District*, 105 Neb. 254; *Peden v. Platte Valley Farm & Cattle Co.*, 93 Neb. 141; *Meier v. Bridgeport Irrigation District*, 113 Neb. 344. The irrigation district being a common carrier of water from the point of appropriation of the stream to the place of delivery to the owner of the land, required to perform said

service, is not liable by statute for any damages resulting from the lawful application of said water to the land by the owners thereof, or for incidental damage to another caused by seepage.

In recognition of the fact that a large area of semi-arid land has been recovered through irrigation projects, the people of the state, speaking through our Constitution, have said: "The necessity of water for domestic use and for irrigation purposes in the State of Nebraska is hereby declared to be a natural want." Const. art. XV, sec. 4. This was the equivalent of a declaration that water is a natural need, and relying upon this principle our people have secured this natural need through irrigation works, and applying it to the semi-arid lands have made them bud and blossom and bear fruit. Recognizing the necessity of the artificial application of water to land in the interest of good husbandry, this state has recognized and encouraged irrigation by constitutional provision and legislative enactment. We are not unmindful, either, of the well-established rule that an owner of land must so use his own property as not unnecessarily and negligently to injure his neighbor. And we are also cognizant of the rule so well stated by Letton, J., in *Aldritt v. Fleischauer*, 74 Neb. 66: "Every proprietor may improve his property by doing what is reasonably necessary for this purpose, and, unless guilty of some act of negligence in the manner of its execution, will not be answerable to an adjoining proprietor, although he may thereby cause surface water to flow on the premises of the latter to his damage." In this case, the problem presented involved the right to drain surface waters from land that it might be made tillable, and it continued as follows: "An owner of land has the right in the interest of good husbandry to drain ponds or basins thereon of a temporary character, and which have no natural outlet or course of flow, by discharging the waters thereof by means of an artificial channel into a natural surface-water drain on his own property, and through such drain over the land of another proprietor in the general course of drainage in

that locality, even though the flow in such natural drain is thereby increased over the lower estate, and provided that this is done in a reasonable and careful manner and without negligence."

If in the interest of good husbandry, coupled with the right to use the land for an appropriate purpose, it is allowable to drain surface waters, which drainage seems to be a burden imposed upon the lower land, certainly the subterranean drainage is a reasonable burden to impose upon the lower land in localities requiring irrigation in the interests of good husbandry. In localities requiring irrigation in the interest of good husbandry, the lawful application of water is an incident to the ownership of the land. If the owner thereof for such purposes applies the water to his land without negligence, and in a proper manner irrigates his land, the drainage from such lawful, careful, and proper application of water to his land is a burden the lower land must bear. The rule relative to the application of water to land ought not to be more severe than that applicable to the running of water through canals and ditches. The principle herein enunciated was considered in the case of *Gibson v. Puchta,* 33 Cal. 310, wherein it was sought to recover for damages resulting from the irrigation of land which caused water to seep into a mine under said land. It was there said: "The defendant had the undoubted right to cultivate and plant this tract of land; and having planted it, there can be as little question that he had the same right to irrigate it for the purpose of maturing his crop. * * * An action cannot be maintained against him for the reasonable exercise of his right, although an annoyance or injury may thereby be occasioned to the plaintiffs. He is responsible to the plaintiffs only for the injuries caused by his negligence or unskilfulness, or those wilfully inflicted in the exercise of his right of irrigating his land." The defendant's position is possibly no worse than if, unexpectedly, sufficient rain fell on said land to produce the same abundant crops grown by irrigation, and, as a result thereof, the water table under the land should be raised

until his lands seeped. It would be *damnum absque injuria.*

The irrigation district is not absolutely required to drain lands which are seeped by percolating subterranean water caused from the operation of legal irrigation works, except in the manner provided by statute. Section 2887, Comp. St. 1922, provides for the drainage of land within its limits which have been subirrigated by reason of the lawful use of water from its canal by the owner or lessee of the land subirrigated, or from any cause, not at fault or by the consent of such owner or lessees. This section of the statute creates liability *ex contractu* between the owners of land within the irrigation district, but said section does not fix or attempt to fix liability for drainage of percolating or seeped waters from irrigation projects on land without the district. Furthermore, plaintiffs in this case cannot compel the Gering and Ft. Laramie Irrigation District, under the above statute, to drain their lands, inasmuch as they are not within the said irrigation district, and the statutory duty of the irrigation district is limited to lands under the district. One of the defendants in its brief cites *State v. Farmers Irrigation District,* 116 Neb. 373, as holding that they are not required to drain seeped lands within their district. This case does not so hold. The remedy provided by this statute for the drainage of seeped lands that lie within the district is exclusive as to such lands. The theory upon which this case is presented is that section 21, art. I of the Constitution, provides: "The property of no person shall be taken or damaged for public use without just compensation therefor." The defendants in this case having the undoubted right to convey to and turn water upon the land under their canals and ditches, and not being liable for damages resulting to adjacent land therefrom, except upon the allegation and proof of negligence, and no such allegation or proof having been made in this case, there is not invasion of property. In order to recover under this self-executing section of the Constitution (*Hopper v. Douglas County,* 75 Neb. 332), property must be taken or damaged for a public use. The method of taking or dam-

aging must violate the rights of the owner thereof. It is not established in this case that any right of plaintiffs has been violated. The cases and authorities cited by the plaintiffs supporting their claim upon this theory do not support the view that the owner of a servient tenement may recover from a dominant tenement. In the absence of negligence in the construction, maintenance, operation, and use of its irrigation works, an irrigation district is not liable to an owner of land for seepage under section 21, art. I of the Constitution. Such negligence neither being alleged nor proved in this case, there can be no recovery. Under the facts established by the evidence in this case the operation for many years of the canal and ditches of the Mitchell district, together with the irrigation of the land thereunder, had raised the water table under plaintiffs' land. At no time, however, had such operations threatened to cause seepage upon plaintiffs' land. It was not until the construction and operation of the Gering and Ft. Laramie district's canals and ditches, and the irrigation and cultivation of land in said district, that the seepage appeared. Even if the Mitchell district was negligent in the operation and use of its canal and ditches, recovery could not be had against it, since its negligence was not the proximate cause of the injury. This court has said: "The proximate cause of an injury is that cause which, in the natural and continuous sequence, unaccompanied by any efficient intervening cause, produces the injury, and without which the result would not have occurred." *Spratlen v. Ish,* 100 Neb. 844. Citing this case with approval in *Steenbock v. Omaha Country Club,* 110 Neb. 794, the court further said: "It is not sufficient that the negligence charged furnishes only a condition by which the injury is made possible, for if such condition causes an injury by the subsequent independent act of a third person, the two acts are not concurrent and the existence of the condition is not the proximate cause of the injury." In this case the evidence establishes that the seepage to plaintiffs' land was caused by water seeping from the canals and ditches of the defendants, and from

the application of water for the purpose of irrigation. These percolating waters raised the water table under said land until it came to the surface as seepage. This was augmented by the cultivation of thousands of acres hitherto unbroken sod, upon the construction of the Ft. Laramie Irrigation canal. For over 25 years the identical operation of the Mitchell district had not injured this land. The evidence seems to support the conclusion that, without the intervening contribution of the Gering and Ft. Laramie canal, and the cultivation of a large area draining toward plaintiffs' land, it never would have caused injury. Whether the failure of the Gering and Ft. Laramie Irrigation District to construct drainage ditches to take care of seep and percolating water on its way to return to the river is negligence, as contended by plaintiffs, is a question of fact. It depends upon the facts and circumstances of each particular case, and it is a question for the determination of the jury. The plaintiffs in this case take the position that they seek to recover under section 21, art. I of the Constitution, but at the same time cite numerous cases involving negligence. We conclude that the learned trial judge was correct in his instruction to the jury that the negligence of the defendants was neither alleged nor proved.

We have carefully read the voluminous record in this case, we have had the help of comprehensive briefs, prepared by able counsel, and we conclude that the trial judge was in error in submitting the case to the jury to determine the amount of the damage and render a verdict for the plaintiffs against the defendants, upon the theory that if they had taken or damaged property, under section 21, art. I of the Constitution, they were liable in damages, notwithstanding the fact that, in so far as the record discloses, they were not negligent. Having reached the foregoing conclusions, the discussion of other propositions presented in the briefs is rendered unnecessary. In conformance with the conclusion reached in this opinion, the judgment is reversed and the cause is dismissed.

REVERSED AND DISMISSED.

ROSE and GOOD, JJ., dissenting.

As common carriers of water, defendants exercised the right of eminent domain and constructed, operated and maintained canals and laterals for the purposes of irrigation. Seepage of water carried in the canals and laterals damaged land of plaintiffs and injured their crops without any fault of theirs. The jury so found on abundant evidence of that fact and the trial court entered judgment against defendants on the verdict. On appeal the majority reversed the judgment below and dismissed the action, giving the following among other reasons:

"In this state the owner of an irrigation canal or ditches is not liable to one whose land is injured by seepage from said canal or ditches, not intentionally caused by him, unless he is negligent in the construction or operation of the works. Therefore, the owner of an irrigation canal or ditch is not an insurer against seepage therefrom, but is liable only for negligence and intentional wrongdoing."

In connection with pleas and proofs of damages from seepage, plaintiffs' action is based on the following provision of the Constitution:

"The property of no person shall be taken or damaged for public use without just compensation therefor." Const. art. I, sec. 21.

The right to compensation for property so taken or damaged is absolute. The Constitution imposes no restriction on that right. It does not make negligence the test of a landowner's right to recover damages resulting from an exercise of the power of eminent domain for the purpose of irrigation or for any other purpose. Neither the legislature in granting the right of eminent domain nor the court in exercising judicial power has any authority to make negligence a condition of recovering damages resulting from a violation of that part of the Bill of Rights declaring: "The property of no person shall be taken or damaged for public use without just compensation." Plaintiffs were not legally handicapped by such a condition in an action to recover damages resulting from seepage of water carried

in the canals and laterals operated by defendants. The rulings announced in the opinion would permit defendants, without liability for compensation, to destroy the entire beneficial use of plaintiffs' land by seepage, while conducting waters in their canals and laterals without negligence in construction, maintenance or operation. It was to prevent any such invasion of property rights without compensation that the constitutional provision quoted was inserted in the supreme law by the people of Nebraska. Contrary to the opinion of the majority, the United States circuit court of appeals, eighth circuit, wisely declared the law to be as follows:

"Under Const. Neb. art. I, sec. 21, providing that private property shall not be taken or damaged for public use without just compensation, the owner of an irrigation canal, though constructed under authority from the state for a public service, and maintained and operated in a lawful and careful manner, is liable for damage caused to the land of another as a necessary effect of such operation." *Hooker v. Farmers Irrigation District*, 272 Fed. 600.

The case cited was one to recover damages resulting from seepage of waters conveyed in canals for purposes of irrigation. It arose under the laws of Nebraska and the decision gave effect to the identical constitutional provision now under consideration. In the course of the opinion, which was delivered by Judge Sanborn, it was said:

"If the plaintiff sustained damage, as in our opinion there is substantial evidence here tending to prove, by the temporary negligence of the defendant to so maintain, operate, and use its canal as not to injure plaintiff's property, it is liable on account of its negligence to pay that damage. * * * If, on the other hand, the defendant has inflicted damage upon the property of the plaintiff that is the necessary effect of its permanent maintenance and operation of this canal in a lawful and careful manner, which the state has authorized it to do for the public use, it is liable to pay this damage to the plaintiff because the infliction of such damage without compensation is a violation of the con-

stitutional prohibition against the taking or damaging of private property for public use without just compensation therefor. Constitution of Nebraska, art. I, sec. 21; *Omaha & N. P. R. Co. v. Janecek*, 30 Neb. 276, 27 Am. St. Rep. 399; *Pumpelly v. Green Bay Co.*, 80 U. S. 166, 167, 177, 179, 181, 20 L. Ed. 557; *United States v. Lynah*, 188 U. S. 445, 469, 471, 47 L. Ed. 539; *Bramlette v. Louisville & N. R. Co.*, 113 Ky. 300; *Jaynes v. Omaha Street R. Co.*, 53 Neb. 631, 641, 649, 650, 39 L. R. A. 751; *Middelkamp v. Bessemer Irrigating Ditch Co.*, 46 Colo. 102, 23 L. R. A. n. s. 795."

The rule announced by Judge Sanborn is in harmony with former opinions of the supreme court of Nebraska. In *Stehr v. Mason City & Ft. D. R. Co.*, 77 Neb. 641, it was held:

"Damages recoverable properly include all damages arising from the exercise of eminent domain which cause a diminution in the value of the property."

This ruling does not make negligence a condition of recovery. In *City of Omaha v. Kramer*, 25 Neb. 489, the court said:

"Constitutional guarantees are of little avail unless carried out in the spirit in which they were framed, and no plea of public benefits should be permitted to impoverish the owner of private property, or override a plain constitutional inhibition."

These views of the law necessarily lead to the conclusion that the decision of the majority is unsound.

Note—See Waters, 40 Cyc. 817 n. 83, 829 n. 7, 838 n. 65, 839 n. 73, 74; 1 L. R. A. n. s. 596; 15 R. C. L. 487 et seq.; R. C. L. Perm. Supp. 3940.

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## HERBERT T. PEMBROOK V. STATE OF NEBRASKA.

FILED FEBRUARY 21, 1930. No. 27088.

1. **Homicide: SUFFICIENCY OF EVIDENCE.** Evidence showing that defendant inflicted eight knife wounds upon deceased, and including testimony of statements made by defendant before and at the time of the fatal encounter, *held* sufficient to support conviction of manslaughter.

2. Criminal Law: CONVICTION: NEW TRIAL. A conviction of a lesser offense than that for which the accused was informed against is not a bar to a prosecution for a greater offense if the accused is granted a new trial.
3. ———: VERDICT: APPEAL. The defendant in a criminal case cannot benefit from the verdict of a jury, if he chooses to appeal therefrom.
4. ———: JUDGMENT: APPEAL: REVERSAL. Reversal of judgment of guilty of murder in second degree and remanding case for new trial placed the defendant in the same position as if no former trial had been had.
5. ———: STATEMENT BY COURT. The court's statement to the jury that the evidence would not justify a verdict of guilty of murder, and that the case was submitted to them only upon the issue of manslaughter, *held* not equivalent to a statement that the court believed the defendant guilty of manslaughter.

ERROR to the district court for Clay county: J. W. JAMES, JUDGE. *Affirmed: Sentence reduced.*

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

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

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

LANDIS, District Judge.

The plaintiff in error, designated hereafter as defendant, was convicted of manslaughter and sentenced. Of the numerous errors presented in the petition in error, defendant relies on and discusses only four in his brief, namely, insufficiency of the evidence to support the verdict, excessive sentence, overruling of motion to quash, and the filing of the amended information.

This is the second appearance of this cause here, in that a previous conviction of the defendant for second degree murder was reversed and cause remanded for new trial. See *Pembrook v. State,* 117 Neb. 759. Judge Thompson says in that opinion: "At Harvard, in Clay county, in an altercation between one French and the plaintiff in

error, hereinafter called defendant, in which such French was the aggressor, the latter was stabbed several times by defendant with the blade of a small pocket knife, from which wounds French died. * * * Further, we find the record is without proof to sustain a conviction of murder, either in the first or second degree. * * * Also, as French, the deceased, conceived and planned the fatal meeting, and was the aggressor at the start of the altercation, it might be advisable to say we do not want to be understood as holding that this record reflects sufficient evidence to warrant a conviction of the crime of manslaughter; and as a retrial may be had, neither do we think it wise to discuss the indicated facts, notwithstanding we have read with care the entire record."

The evidence in the record now before us, offered by the state, shows that on the afternoon of the tragedy the defendant told John Miller that French's wife had a social disease and was not fit to run a restaurant. This was communicated to French, and on the evening of the same day he called defendant across the street and with Miller took up this statement about his wife, which defendant denied. French then slapped the defendant. At this point Miller left them.

In the first trial, the record of which this court reviewed, the state offered no eye-witness as to what took place between the deceased and the defendant at the time the stabbing was done. In the instant record such a witness was offered in one E. R. Pense. This witness testified: "Herbert Pembrook and Herbert French were standing out on the sidewalk, and Herbert had his back to me, and Herbert Pembrook was facing me; and Herbert Pembrook made a rush at French and stabbed him. Herbert Pembrook says: 'You dirty * * * if you don't let me alone I'll cut your * * * out.'"

The testimony of Dr. Gibbon is that he found eight knife wounds on French's body, which he describes as "a superficial one inch cut half way between the shoulder and elbow upon the dorsal surface of the left arm; another superficial

half inch cut half way between the elbow and wrist on the left arm on the dorsal surface; a four inch cut, about four inches long and two inches deep, in the left buttock, posterior surface; a two inch cut, two inches long and two inches deep, on the lateral surface of the left thigh; a one inch cut, one inch deep, on the ventral surface of the scrotum; a half inch cut on the right side of the scrotum, superficial. I found another cut, a half inch long and two inches deep, low in the right groin, and I found another cut, two inches long and about four inches deep, high up in the right groin, which severed the right external iliac artery. The cut extended upward into the abdominal cavity and severed this artery," and was the fatal one which caused the death of Herbert French. It is without dispute that the defendant inflicted these wounds.

William Seybold testified to a vulgar statement of the defendant some time previous to the tragedy which is premonitory of the two scrotum wounds inflicted. A careful reading of the record convinces us that there is sufficient evidence to support the verdict and the error complained of that the evidence is insufficient cannot be sustained.

As to the errors claimed in allowing the amended information to be filed and in refusing to quash it, the defendant insists that because at the former trial the verdict was guilty of the crime of murder in the second degree, although this was reversed for new trial, he was in effect acquitted of the crime of first degree murder. The precise question is whether a conviction of a lesser offense than that for which the accused was informed against is a bar to further prosecution for the greater offense if the accused is granted a new trial. Nebraska is committed to the position that the defendant cannot benefit by the verdict of the jury, if he chooses to appeal from it. The reversal of the judgment of guilty of murder in the second degree and the remanding of the case for new trial placed the defendant in the same position he would have been had no former trial been had, and the whole case is open for investigation. *Clarence v. State,* 89 Neb. 762.

The defendant further contends that by stating to the jury that they would not be warranted under the evidence in finding the defendant guilty of murder in either the first or the second degree, and that the case was being tried and submitted to them only upon the issue of manslaughter, is equivalent to telling the jury that the court believed that the defendant should be found guilty of manslaughter. We cannot agree with this, because it is based on the assumed premise that the jury were not intelligent and deliberately disregarded their oath. The long experience of the race is behind our jury system. This method of determining facts is peculiarly a development of our jurisprudence, of which we are justly proud. This jury received carefully prepared instructions, fully protecting the rights of the defendant, and we are not prepared, upon this record, to say that the twelve men, bringing their experience and common sense to a consideration of this case, deliberately misconstrued plain instructions, and inferred an opinion of the court as a basis of their verdict.

The sole issue submitted to the jury was manslaughter, and the court did not err in allowing the amended information to be filed or in refusing to quash it.

Defendant claims his ten year sentence for manslaughter is excessive. The record reflects nauseating, disgusting, vile and primitive acts and instincts. From the method and way of living of the defendant, society should be protected. He is close to 50 years of age and has been in continuous confinement since his arrest on September 19, 1927. Probably the ultimate interests of society, as well as of the defendant, would best be conserved if the judgment be modified. While the record sustains the verdict of the jury, and is free from prejudicial error, yet it does show that deceased was a large, powerful, robust man; the defendant a much smaller man, and that on two former occasions the defendant was viciously and brutally assaulted by the deceased. After carefully considering the whole record, we are inclined to the view that there are grounds upon which the defendant may base argument against receiving the limit under a conviction of manslaughter.

Under provisions of section 10186, Comp. St. 1922, the judgment of the district court is modified to the extent that the defendant shall serve a term of five years. As thus modified, the judgment is affirmed.

AFFIRMED: SENTENCE REDUCED.

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IVAN WILCOX V. STATE OF NEBRASKA.

FILED FEBRUARY 21, 1930. No. 27207.

1. Bail: RECOGNIZANCE: SUFFICIENCY. Recognizance on appeal from conviction in county court of statutory misdemeanor, conditioned that appellant appear on designated day, which was first day of third term after rendition of judgment, and which did not require appellant to abide judgment of district court, was invalid under section 1, ch. 113, Laws 1923, and conferred no jurisdiction on district court, the fact that no jury was summoned for intervening terms not justifying noncompliance of recognizance with statutory requirements, since under chapter 70, Laws 1925, the district court had power to order a jury at either of such terms.
2. ———: ———: ESTOPPEL. That the county attorney appeared before the district judge and sought to have appellant's recognizance on appeal from conviction of a statutory misdemeanor forfeited for nonappearance on date stipulated in the recognizance does not work an estoppel precluding dismissal of appeal as previously ordered by the district court for noncompliance with section 1, ch. 113, Laws 1923.

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

*Perry, Van Pelt & Marti* and *Pierce & Simmons,* for plaintiff in error.

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

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

LANDIS, District Judge.

Plaintiff in error here, defendant below, was convicted in the county court of a statutory misdemeanor, and at-

tempted to appeal to the district court, where the appeal, on motion of the state, was dismissed because the recognizance for the appeal was not in conformity with statutory requirements.

The recognizance for the appeal was given and approved April 3, 1929, and conditioned that the defendant appear before the district court on the 18th day of November, 1929, and from time to time, term to term, and not depart the court without leave. On April 3, one of the days of the March, 1929, term thereof, the district court was in session. The next session of the district court was when the May, 1929, term convened on May 27. November 18, 1929, was the first day of an announced November, 1929, jury term, being the next succeeding term after the May, 1929, term of the court.

Chapter 113, Laws 1923, regulates appeals from county courts in misdemeanor cases. Section 1 of that chapter provides, in substance, that no appeal shall be granted unless appellant shall enter into a written recognizance, conditioned for his appearance forthwith, and without further notice, to the district court, and from day to day thereafter, until the final disposition of such appeal, to answer the complaint against him and to abide the judgment of the district court.

The recognizance given in the instant case is not strictly in accord with the requirements of the statute. Instead of requiring defendant to appear forthwith, it requires him to appear November 18, 1929, which, considering the March and May terms of the district court, would be the first day of the third term after the rendition of the judgment on April 3, 1929. The recognizance does not require defendant to appear from day to day, and fails to bind him to abide the judgment of the district court.

Defendant contends that the day named in his recognizance is the same as "forthwith." This is based on the fact that no jury term of court had been announced by the district judge, other than the term beginning November 18, 1929, at the time the recognizance was executed. The fact

that a jury would be called for the November, 1929, term of the district court did not mean that there would be no jury called for the May, 1929, term, or even after the jury was discharged for the March, 1929, term on April 2, 1929, as the record herein shows, that one would not be called for the last period of such term.

On the first day of January of each year the judges of the district court fix the time for holding terms of court in the counties comprising their respective districts during the ensuing year, as provided in section 1085, Comp. St. 1922, but there is no requirement that the jury terms should then be fixed finally and absolutely. The court could have ordered a jury, if necessary or expedient to try the defendant at a later period in March, 1929, or in May, 1929, terms. Laws 1925, ch. 70. It is for the court to determine the matter of calling the jury, and for the defendant to appear "forthwith." It is obvious that the day selected by the defendant in his recognizance under this record is not the same as "forthwith."

The instant recognizance did not comply substantially with the statutory requirements, is invalid, conferred no jurisdiction on the district court, and is ruled by the decisions of this court in *Killian v. State,* 114 Neb. 4, and *Oppfelt v. State,* 117 Neb. 549.

Counsel for plaintiff in error rely upon *Abbott v. State,* 117 Neb. 350. This case announces the rule that the word "forthwith," as used in the statute relating to the appearance of a defendant in a criminal case in the district court, means the first opportunity offered defendant, after appeal is perfected, to appear when said court is in session. There the recognizance was conditioned for defendant's appearance on the first day of the next jury term of the district court, which was, in fact, the first day when that court held a session at which he could appear. It was, therefore, equivalent to requiring him to appear forthwith.

In the instant case, the recognizance was for the appearance on November 18, 1929, after two sessions of the district court in two different terms at which defendant could

have appeared. Clearly *Abbott v. State, supra,* is not in point. Moreover, plaintiff in error failed to comply with the statute requiring him to appear from day to day and abide the judgment of the district court.

On May 27, 1929, the district court dismissed the appeal. On August 27, 1929, error proceedings were filed in this court. By supplemental transcript plaintiff in error shows that the county attorney appeared before the district judge and sought to have the bond involved herein forfeited on the ground that the defendant did not appear for trial on November 18, 1929.

Plaintiff in error claims that the county attorney by asking a forfeiture of the bond has recognized its validity and that the state is now estopped to deny the same. This contention of plaintiff in error is not tenable, because he has not changed his position or condition by reason of the action of the county attorney and has not been prejudiced thereby. Neither could the act of the county attorney in seeking a forfeiture of the bond operate to confer jurisdiction on the court to determine the appeal on its merits. The district court did not err in dismissing the appeal. The judgment is

AFFIRMED.

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SARAH BAKER ET AL., APPELLEES, V. JAMES C. DAHLMAN ET AL., APPELLANTS.

FILED FEBRUARY 21, 1930. No. 26990.

1. **Municipal Corporations: POWERS: CONSTRUCTION: STREET IMPROVEMENTS.** The power delegated to a city to construct local improvements and levy special assessments for the payment thereof is to be strictly construed against the city, and every reasonable doubt as to the extent of limitation of said power is to be resolved against the city.
2. **———: STREET IMPROVEMENTS: AUTHORIZATION.** *Held,* in this case, that section 3571, Comp. St. 1922, does not authorize the resurfacing of more than a single street in the same proceeding; and that the improvement made was without authority of law because no petition of the property owners was obtained as a condition precedent thereto.

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

*John F. Moriarty, Thomas J. O'Brien* and *B. J. Boyle*, for appellants.

*A. H. Murdock* and *J. P. Breen, contra.*

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

SHEPHERD, District Judge.

The instant case involves the resurfacing of a number of contiguous and intersecting streets in Omaha, quite a large district in the residence portion of the city. The city council proceeded under section 3571, Comp. St. 1922, which provides for the surfacing of a street or part of a street without obtaining a petition from the adjoining property owners, and charged the cost to the abutting property. The plaintiffs (appellees here) brought suit to enjoin the collection of the special assessments and to cancel the same. Upon trial the district court entered a decree in favor of the plaintiffs, finding that the work had been done without authority of law, ordering the cancelation of the said assessments, and enjoining the defendants (appellants here) from attempting to collect the same.

The decision of the district court went upon the theory that, since the project was to resurface a number of streets, rather than a single street, or part of a street, it became necessary to secure a petition signed by a majority of the front foot owners adjoining, before the work could proceed. If it be determined that the trial court was right in that particular, such determination will dispose of eight of the nine assignments of error relied upon by the appellants, as assignments to that number are grouped around and upon this specific point.

The Omaha charter, chapter 40, Comp. St. 1922, provides in sections 3555 and 3556 that the council may improve main thoroughfares leading out of the city and city streets generally within a mile and a half of the city hall without

petition, and it declares in section 3557 that, except as otherwise provided, the council shall not order any street improvements or cause the same to be made. It is conceded in the record that neither of these exceptions cover the case at bar.

Immediately following in the act is section 3558 in these words: "The city council may, upon a petition of the record owners of a majority of the frontage of taxable property upon the streets or parts of streets within a district created for that purpose, order any street or any number of consecutive streets which extend in the same general direction, together with the parts of streets, alleys and ways either intersecting or connecting therewith, improved within reasonable, appropriate or necessary limits, in one proceeding and in one improvement district by causing the same in whole or in part to be paved, repaved, curbed or recurbed or the grades changed or graded, or the paving surfaced, resurfaced or relaid, or any combination of such work to be done, including as well the change of grade and grading, or either or both, on any of the streets or ways within such district." Obviously this is the general section authorizing street improvement in the metropolitan city.

But there is a third exception, the one depended upon by appellants in this case, a permission to the council to resurface without petition therefor if no protest is made within thirty days after publication of official resolution to that end. This permission is to be found in the section of the statutes first above mentioned (section 3571), also a part of the Omaha charter. It reads as follows: "Whenever it is desired to surface or renew the surface, to change the character of the existing pavement or the surface thereof upon a street or part thereof, the city council may by proper resolution for that purpose propose such improvement, stating the specific character of the improvement thus to be made." And a second paragraph of the section sets forth the particulars of the notice and prescribes the method of assessing the cost to the property adjoining.

The question is whether this third exception, limited as

by its terms appears, may be extended to the resurfacing of a number of streets in combination under one proceeding, or whether it is limited to the one street, or part of one street, which the language of the act naturally indicates. Certainly the rule of strict construction commonly employed when charges are imposed upon the property of the citizen inclines the reader to the latter view. And the rule of construction which gives to well known words their common and ordinary meaning supports that view.

We think the council assumed a power not conferred upon it by the statute in attempting the resurfacing of a district made up of a number of consecutive and intersecting streets under section 3571 and without a petition of the property owners. And an improvement without power cannot be made the basis of a special assessment against the property of the citizen.

Said section 3558 prescribes the steps by which the city council may proceed with paving, resurfacing and street improvements generally. It is quite evident, considering the two sections in connection with the other parts of the act, that it was intended that street improvements should not as a general thing be made a charge upon adjoining property, without petition, and that section 3571 is an exception to the rule. Section 3558 provides for the paving of one or many streets in one proceeding, and for the surfacing or resurfacing of one or many streets in one proceeding, using language that leaves no doubt of what was in the legislative mind; and if it had been intended by section 3571 to permit resurfacing to an unlimited degree without petition the legislature would have said so in words that would have been certain.

More or less frequently in a large city a particular street, or part of a street, is bound to need resurfacing or even repaving because of heavy traffic or some particular development in city growth; and speedy action becomes highly desirable. There can be little doubt that the legislature had this need in mind when it enacted section 3571 to follow section 3558 in the Omaha charter; and it is equally prob-

able that in so doing it meant to confine the power conferred upon the council to the narrow limits of a single street, so that while the need was met the adjoining owner might remain secure from imposition. Interpreting section 3571 in this way, the two statutes admirably take care of whatever situation may arise.

It is plain that in a limited district, not greater than a street, it would be comparatively easy to make the protest necessary to stop an improper proceeding originating in the council, while in a large district, composed of many streets and cross streets, it would be correspondingly difficult. In the large district it would be very hard indeed to obtain a protest of 40 per cent. of the property owners in the short space of 30 days. It is significant that in the large district the requirement of petition protects the citizen, while in one small district the provision for protest answers the same purpose.

It is not to be forgotten that section 3571 empowers the city council to change the character of the existing pavement as well as to resurface. The extension of area from the single street to a number of streets by judicial interpretation would give the council a power that was never intended by the legislature, a power that might be used to the point of confiscation.

It is true that in one or two of the states it has been held that legislative permission to improve a street gives warrant to improve a number of connected streets, but not, we think, in any case in which the statutory provisions are similar to those of Nebraska. In the Illinois case cited, *Wilbur v. City of Springfield,* 123 Ill. 395, the question was rather whether a number of streets could be connected under one proceeding for improvement where the work on the several streets was somewhat different as to character and amount. And it was there held that, where the work did not differ to such degree as to make it entirely out of the question to fairly apportion the cost, the difficulty of the situation would not be allowed to invalidate the work done. In addition to this, the law under which the im-

provement proceeded provided in substance that the council might proceed to improve "any of the streets of the city," a descriptive phrase different from that in question in this case, and one that might more easily be construed to mean any number of the city's streets. The South Dakota case, *Wood v. City of Hurley*, 29 S. Dak. 269, is somewhat in point, though it applies to sidewalks. But, in view of the statutory provisions here involved, it can hardly be an authority in the instant case. The other cases cited in the briefs of the appellants have been examined with care and found inapplicable. To discuss them seems unnecessary.

In the case of *Brown Real Estate Co. v. Lancaster County*, 108 Neb. 514, the court held that a provision of law for the paving of "any road, highway or boulevard" authorized the inclusion of parts of a number of country roads in a drive or boulevard to state institutions close to the city of Lincoln, saying that, if a neighborhood is better accommodated by an improvement in the form of a circle than by a straight line, the law did not forbid it. But it indicated in the same case that such a rule would not apply to paving in cities, and stated that it had been held that separate streets in cities cannot be included in a single improvement.

So, indeed, the court had decided in *Hutchinson v. City of Omaha*, 52 Neb. 345, in which the legislative provision was that the council was given power to open and improve any street, avenue or alley within the limits of the city. The court held in its opinion that the grant of power was to grade "any street" and that there was no express authority to join several streets in a single improvement. Owing to the nature of the controversy in the case at bar, the following language from the opinion is peculiarly apropos:

"Recurring to the charter, we find the grant of power is to grade 'any street.' This is followed by express permission to grade a part of the street. There is no express authority to join several streets in a single improvement and to charge upon the owners of land abutting upon one the expense of grading another. Nor do we think that we

have any right to imply such authority from the language of the charter. That such a measure would in some instances be more economical and of actual advantage to property owners is wholly aside from the question. That was a matter for the legislature to determine, and such a power cannot be sustained by the courts, merely from motives of expediency, in the absence of legislative authority."

The rule of strict construction in matters of this kind obtains in this state. In a comparatively late case the court said: "The power delegated to a city to construct local improvements and levy special assessments for the payment thereof is to be strictly construed against the city, and every reasonable doubt as to the extent or limitation of said power is resolved against the city." *Futscher v. Rulo*, 107 Neb. 521. In the *Hutchinson* case, *supra*, there is a similar expression: "It is no less familiar that statutes authorizing the exercise of such power are to be strictly construed."

A final assignment remains to be considered, the assignment that the finding of the district court that the action was brought by the plaintiffs for themselves and all other property owners similarly situated is contrary to law. The petition filed in the district court recites that the matter involved herein is a matter of common interest to the plaintiffs and to all other persons similarly situated and owning property in the district, and that plaintiffs bring their action in behalf of themselves and all other property owners similarly situated within that part of the city of Omaha included in said district. The situation is such as to permit a proceeding of this nature by one or more persons in behalf of many, and the pleading is sufficient to that end. No objection or protest seems to have been made to the case as a case in behalf of all persons in the district, and the trial seems to have proceeded upon that theory. We think that the trial court made no mistake in its finding.

From the conclusions arrived at, it follows that the judgment of the district court is

AFFIRMED.

DAY, J., dissents.

WILLIAM H. SMOKE, APPELLANT, V. ELSIE POPE, APPELLEE.

FILED FEBRUARY 28, 1930. No. 27105.

1. **Vendor and Purchaser**: POSSESSION: NOTICE. Possession of land may be notice to the world of possessory rights of which inquiry of the occupant would elicit knowledge.
2. ———: ———: ———. In entering into a contract to purchase land in possession of a third person, the purchaser is bound to inquire about the occupant's interest therein.
3. ———: PURCHASER IN GOOD FAITH. One purchasing land with knowledge of another's previous contract to purchase it is not a purchaser in good faith and will not be protected as such if his knowledge was acquired before paying the purchase price.
4. ———: CONTRACT: REFORMATION: SPECIFIC PERFORMANCE. Equity may reform a contract for the purchase of land so as to include terms upon which the parties definitely agreed and may also require specific performance of the contract as reformed.
5. **Specific Performance**: DAMAGES. In a suit in equity for specific performance, attorney's fees and other expenses of litigation are not, as a general rule, recoverable as damages resulting from breach of contract to sell and convey land.

APPEAL from the district court for Dawes county: EARL L. MEYER, JUDGE. *Affirmed as modified.*

*Allen G. Fisher* and *Charles A. Fisher*, for appellant.

*E. D. Crites* and *F. A. Crites, contra.*

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

ROSE, J.

This is a suit in equity to reform and to specifically enforce a written contract for the sale and purchase of 30 acres of land in the southwest quarter of section 19, township 33, range 48, Dawes county. The quarter section described is bounded on the west and south by section-line highways. East and west the 30-acre tract is 2,580.5 feet long. North and south it is 505.5 feet wide. Its west end is 33 feet from the section line or from the center of the highway running north and south and its south side is 33 feet from the section line or from the center of the highway running east and west. It does not include any land

occupied by the section-line highways. William H. Smoke is plaintiff and, by purchase from Elsie Pope, defendant, claims the 30-acre tract described. Defendant asserted that the land sold by her to plaintiff extends to the section lines or to the center of the highways on the west and south; that it was so described in the contract of sale and that she tendered a deed conforming thereto; that she sold and conveyed to Clarence E. Chamberlain a 50-acre tract north of the 30-acre tract sold to plaintiff; that the deed to Chamberlain contained two acres of land along the north side of the strip claimed by plaintiff; that defendant, not being the owner of the two acres of land in controversy, cannot convey it to plaintiff. The pleadings put in issue the facts in controversy. Upon a trial of the cause the district court found generally in favor of plaintiff and reformed his contract of purchase so as to include the two acres in litigation but did not decree specific performance of the contract as reformed or require defendant to execute and deliver to plaintiff a warranty deed for the 30 acres of land described in the petition. To obtain complete relief plaintiff appealed.

From that part of the decree reforming the contract neither party appealed. In restoring the terms upon which the parties definitely and specifically agreed the district court made no mistake. No other conclusion could properly be reached upon a trial *de novo*. Defendant sold and plaintiff purchased 30 acres of land free from incumbrances and easements. The western and southern boundaries of the tract were definitely pointed out to plaintiff by defendant and were east and north of the highways. The purchase price was $60 an acre. Plaintiff made a cash payment of $100 and paid the remainder, or $1,700, before maturity and before receiving a deed or an abstract. He was not estopped by the erroneous description in the written instrument. He refused to accept the deed describing the western and southern boundaries as the center of the highways. He took and continuously retained possession of the 30-acre tract east and north of the highways. He fenced the

premises in fact purchased and made other valuable and lasting improvements thereon. He refused to surrender to defendant or to her grantee, Chamberlain, any part of the land which he claims to have purchased. That part of the decree reforming the contract, therefore, will not be disturbed.

Was plaintiff entitled to a decree requiring defendant to execute and deliver to him a warranty deed for the 30 acres of land described in the contract as reformed? While the record shows that defendant entered into a subsequent contract to sell and convey to Chamberlain two acres of land she had previously sold to plaintiff and that she afterward executed and delivered a deed therefor, this is no defense whatever to the suit in equity for specific performance of her reformed contract with plaintiff. Chamberlain was not an innocent purchaser of the two-acre strip of land. Before accepting his deed and before parting in full with the purchase price of the 50-acre tract which he had agreed to purchase from defendant, he knew that plaintiff was in possession of the 30-acre tract on the south, including the two acres of land in controversy. Chamberlain also knew the nature of plaintiff's claim to his right of possession. This is conclusively shown by the evidence. Possession was notice to the world of possessory rights of which inquiry of the occupant would elicit knowledge. In entering into a contract to purchase land in possession of plaintiff, Chamberlain was bound to inquire about the former's interest therein. *Dengler v. Fowler*, 94 Neb. 621.

In an independent action at law, Chamberlain proceeded against Smoke by forcible entry and detainer to acquire possession of the identical two acres involved in the present suit in equity. The district court for Dawes county, wherein the action was pending, found the issues in favor of Smoke, specifically recognized his equitable right to a reformation of his contract to purchase the 30-acre tract so as to include the two acres of land now in litigation and dismissed the action at law. A copy of the final judgment therein was

admitted as evidence in the equity suit. The law applicable to the facts therein has been stated as follows:

"A party who purchases real estate with knowledge that another has a contract of purchase for the same is not a *bona fide* purchaser; and if he acquires such knowledge at any time before the payment of the consideration, he will not be protected as a purchaser in good faith." *Veith v. McMurtry,* 26 Neb. 341; *Barney v. Chamberlain,* 85 Neb. 785. See, also, *Bowman v. Griffith,* 35 Neb. 361; *Dundee Realty Co. v. Leavitt,* 87 Neb. 711; *McParland v. Peters,* 87 Neb. 829.

The conclusion is that plaintiff was entitled to specific performance of his contract of purchase as reformed and the decree of the district court will be modified accordingly.

Another question is presented for determination. By pleading and proof plaintiff sought to recover attorney's fees and other expenses of litigation as damages resulting from defendant's breach of her contract to convey the entire tract of land sold and for which she received payment in full. The claim therefor was rejected below and plaintiff presented it for allowance on appeal. Expensive litigation was caused by defendant's breach of contract, but the law does not seem to authorize a recovery for such a claim. *Toop v. Palmer,* 108 Neb. 850.

The decree of the district court is modified to require specific performance by ordering defendant to execute and deliver to plaintiff a good and sufficient warranty deed to the 30 acres of land described in the contract as reformed. In the event of her failure to do so, the decree as so modified will operate as such a conveyance. The costs in both courts will be taxed to defendant. As thus modified, the decree of the district court is affirmed.

AFFIRMED AS MODIFIED.