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JULIED SITTLER, APPELLEE, V. AMELIA WITTSTRUCK, APPELLANT.

FILED FEBRUARY 5, 1932. No. 28158.

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

Frampton & Moseley, for appellant.

G. E. Hager and *Perry W. Morton, contra.*

Heard before ROSE, GOOD and EBERLY, JJ., and CARTER and CHASE, District Judges.

PER CURIAM.

From a decree of the district court, quieting in plaintiff title to a strip of land along the east end of the north half of the southwest quarter of section 6, township 8 north, range 6 west, in Lancaster county, Nebraska, and enjoining defendant from continuing to trespass thereon, defendant has appealed.

Plaintiff and defendant each asserted title to the tract in question and prayed to have his title quieted. Defendant was the record owner of the title; plaintiff claimed prescriptive title by adverse possession under claim of ownership for more than ten years.

Defendant complains because the trial court refused to grant her a jury trial. The action by plaintiff was essentially an action in equity and authorized by section 76-401, Comp. St. 1929. In *Eayrs v. Nason*, 54 Neb. 143, this court held that this section of the statute modified the old chancery rule, and that a party may maintain an action to quiet his title to real estate, whether he be in or out of possession, and whether his title be legal or equitable. Each party was seeking equitable relief; each was invoking the aid of a court of equity. The court very properly denied a trial by jury.

The principal question is whether the evidence is sufficient to sustain the judgment of the trial court. It is conceded that plaintiff is, and for many years has been,

the owner of the record title to the southeast quarter, and defendant the owner of the record title to the east half of the southwest quarter, of said section 6. For 40 years or more there has been a fence running north and south and slightly to the west of the boundary line between the two tracts of land. This fence at the north end was about 33 feet west of the true boundary, and the south end was approximately on the boundary line. By agreement between the respective owners, each was to and did keep in repair one-half of this fence; plaintiff the south and defendant the north half thereof. Recently, the defendant moved the north half of the fence from its former location to the true boundary line between the two tracts of land. Plaintiff, asserting that he is the owner of the land on the east side of the original location of the fence, brought this action.

It appears that for 40 years or more this fence has been maintained on its former location; that the plaintiff and his predecessors in title have cultivated and used the land as their own up to the fence line, and that during this time plaintiff and his predecessors have claimed title to the land, while defendant has cultivated and used the land on the west side thereof. Doubtless, by mistake, when the fence was built, instead of being on the true boundary line, it was set the distance west from the true boundary line, above indicated. The evidence discloses beyond dispute that plaintiff has had the open, notorious, continued, uninterrupted possession, use and occupancy, under claim of ownership, of all the land lying east of the fence, for more than ten years before defendant moved the fence.

It is a well-recognized principle of law that, where adjacent owners of land construct a fence as a boundary line between their respective tracts, and each uses and occupies the land to the fence, each claiming title to the land on his respective side of the fence for a period of more than ten years, each thereby acquires an absolute title, by adverse possession, to the land on his side of the fence, regardless of whether or not it was on the true boundary.

This principle is so well established that it requires no citation of authorities to sustain it.

The evidence not only justifies but requires the finding of the trial court that the strip of land in question, being 33 feet wide on the north end and 15½ feet wide on the south end, and being immediately west of the north half of the southeast quarter of said section, is vested in the plaintiff by adverse possession, and that defendant has been wrongfully trespassing thereon, and threatens to continue so to do. Plaintiff, having acquired title to this strip of land by adverse possession, became the true owner thereof, and title thereto was properly quieted in him. Defendant was properly and lawfully enjoined from further trespassing thereon.

The judgment of the trial court is right and is

AFFIRMED.

STATE, EX REL. PUBLIC SCHOOL DISTRICT NUMBER 6, CEDAR COUNTY, APPELLANT, V. CHARLES W. TAYLOR, APPELLEE.

FILED FEBRUARY 5, 1932. No. 27954.

Schools and School Districts: PUBLIC SCHOOL FUNDS: ALLOTMENT. The state superintendent of public instruction will not be required by mandamus to recognize a school district as a public school district entitled to share state educational trust funds created for secular public school purposes exclusively, if the only school in the district is sectarian, though organized, officered and certified as a public school district.

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

John J. Ledwith and *P. F. O'Gara,* for appellant.

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

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

ROSE, J.

This is an application for a peremptory writ of mandamus commanding the state superintendent of public instruction to recognize the school in School District Number 6, Cedar county, relator, as an accredited high school and as a public school entitled to share by apportionment moneys belonging to the Nebraska school funds.

Relator averred that it was regularly organized as a public school district many years ago and that it has ever since functioned as such; that it shared state public school funds until respondent interfered with its right thereto; that the superintendent of public instruction of Cedar county duly certified to respondent data showing that relator is entitled to its share of the state public school funds. The application alleges facts sufficient to entitle relator to the writ, if School District Number 6, Cedar county, is conducting a "common or public school," within the meaning of those words as used in the Constitution and statutes relating to schools and school funds.

Respondent admitted the organization of relator as a public school district, but resisted the application for mandamus on the ground that relator is not conducting therein a public or common school. In substance, respondent pleads in his answer that relator is conducting a religious, parochial and sectarian school to which state public or common school funds cannot legally be diverted or apportioned.

Evidence was adduced on both sides at considerable length. The district court found the issues in favor of respondent and denied a peremptory writ. Relator appealed.

Counsel for relator called attention to the facts that district number 6, Cedar county, is regularly organized as a public school district and that data entitling it to share state public school funds were certified by the county superintendent of public instruction of Cedar county to respondent. In this connection it was earnestly argued that the state superintendent of public instruction had under the law no alternative but to recognize relator as an ac-

credited public school district and to make for its benefit the necessary apportionment of public school funds. It was argued that any use of the school or school building for sectarian instruction or religious exercises inconsistent with a public school maintained at public expense should be prevented by public authority without destroying the school district or depriving the pupils therein of their constitutional right to a public school education.

The nature of the school and the character of the funds which a peremptory writ of mandamus would compel respondent to apportion to relator for school purposes are material inquiries. The high moral character, qualifications, courtesy, culture and refinement of the teachers were recognized by respondent and by the witnesses who testified in his behalf on those subjects. Moreover, the building in which the school is conducted is a commodious, subtantial stone and brick structure admirably adapted to school purposes.

The school building is situated in a rural community six or seven miles from the post office at Fordyce on a tract of approximately 13 acres of land belonging to St. Boniface Parish of the Roman Catholic Church. In front, across a highway, is a Catholic church. Not more than 150 feet away there is a parish house occupied by the parish priest who has the care of the three buildings of the group—all church property. There is no other building near. Cut in stone over the entrance to the school building, on top of which is a cross, is the name "St. Boniface School."

Relator, School District Number 6, Cedar county, does not own a schoolhouse but leases from St. Boniface parish three rooms in its school building, two on the first floor and one on the second, where pupils study, receive instruction and recite. Three teachers occupy living and sleeping rooms in the same building. In the basement there are a chapel and a kitchen. During the winter months the chapel is used for religious services conducted by the parish priest, where all pupils are permitted to attend. On

the altar in the chapel there are statues and other emblems of the Catholic religion. As a custom, during the greater part of the school year the priest of the parish says mass in the chapel at 8 o'clock in the morning. Before school opens for the day, pupils, while in the care of the school, march from schoolrooms to the chapel and there attend ritualistic services conducted according to Catholic faith and tenets. Beginning at 8:30 a. m. the parish priest devotes 15 minutes to religious instruction in the schoolrooms, the regular school work commencing at 8:45. The pupils have in their desks and study Catholic readers and the catechism used in Catholic parochial schools. Before and after recess they repeat little prayers.

At the request of the members of the school board of district number 6, Cedar county, the parish priest found for them three teachers who entered into a joint contract of employment for $120 a month for all. One of them received a monthly warrant for the services of the three. All are ordained nuns belonging to the Benedictine order of the Catholic sisterhood. In the schoolrooms and elsewhere they wear the garb of their sacred order, consisting of long black gown, white coif and white corona covered by a black veil. The garb includes the rosary also.

The school building and surroundings, the religious emblems, the sectarian textbooks and catechism, the prayers of the pupils, the garb and devotional attitude of the sisters and the instructions and services of the parish priest in the chapel and classrooms create an environment that reflects the spirit, example and belief of the Catholic religion in the school itself. Inculcation of that religion is part of the school work. Undisputed evidence in the record will admit of no other conclusion. Should respondent be coerced by mandamus into recognizing relator as a public or common school and consequently apportioning state public school funds to a school so conducted?

The Constitution enumerates "perpetual funds for common school purposes of which the annual interest or income only can be appropriated." These funds are trust

funds devoted exclusively to those purposes and cannot lawfully be diverted to other purposes. Const. art. VII, secs. 3-9. The Constitution declares:

"Such funds with the interest and income thereof, are hereby solemnly pledged to the purposes for which they are granted and set apart, and shall not be transferred to any other fund for other uses." Const. art. VII, sec. 9.

The Constitution further provides:

"No sectarian instruction shall be allowed in any school or institution supported in whole or in part by the public funds set apart for educational purposes." Const. art. VII, sec. 11.

"No preference shall be given by law to any religious society." Const. art. I, sec. 4.

The word "sectarian," as used in the Constitution, obviously applies to the Catholic church without any distinction between the original church and later denominations of the Christian religion, and is so used herein.

The effect of the writ demanded by relator as a matter of right would be to require the state superintendent of public instruction to apportion part of the interest and income from the state common school trust funds to a school in part sectarian—a school which is not a common or public school within the meaning of the Constitution. To recognize relator's school as a common or public school and to make the resulting apportionment sought by relator would amount to an illegal diversion of public trust funds from the purposes of the trust. To do so is not a duty enjoined by law upon respondent. The writ was properly denied.

AFFIRMED.

GRANVILLE WILLIAMS, APPELLEE, V. ADA NUTTER, APPELLANT.

FILED FEBRUARY 5, 1932. No. 27883.

Judgment: RES JUDICATA. A prior judgment on a different cause of action is, in a subsequent action, *res judicata* only as to such matters as were in issue in the former action.

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

Perry, Van Pelt & Marti, for appellant.

John C. Hartigan, contra.

Heard before ROSE, GOOD, DAY and PAINE, JJ., and NISLEY, District Judge.

DAY, J.

The plaintiff brings this action to recover $1,500 which he claims one Nutter agreed to pay him if he would consent to the sale of certain Thomas county land which was owned by the plaintiff and upon which the defendant held a mortgage. The case was tried to a jury, which returned a verdict for $766, upon which a judgment was entered and from which the defendant appeals.

The amended petition alleges that the plaintiff was the owner of certain lands situated in Thomas county, Nebraska, and that the defendant held a mortgage upon this land upon which there was due approximately $4,500; that the plaintiff consented to permit defendant to sell or trade said land, with the understanding that the defendant was to pay plaintiff all the proceeds from the sale of the land over the amount of Nutter's lien; that the defendant entered into a contract to transfer the land to one Green, for which Nutter was to receive some land in Kansas; the plaintiff executed a deed to the land to Green, the defendant informing the plaintiff that the Kansas land was taken for a consideration of $6,000; that the defendant had agreed to pay plaintiff the difference, or $1,500. The defendant denied the allegations of the petition, and alleged that the cause of action as pleaded in the plaintiff's petition is *res judicata,* for that the issues have been determined in a case in the district court for Thomas county, Nebraska, wherein the plaintiff herein was a defendant and the defendant herein a plaintiff. He also alleged a written contract, which was denied by plaintiff.

The Thomas county case was a suit to rescind the trade

between Nutter and Green and to reinstate Nutter's mortgage upon the land in that county. Williams was made a party, but upon the final decree the court found that he had no interest in the land and he was dismissed from the action as having no interest therein. The only question in that case was whether Nutter had been defrauded by Green. The consideration upon which this action was based was the transferring of the legal title of land owned by Williams to Nutter, who held a mortgage upon it, in payment of the debt secured thereby. In conformity to this agreement Nutter released his mortgage and Williams, at Nutter's request, conveyed the land to Green. The causes of action are not identical, so that the former action, even if prosecuted to judgment between the parties, would not be *res judicata,* unless a right, question or fact in issue in the present action was put in issue and determined in the former action. A right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction as a basis for a judgment between the same parties cannot be relitigated, even though the second suit is upon a different cause of action. *Chicago, B. & Q. R. Co. v. Cass County,* 72 Neb. 489; *Anderson v. Kreidler,* 56 Neb. 171. No reference is made in any of the pleadings or in the judgment to the transaction between Nutter and Williams, whereby the latter executed the deed to Green at the request of Nutter. The contract which is alleged as the basis of this action was not pleaded and was not an issue in that action. The judgment of the court in that action was that Williams had no interest in the litigation between Nutter and Green to rescind the exchange. When the second action is upon a different cause of action, a judgment in the prior action is *res judicata* only as to those matters in issue upon the determination of which that judgment was rendered. *Slater v. Skirving,* 51 Neb. 108; *Hamilton Nat. Bank v. American Loan & Trust Co.,* 66 Neb. 67, 82.

No right, question or fact to be determined in this case was adjudicated in the Thomas county case. Another test

applicable in this case is that Williams could not have appealed from the Thomas county case because the decision was in his favor. Can he be bound in this case adversely by a favorable judgment in that court? The answer is that the issues in this case were not in issue and determined in that case.

The other contention of the appellant is "that parol evidence is inadmissible to vary or contradict the terms of a written instrument." As an abstract rule of law this contention is correct, but there was a dispute as to whether there was a written contract. The alleged contract was questioned and denied by the plaintiff. The question as to what the contract was between the parties was submitted to the jury under proper instructions. Among other things, the jury were instructed that parol evidence cannot contradict a written agreement, but may explain that which is ambiguous. Before the rule could be applied, it was necessary to decide whether there was a written contract. This issue of fact was resolved by the jury in favor of the plaintiff.

We have examined the entire record and find no prejudicial error. The judgment of the district court is

AFFIRMED.

ALVA R. ROBINSON ET AL., APPELLANTS, V. JOHN T. BRESSLER ET AL., APPELLEES.

FILED FEBRUARY 5, 1932. NOS. 27855, 27856.

1. **Vendor and Purchaser: "MARKETABLE TITLE."** A marketable title is a title free from reasonable doubt both as to matters of law and fact—a title which a reasonable purchaser, well informed as to the facts and their legal bearings, willing and ready to perform his contract, would, in the exercise of that prudence which business men ordinarily bring to bear upon such transactions, be willing to accept and ought to accept.
2. ———: ———: EVIDENCE: OPINION OF ATTORNEY. The good faith opinion of counsel of experience and good standing, in reference to a title which he has examined, is a material fact to be considered by the court in determining the marketability of the title.

3. ———: ———: RESCISSION. The defects in the title considered in the opinion are sufficient to render the title in controversy unmarketable and, under the circumstances of the case, to justify the defendants in refusing to accept it, and the court in awarding a rescission of the contract of purchase.
4. ———: RESCISSION: LIEN FOR PURCHASE PRICE. Upon award of rescission, the purchaser may be entitled to a lien upon the property for the amount of purchase price theretofore paid.
5. ———: ———: ACCOUNTING. Upon a review of the accounting as made in the trial court, *held*, that the same should be modified, and the sum recoverable by defendants, as and for return of the purchase price, reduced to the sum of $75,000, with interest from the date of the decree.

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

Kingsbury & Kingsbury and *Nesbitt, Goodwin & Nesbitt*, for appellants.

C. H. Hendrickson, J. J. McCarthy and *E. J. McCarthy, contra.*

Heard before GOSS, C. J., DEAN, EBERLY and PAINE, JJ., and BLACKLEDGE, District Judge.

BLACKLEDGE, District Judge.

On July 21, 1919, the plaintiffs as vendors made a contract for the sale of 635 acres of land situated in Dixon county, Nebraska, with A. R. Davis as purchaser. The sale price was $160,000, and $20,000 was paid at the execution of the contract. The contract provided that the vendors should convey and assure to the party of the second part in fee simple, clear of all incumbrances, by good and sufficient warranty deed and abstract of title showing of record good and perfect title to the land. The contract was to be performed March 10, 1920.

Although the contract was made in the name of A. R. Davis as purchaser, it appears that others were jointly interested with him in the purchase and it was so understood between all of the persons who claimed an interest in the purchase. There is no dispute that the vendors recognized defendant John T. Bressler as being one of the purchasers

and he principally transacted the business on behalf of the purchasers. Whether the other persons were or were not interested to the extent claimed by defendants at the trial does not seem to have any material bearing in the determination of the case. The trial court found that it was understood and agreed by all the parties that those interested as purchasers were A. R. Davis, John T. Bressler, William E. Von Seggern and John T. Bressler, Jr., each having a one-fourth interest.

At the time for performance of the contract, it developed that the purchasers had arranged a resale of one quarter section of the land, the northwest quarter of section 20, township 28, range 14, to one Thomas Erwin at the price of $50,000, and that the vendors were not then able to give good title to any of the land. Thereupon it was arranged that the purchasers should complete their sale of the one quarter section to Erwin, who would accept a conveyance made directly from the plaintiffs and a bond in the nature of an indemnity procured by John T. Bressler, indemnifying Erwin against any defects or imperfections in the title; that the purchasers should make additional payments on the purchase price, go into possession of the premises, and that the vendors should proceed to correct and perfect the title.

At this time the purchasers did make to the vendors two additional payments of $50,000 each upon the purchase price. The conveyance was made to Erwin and he settled with his vendor Bressler by paying half of his purchase price and executing for the remaining $25,000 a mortgage maturing March 1, 1940, at 5 per cent. interest, and thereupon entered into full possession and control of the land. As to this part of the land the trial court found that the defendants sold the same to Erwin receiving therefor the sum of $50,000, and that by agreement of all the parties a deed was executed by plaintiffs for this land directly to Erwin, and as that is a separate and completed transaction and apparently beneficial and agreeable to all parties concerned, that part of the contract is allowed to stand and

is not affected by the decree, except that the defendants were required to account, in the accounting made by the court, for the full amount of the purchase price.

There was an abstract of title made and certified as of date January 28, 1920. It seems to have been taken and understood then by all of the parties, as was the fact, that the abstract did not show good title of record in the vendors. There were certain defects apparent which all recognized must be corrected, although it does not appear that at that time there had been any real examination of the title or opinion by a title examiner.

The title record showed a warranty deed covering the south half of section 17 by Amanda G. Lee and husband to O. E. Clark, duly executed and acknowledged in June 1881, and recorded July 2, 1881. It also showed that the patent covering the whole section of land, that is, the north half of section 20, and the south half of section 17, was issued to Elijah N. Robinson and recorded January 24, 1919, although dated October 10, 1870. It was also a fact that in the meantime Elijah N. Robinson, patentee, had died in January, 1909, a resident of the state of West Virginia, his will dated in 1903 had been probated in that state in February, 1909, but no probate proceedings had ever been had in this state as affecting these lands. The vendors were claiming title and assuming to convey the same as heirs and devisees of said Elijah N. Robinson. It further appeared that John T. Robinson, son of Elijah N. Robinson and one of the devisees in his will, died in September, 1909, intestate, a resident of the state of Indiana, and leaving surviving him a widow and two daughters, and that no proceedings for the probate of the estate of said John T. Robinson in this state as affecting said land had been had.

There were other matters connected with the title which were more or less discussed between the parties, but the principal things concerned these two estates and the Amanda G. Lee deed to O. E. Clark and, later on, the matter of inheritance taxes as against the two estates.

While these conditions existed and after the time stipulated in the contract for its performance, the vendors did proceed in April, 1920, to institute proceedings in the county court of Dixon county for the probate of the foreign will of Elijah N. Robinson, which proceedings resulted in a decree of that court on May 3, 1920, admitting the instrument to probate in that court, and ordering that regular administration be dispensed with and that the real estate described in the petition filed herein "be and the same hereby is assigned in accordance with the terms and conditions of the last will and testament of the said E. N. Robinson, deceased." At about the same time the vendors also instituted in the county court of Dixon county proceedings for the determination of heirship in the matter of the estate of John T. Robinson, deceased, which proceedings resulted in a decree of that court May 10, 1920, adjudging that Ida B. Robinson, his widow, and May R. Cross and Clio Bond, as children, were the sole and only heirs at law of John T. Robinson, deceased, and as such were owners of an undivided interest in the Dixon county land. In the meantime, in August, 1919, and in April, 1920, respectively, the widow, Ida B. Robinson, and Clio Bond, with her husband, had executed deeds conveying this land or their interest in it to the plaintiffs; and it appears from the testimony, although not in the abstract, that there was a contract between these vendors and the remaining heir, May R. Cross, as to which a controversy arose between the parties and litigation was had in the courts of West Virginia, which finally terminated in the vendors procuring a deed from May R. Cross and her husband executed and filed of record in January, 1922.

It should also be stated that at the time of the arrangement between the parties when performance of the contract was due, the defendant John T. Bressler, although not having title to the property in question, the deed for all of which except the Erwin tract being held in the possession of the First National Bank of Wayne, Nebraska, executed a mortgage to the plaintiffs for $25,000, upon the

southeast quarter of section 17 and, a year later, paid the interest and $5,000 of the principal sum represented by such mortgage. The mortgage debt was made in five different notes of equal amount maturing annually, the first in 1921.

Mr. C. F. Barnes, husband of a daughter of Elijah N. Robinson, was principal spokesman and correspondent on behalf of plaintiffs and John T. Bressler on the part of defendants. The plaintiffs did nothing further in the way of perfecting their title, but urged the payment of the balance due of the purchase price, which was now represented by the mortgage just referred to and a balance of $15,000, on the original contract. The defendants made some other payments of interest, but occasionally insisted that they could not handle the land because the title was defective and they were not able to pay because of the deflation in land market and values. Plaintiffs insisting upon further payments the defendants, on or about April, 1923, submitted the abstract for examination and opinion as to title to Fred S. Berry, an attorney at Wayne, Nebraska. Mr. Berry gave his written opinion as to the title under date of April 13, 1923, and it was soon thereafter transmitted to Mr. Barnes as representing the plaintiffs. Nothing further was done, however, by plaintiffs in correction of the title. They insisted that it had already been made good. The defendants made no further payments on account of the purchase price. Negotiations, however, in a sort of a desultory way continued between the parties until the fall of 1926, during which time defendant Bressler made one or two offers to take the property subject to the claimed defects of title except inheritance taxes, upon the making of a specified discount from the balance of the purchase price, but nothing was accomplished and in July, 1929, the plaintiffs filed a petition in the district court for Dixon county for the purpose of foreclosing said mortgage of $25,000, and the following November filed their petition in said court for the purpose of foreclosing the contract of sale and purchase and recovery of the bal-

ance due thereon. These are the two suits that are now here for determination.

The defendants set up in each suit the contract of purchase and proceedings had under it, the defects of title as they claim them to be, and claimed a rescission of the contract and cancelation of the mortgage. They further allege that the plaintiffs were nonresidents of the state of Nebraska and own no property therein except that involved in this controversy, and ask that they be allowed a lien upon the property for a return of the purchase price theretofore paid which should be decreed to them, and offer to restore possession to the plaintiffs.

The trial court consolidated the two actions, heard them together and determined them in one decree. Also during the pendency of the proceedings, A. R. Davis having previously died, his executrix and heirs were made parties defendant and Von Seggern and Bressler, Jr., appeared and answered, so that all of the parties were before the court.

Some objection was raised by plaintiffs to the matter of consolidation of the cases and the appearance therein of the other defendants as parties in interest under the contract of purchase, but as these were matters within the discretion of the trial court, which discretion we cannot see has in any wise been abused, and there is nothing to show that the plaintiffs were prejudiced thereby, we do not think they merit further attention.

The trial court found generally for defendants and that the equities were with them, and that plaintiffs had not acted with such diligence, fairness and regard of the rights of others as is generally required by courts of equity, did not perform their contract, and that defendants were entitled to a rescission thereof. The court further found as is hereinbefore stated as to the separability of that part of the contract and transaction which had led to the conveyance to Thomas Erwin, and that the plaintiffs did not have a marketable title to the land and induced the defendants to make the payments and execute the mortgage involved herein upon the understanding that the plaintiffs

would diligently proceed to perfect their title; that defendants have been in possession of the real estate under that condition and have collected the rents and profits therefrom. The court then proceeds to make an accounting of the amounts paid by defendants on account of the purchase price and of the amounts involved in the Erwin transaction and amount unpaid of the purchase price and of rents and profits received by the defendants and finds that there is a balance due of $117,199, which should be returned to the defendants, the contract and mortgage canceled, and making said balance a lien upon the land, except the Erwin quarter, in favor of the defendants. The court also made suitable provisions for the distribution of the proceeds as between the parties defendant and in reference to settlements with tenants in possession concerning certain improvements on the property, and generally a quite comprehensive decree for the disposition of all interests and distribution thereof.

The plaintiffs make some further objection to the decree in that it provided that the amount adjudged to be returned on account of the purchase price was made a lien upon the property. As a basis for this it appears that the plaintiffs were nonresidents of this state and had no other property within the state. Under the circumstances of the case, we hold that in case of rescission such a provision in the decree is entirely proper. 27 R. C. L. 627, sec. 383; *Elterman v. Hyman,* 192 N. Y. 113, 127 Am. St. Rep. 862; *Everett v. Mansfield,* 148 Fed. 374, 8 Am. & Eng. Ann. Cas. 956.

The real question upon which the case turns is the sufficiency of plaintiffs' title; and the questions remaining in plaintiffs' showing in that regard are as to the effect, if any, that should be given to the deed by Amanda G. Lee to O. E. Clark, the insufficiency, if any, in the matter of the probate proceedings concerning the estate of Elijah N. Robinson, and the matter of the inheritance taxes.

Of course, there are other features discussed in the briefs, and in connection with the title, none of which per-

haps in themselves would be sufficient justification for refusal of the title, but which in the aggregate should go into the scale in determining the question of plaintiffs' diligence, fairness and regard for the rights of others to entitle them to the relief asked, which in this case would approximate specific performance of the contract, and should be adjudged on that basis.

As illustrative of the preceeding statement, long after these cases had been commenced, and on the eve of trial, the plaintiffs did undertake some further compliance with defendants' objections to title by procuring and recording in the county records an affidavit of Alva R. Robinson covering certain historical features of the proceedings, but the particular part, if any, thereof being the statement which undertakes to show the death of the wife of Elijah N. Robinson. Also the affidavit of Alice B. Barnes which discusses the relationship of the parties and makes an identification as to names. Also another affidavit of Alva R. Robinson which undertakes to show possession on the part of himself and his coplaintiffs and of Elijah N. Robinson their ancestor and that neither Amanda G. Lee nor O. E. Clark had or claimed possession of the premises. There is also attached to the abstract, but not shown as one of the entries thereon nor shown to have been filed or recorded, a certificate of Abe Montgomery, clerk of the county court of Brooke county, West Virginia, purporting to delineate the proceedings had in that court and the regularity thereof in the matter of the estate of Elijah N. Robinson. The plaintiffs urge that they should have the benefit of these things upon the doctrine that they were apparent before the trial and decree and that it is sufficient if they tender a good title at any time up to the time of trial, relying upon the authority of the case of *Seaver v. Hall,* 50 Neb. 878. There doubtless are circumstances, as there were in the case of *Seaver v. Hall, supra,* where it is equitable to allow a vendor the benefit of such showing; but the plaintiffs have insisted at least since 1926, and did insist as late as the filing of their reply in these cases,

that the title they had tendered was good and sufficient. They further urged at the trial that the defendants had no right of rescission because of having entered into possession of the land and had waived the same thereby as well as by execution of the mortgage which is involved in this suit.

All these matters were for the equitable consideration of the court along with other features in the case.

Upon the part of the defendants it was contended in reference to the proceedings for the probate of the will of Elijah N. Robinson, and an inspection of the record shows the contention well founded, that the proceedings did not, either such as were had in the state of West Virginia or those in this state, show, nor did either court determine, any question as to the wife or widow of Elijah N. Robinson, deceased, or whether she survived him. The record of the West Virginia court shows that certain persons who are named as parties in interest appeared and subjected themselves to the jurisdiction of the court, but it makes no attempt to determine whether those were all the parties interested and makes no mention or determination as to any surviving widow. In the probate proceedings in Nebraska upon the foreign will, there is an allegation in the petition that he left no widow surviving; but the court makes no finding in that regard, and its decree is that the real estate is assigned according to the terms and provisions of the will, which will upon its face gives to the widow an interest in the premises.

Another question raised is as to the deed by Amanda G. Lee. It is contended by the plaintiffs that this deed is simply a stray, or the deed of an interloper, not otherwise connected with the chain of title, and that therefore it amounts to nothing and should be given no consideration. This proposition should be considered as it existed in reference to this particular title. There are instances, of course, where, there being a chain of title, some stray deed which appears on record and having no connection with the title is deserving of but little consideration; but

at the time of this purchase, the contract for which was made in July, 1919, this deed was the only instrument which had been on record purporting to affect the title, except the patent. The patent itself had been recorded less than six months before this contract of purchase was entered into. The patentee had been dead for ten years when it was recorded and it had not been recorded during his lifetime although dated in 1870. The deed by Amanda G. Lee to O. E. Clark was regularly executed, acknowledged and entitled to be recorded, and stood for nearly 40 years as the only muniment of title appearing on the records for that tract of land which covered half the acreage involved in the contract of purchase. In this situation and with the plaintiffs residing in a distant state and claiming, not by any conveyance, but under the law of wills, and with nothing on record in their behalf until after this contract was by its terms to be performed, it is not unreasonable that the purchaser should require some special assurance in reference to his title.

There are cases which hold that the deed of a stranger does not constitute a cloud upon the title. This matter of cloud on title has been before the courts so much and in so many different ways that it has become a term with which to conjure. Largely because courts of equity had so circumscribed its meaning and application, this state and many states have enacted laws for the quieting of titles which cover instances where the instrument would not be recognized under the earlier equity practice as a cloud upon the title.

Because of the general adoption of registration laws, whereby the records became so universally and entirely relied upon to show the character of the title, and the undeniable fact that often instruments of record not recognizable as clouds under the existing equity practice did nevertheless actually adversely affect the title and impair its value, severe criticism of the earlier doctrine was offered by an eminent authority in this language:

"While this doctrine may be settled by the weight of

authority, I must express the opinion that it often operates to produce a denial of justice. It leads to the strange scene, almost daily in the courts, of defendants urging that the instruments under which they claim are void, and therefore that they ought to be permitted to stand unmolested, and of judges deciding that the court cannot interfere, because the deed or other instrument is void, while from a business point of view every intelligent person knows that the instrument is a serious injury to the plaintiff's title, greatly depreciating its market value, and the judge himself who repeats the rule would neither buy the property while thus affected nor loan a dollar upon its security. This doctrine is, in truth, based upon mere verbal logic, rather than upon considerations of justice and expediency." 4 Pomeroy, Equity Jurisprudence (4th ed.) sec. 1399.

It has followed that legislative enactments have broadened the powers and duties of the courts in reference to such matters, and the courts themselves have come to a fuller recognition of the requirements of modern business pertaining to record titles. *Holland v. Challen,* 110 U. S. 15; *McGuinness v. Hargiss,* 56 Wash. 162; *Kinsman v. Spokane,* 20 Wash. 118, 72 Am. St. Rep. 24; *Broderick v. Cary,* 98 Wis. 419; *Palmer v. Yorks,* 77 Minn. 20; *Moores v. Clackamas County,* 40 Or. 536.

By statutory provision (Comp. St. 1929, sec. 76-215) the deed under consideration was entitled to be recorded, and it, or the record thereof, was receivable in evidence without further proof, and it is declared (Comp. St. 1929, sec. 76-237) that no conveyance of lands is void for the reason that at the time of its execution such lands are in the possession of another claiming adversely.

The attorney who examined the title was also a witness in the case. He is and has been for years a member of the bar of this state, recognized both locally and generally throughout the state as a lawyer of experience and of high standing, integrity and ability. We do not mean to hold that the opinion of counsel is controlling in a case of this

kind for the purpose of determining whether the title is good or bad, but we recognize that it is the usual practice for persons dealing in property of this nature to apply to attorneys having some knowledge and experience in that line and to rely upon the advice given them. The court should and does consider the good faith opinion of counsel as a material fact in such matters. Such opinion that a title is unmarketable may or may not in itself be sufficient to create a doubt which would justify a refusal to accept the title. The importance and value of an opinion in a particular case must depend upon the counsel and the circumstances under which he is acting. *Howe v. Coates,* 97 Minn. 385, 114 Am. St. Rep. 723; *Cummings v. Dolan,* 52 Wash. 496, 132 Am. St. Rep. 986, and note 1043; *Walker v. Gillman,* 127 Mich. 269.

A marketable title means a title free from reasonable doubt both as to matters of law and fact—a title which a reasonable purchaser, well informed as to the facts and their legal bearings, willing and ready to perform his contract, would, in the exercise of that prudence which business men ordinarily bring to bear upon such transactions, be willing to accept and ought to accept. *Todd v. Union Dime Savings Institution,* 128 N. Y. 636; *Howe v. Coates,* 97 Minn. 385, 114 Am. St. Rep. 723.

There is also for consideration the matter of the inheritance tax which might perhaps have been compensated for or obviated by an abatement from the purchase price, and yet there is no reason why the purchaser should be put to the necessity of himself having a determination made by the proper tribunal to find and assess the proper amount of inheritance tax. As to the matter of the estate of Elijah N. Robinson, it appears that during the course of the trial of this case one of the abstracts was removed from among the exhibits and an entry made thereon showing the payment in November, 1921, of an inheritance tax in the matter of that estate; but there is no showing anywhere in reference to an inheritance tax in the estate of John T. Robinson, deceased. We cannot say that the conclusion of the counsel in this case was wrong.

We hold that the claimed defects in the title asserted by the defendants and hereinbefore discussed are sufficient to render the title unmarketable, and that they, remaining uncorrected for several years and until after the commencement of these suits to enforce completion of the purchase, warranted the refusal by the defendants and the allowance by the court of the rescission of the contract.

There remains for further consideration the matter of the accounting by the court and the provisions resting thereon. This we have carefully considered, and while the theory upon which the court made the accounting is recognized and is applicable in some cases, yet the practical working out of it in this case does not seem to do justice between the parties. The court took for computation the various payments that had been made on the purchase and computed interest thereon at 7 per cent. per annum up until the time of trial, charging the plaintiffs with the total amount. It then determined from the evidence the amount of rents and profits received by the defendants during the same period, computing interest in the same way thereon, and upon the $50,000 realized from the Erwin sale, and charged the defendants with that amount, striking a balance therefrom the result of which is $117,-199, for which decree was entered. When it is considered that the parties themselves had by their contract fixed the value of the property at $160,000, and that the Erwin quarter had been eliminated by the acts of both parties, it does not seem right that the plaintiffs should by any computation become chargeable for so much of an excess in favor of the defendants who during the time retained possession and received the rents and profits from the whole property. The parties were upon an equal basis as far as dealing with the property was concerned, and while they did not proceed with such diligence as to entitle them to the full measure of relief that the law sometimes provides, it does not seem that the defendants should be allowed to receive the whole use of the property, plus a considerable amount for the use of the purchase price. The

aggregate amount of interest included in such accounting and charged against plaintiffs is something in excess of $95,000, and the aggregate amount of interest included in the accounting and charged against the defendants is something in excess of $41,000. We think that the accounting may be made upon a much simpler basis and more nearly approximating justice. There appears to be no occasion for the computation of interest at all up to the time of trial. By their voluntary acts the defendants had possession of the property and plaintiffs had possession of $125,000 of the purchase price which had been paid to them. Plaintiffs are not entitled to have interest upon the unpaid balance of the contract price because they had not perfected their title and tendered it so as to entitle them to recover the balance of the purchase price; but, as against the use of the property by the defendants, the plaintiffs are justly entitled to the use of so much of the money as had been paid to them. Both were also entitled to the permanent elimination of the $50,000 on account of the Erwin land. This would leave, not making any allowance to Bressler on account of the $2,000 commission, a balance of $75,000, to the return of which defendants are equitably entitled, and which they should receive with interest thereon from the date of the decree of the trial court as and for a return of the purchase price.

The judgment and decree of the trial court will therefore be and hereby is modified in this particular by reducing the amount of $117,199, therein provided to the sum of $75,000, and eliminating the accounting as made in said decree, but otherwise approving and affirming the decree of the trial court in all its provisions.

AFFIRMED AS MODIFIED.

CHRIS J. KIENKE, APPELLANT, V. WILLIAM N. HUDSON ET AL., APPELLEES.

FILED FEBRUARY 5, 1932. No. 27743.

1. **Statutory Provision.** "Every director of a commercial state bank, other than cooperative banks, having a capital of $50,000

or less, must be the owner of at least 4 per cent. of its capital stock in his own name and right. Comp. St. 1929, sec. 8-121," *Kienke v. Kirsch*, 121 Neb. 688.

2. **Banks and Banking**: OWNERSHIP OF STOCK: ESTOPPEL. "One who knowingly permits a certificate for shares of the capital stock of a commercial bank to stand in his name, for the fraudulent purpose of making it appear that he is thereby qualified, under the law, to become a director of such bank, and by virtue of such apparent ownership does become and act as such director, in violation of law, will not be heard to say that he was not the owner of said shares of stock in his own right, during the period he so served as such director." *Kienke v. Kirsch*, 121 Neb. 688.

APPEAL from the district court for Keya Paha county: ROBERT R. DICKSON, JUDGE. *Reversed.*

J. J. Harrington and *Ross Amspoker*, for appellant.

Sterling F. Mutz, contra.

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

HORTH, District Judge.

This is a companion case of *Kienke v. Kirsch*, 121 Neb. 688. It involves similar controlling facts and is determined by the opinion in the foregoing case, and for the reasons therein stated the judgment is reversed and the cause is remanded for further proceedings.

REVERSED.

HORACE CARY ET AL., APPELLANTS, V. A. H. REITER ET AL., APPELLEES.

FILED FEBRUARY 5, 1932. No. 27890.

1. **Appeal**: CONFLICT OF EVIDENCE. While, under the statute, this court is required to try an action in equity *de novo*, yet, when the evidence on material issues so conflicts that it cannot be reconciled, it will consider the fact that the trial court observed the witnesses and their manner of testifying and must have accepted one version of the facts rather than the opposite.
2. *Held*, that the evidence in this case justifies the findings of the trial court.

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

George A. Munro, for appellants.

Nye & Nye, contra.

Heard before ROSE, GOOD and DAY, JJ., and MESSMORE and NISLEY, District Judges.

MESSMORE, District Judge.

This is an action in the nature of a creditors' bill brought by appellants, who were plaintiffs below, to set aside certain conveyances executed by appellee herein, A. H. Reiter, to appellees Ida E. Reiter, Sophie Legband and Herman G. Reiter.

Appellants' petition alleges that they are trustees for the depositors and unsecured creditors of the former American State Bank of Kearney, appellant A. C. Wittera also being trustee for the depositors' committee for said bank; that on the 13th day of September, 1930, a judgment was rendered in the district court for Buffalo county in favor of appellants and against appellee A. H. Reiter in the sum of $3,771 and costs; that an execution had been issued on said judgment and returned by the sheriff of said county wholly unsatisfied.

Appellants further allege that appellee A. H. Reiter conveyed certain real property and chattels to Ida E. Reiter, Sophie Legband and Herman G. Reiter with intent to hinder, delay and defraud appellants; that there were pretended but no actual considerations for said conveyances; that appellees Ida E. Reiter, Sophie Legband and Herman G. Reiter knew of the indebtedness of appellee A. H. Reiter to appellants; that said conveyances were made March 4, 1930, March 6, 1930, and March 15, 1930, while the action of appellants against appellee A. H. Reiter was pending in said district court and prior to the entry of judgment therein, and that appellants obtained a judgment against appellee A. H. Reiter in said action.

Appellee Ida E. Reiter in her separate answer specifically

alleges that the northwest quarter of section 8, township 10 north, range 18 west, in Buffalo county, was occupied by herself and husband, A. H. Reiter, as their home where they had resided for several years, and she claimed a homestead exemption therein of $2,000 over and above a prior mortgage lien of $4,000 thereon.

Appellee Herman G. Reiter specifically alleges in his separate answer that appellee A. H. Reiter was indebted to him for a loan of money in the sum of $1,000 and that the same was past due and unpaid.

Appellee Sophie Legband specifically alleges in her separate answer that appellees A. H. Reiter and Ida E. Reiter were indebted to her for loans made to them and that the same were past due and unpaid.

All appellees in their separate answers specifically deny any intent to hinder and delay appellants, or any creditor, and allege that said conveyances were made in good faith and for the purpose of securing past-due indebtedness owing the respective parties by the said A. H. Reiter.

Appellants by way of a reply filed general denials to all answers.

By stipulation of the parties on the evidence it was agreed that appellants obtained a judgment against A. H. Reiter on September 30, 1930, for $3,771 and costs; that execution was issued on said judgment and returned wholly unsatisfied for want of property on which to levy.

It was further stipulated that on March 4, 1930, A. H. Reiter had title to the east half of section 14, township 9 north, range 18 west of the sixth P. M., in Buffalo county, and had had title to the southeast quarter of said land since 1915 and title to the northeast quarter thereof since 1919; that on March 4, 1930, said land was incumbered with a mortgage of $6,000 in favor of the Union Central Life Insurance Company, said mortgage covering the whole half section; that on said date A. H. Reiter and Ida E. Reiter, his wife, executed a mortgage on said land to Sophie Legband, the consideration named therein being $1,150, and being made subject to the prior mortgage of $6,000;

that on March 6, 1930, A. H. Reiter conveyed by warranty deed said land to his wife, Ida E. Reiter, which deed was recorded in the office of the register of deeds of said county, the consideration named in said deed being $3,000; that on the 15th day of March, 1930, A. H. Reiter held title to the northeast quarter of section 8, township 10 north, range 18 west of the sixth P. M., in said county, on which there was a mortgage of $4,000; that the said A. H. Reiter had held title to said land since June, 1919; that on March 15, 1930, the said A. H. Reiter conveyed said land by warranty deed to the said Ida E. Reiter, the consideration named therein being $1,000; that on March 4, 1930, appellees A. H. Reiter and Ida E. Reiter executed a bill of sale for certain chattel property to Herman G. Reiter, the consideration named therefor being $1,000; that said bill of sale was filed and recorded in the office of the county clerk of said county on March 5, 1930; that the said Herman G. Reiter is the father of the said A. H. Reiter; that the mortgage executed by appellees A. H. Reiter and Ida E. Reiter on the east half of section 14, township 9 north, range 18 west of the sixth P. M., in said county, was recorded in the office of the register of deeds March 6, 1930, being the $1,150 mortgage given by them to Sophie Legband; that the deed to the northeast quarter of section 8, township 10 north, range 18 west, in said county, was recorded in said office on the 15th day of March, 1930; that the deed to the east half of section 14, township 9 north, range 18 west, in said county, was recorded in said office on the 6th day of March, 1930; that appellee Sophie Legband is the mother of the said Ida E. Reiter and resides in Dodge county, Nebraska; that the indebtedness upon which said judgment was entered was evidenced by two promissory notes executed by appellee A. H. Reiter to the said American State Bank prior to the time of the filing of said petition; that said petition was filed in the district court for Buffalo county February 15, 1930, and that summons in said action was served on the said A. H. Reiter February 18, 1930; that the indebtedness on which the judgment was

based was incurred by Reiter on two different dates, the first being the 6th of March, 1929; that both notes were renewals of prior indebtedness and for new money received, and dated March 6, 1929, and June 4, 1929.

The material evidence, in addition to that contained in the stipulation which has been quite fully set out, discloses that in the spring of 1929 Herman G. Reiter loaned $1,000 to his son, A. H. Reiter. The check for $1,000 and the note he took from his son as evidence of this indebtedness were received in evidence. On March 4, 1930, this note was paid by a bill of sale covering certain chattels as set forth in the stipulation. Herman G. Reiter testified that he sold 10 head of the calves covered by this bill of sale for $292.95, net, and with the proceeds paid certain interest for the benefit of his son and other expenses, such as $25 attorney's fee to Fred Nye, and kept $20.15 of this money for himself. The remainder of the cattle and implements included in the bill of sale stayed in the possession of A. H. Reiter and he used the same and received the income therefrom with the permission of his father.

Ida E. Reiter testified that she and appellee A. H. Reiter were husband and wife and had been married for 15 years and lived on the northeast quarter of section 8, aforesaid, for the past 4 years; that said quarter was mortgaged for $4,000, and that she had inherited $5,291.23 from her father's estate when she was 18 years old and before she was married. She testified further that a $900 check made under date of March 22, 1915, was given by her to her husband; that he used some of it to pay on the land (it developed later on in the evidence that this money was used to buy stock and implements); further, that an $800 check which she gave to Cochran and Miller (exhibit 5) was used to pay on the southeast quarter of the land in question, and also that a $700 check, dated February 1, 1916, was used as a payment on the half section of land described in the stipulation; that on June 24, 1919, she gave a check to Colbert and Reynolds for $1,000 (exhibit 7); that this amount was applied on the purchase price of

the half section aforesaid. There was some dispute in the record as to whether or not this $1,000 was paid out of the account of Ida E. Reiter, and also a check for $800, known as exhibit 8. She testified that this money was taken from a bank in Snyder, Nebraska, and that she gave her husband a check in the first instance, he in turn taking it to the City National Bank in Kearney, she having indorsed it, this creating an account in his name, and that subsequently a check was made by her which he signed; that she placed her name below his signature on the check, and that certain other notations were made on the checks later to show what they paid; that the money evidenced by all of said checks came from her separate estate. The trial court accepted this explanation.

She testified further to conveyances made to her by her husband and the dates thereof, as stated in the stipulation. In referring to the deed to the half section given her by her husband in the spring of 1930, to the question, "Why was that made?" she replied, "I never had anything to show for what money I paid on it and I thought I ought to have something to show for it." To the question, "What consideration was named in that deed?" she replied, "Why, he allowed $3,000 paid on the land, but I actually paid more than that, but he called it $3,000." Concerning the deed she received from her husband for the home quarter, to the question, "Why was that made?" she replied, "Because I paid some money on it." Concerning exhibit 8, a check for $800, dated June 18, 1919, signed by A. H. Reiter, and under it the name of Ida E. Reiter, with a notation thereon, "Miller place," the witness testified that it was a payment to A. Nelson, an agent, and applied on the home quarter. Witness' passbook was received in evidence, showing deposits of $4,152.78 between March 29, 1915, and July 6, 1916.

The witness further testified that she knew her husband owed large sums of money to the bank; that she and her husband talked to one A. C. Wittera, trustee for the depositors' committee for the American State Bank of Kear-

ney, a few days before the conveyances were executed, and that she did not mention to Wittera at that time that her husband owed her anything, nor that the instruments of conveyance from her husband to her had been signed. She further testified to the loan of Sophie Legband to herself and husband in the sum of $1,150 and to the mortgage given to the said Sophie Legband for $1,150, subject to the $6,000 mortgage, on the east half of section 14, township 9 north, range 18 west, in Elm Creek township, and also to three smaller notes of $200, $300, and $600, respectively, payable to the said Sophie Legband and given by them, which notes were taken up March 30, 1930, and the note of $1,150 given in lieu thereof and secured by the mortgage above referred to.

A. H. Reiter testified to the bill of sale given to his father; that it was a valid indebtedness; and also to a written statement given the bank; that the items therein were put down by the banker; that he had no apparent knowledge of the statement but had signed it; denied that he made statements as to the value of the property, but answered questions as to the number and amount of cattle, hogs and corn, but not as to their values; that he was not asked whether he owed any money.

A. C. Wittera testified in rebuttal for appellants to the property statement given by the said A. H. Reiter, which was received in evidence, and to the values of the lands in question, they being from $25 to $35 an acre; that Mrs. Reiter had said nothing to him about A. H. Reiter owing her money, nor had A. H. Reiter said anything to him about his owing his wife money, or that Mr. and Mrs. Reiter were indebted to Mrs. Legband at the time.

A. H. Reiter called in rebuttal for appellees denied that he made the statement that the 320 acres of land in question were valued at $17,000 or that the 160 acres were worth $9,000, as portrayed by the statement to the bank, or that the implements were worth $500; that he was never asked about any indebtedness by the person taking his statement.

Witnesses for appellees, in fixing the value of the real estate, placed the value of the half section at $25 an acre and $30 to $35 an acre for the 160 acres of land.

The trial court found generally and specially in favor of each and all of the appellees.

From the statement of facts contained in the stipulation, the evidence of the witnesses and the findings of the trial court on the facts this appeal in equity comes to this court for a trial *de novo*, as provided by section 20-1925, Comp. St. 1929.

This court has held that, when the evidence on material issues so conflicts that it cannot be reconciled, this court will consider the fact that the trial court observed the witnesses, their manner of testifying, and must have accepted one version of the facts rather than the opposite. *Shafer v. Beatrice State Bank*, 99 Neb. 317; *In re Estate of Waller*, 116 Neb. 352.

Reversible error has not been pointed out, and it follows that the decree of the trial court must be, and is hereby,

AFFIRMED.

NEBRASKA STATE BANK OF NORFOLK, APPELLANT, V. SCHOOL DISTRICT OF CITY OF PIERCE, APPELLEE.

FILED FEBRUARY 5, 1932. No. 28026.

1. **Assignments.** Ordinarily, an assignee of a chose in action takes the same right as was possessed by, and subject to the same defenses and equities which could be enforced against, his assignor.
2. **Banks and Banking: NOTICE.** Knowledge of the president and managing officer of a bank will be imputed to such bank, where such officer is acting for and in the interest of his bank.
3. ———: **DEPOSIT OF SCHOOL FUNDS: TRUSTS.** A bank receiving a deposit of funds of a school district, in the hands of its treasurer, who is also president and managing officer of such bank, holds such funds as trustee for the district.
4. ———: ———: **RIGHT OF SET-OFF.** Where a bank, acting through its president and managing officer, who is at the same time treasurer of a school district, purchases warrants of the district drawn on such treasurer, which are irregular on their

face so that they are not entitled to registration by the treasurer, the bank in such case holds the claim represented by such warrant subject to the rights of the district to offset any claim it has against the bank.

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

Shurtleff & Spillman, for appellant.

Douglas Cones and *M. H. Leamy, contra.*

Heard before GOSS, C. J., DEAN, EBERLY and PAINE, JJ., and WRIGHT, District Judge.

WRIGHT, District Judge.

This action was brought by Nebraska State Bank of Norfolk, Nebraska, as plaintiff, against School District of the City of Pierce, Nebraska, defendant. During the course of the litigation, the bank became insolvent, and thereupon Clarence G. Bliss, as receiver of plaintiff bank, was substituted as plaintiff. The parties will be designated, as in the district court, plaintiff and defendant, respectively.

Plaintiff seeks to recover as assignee of 44 warrants drawn on the defendant's treasurer, each regular on its face except that, while it was signed by the secretary, it was not signed by the president or vice-president of defendant's board, as the statute requires. It is agreed by the parties that each was issued for the payment of a valid claim against the defendant which had been examined, approved and allowed by its board.

For five years immediately prior to March, 1928, Frank Pilger was the treasurer of defendant school district and also president and managing officer of the Pierce State Bank of Pierce, Nebraska, in which bank he deposited defendant's funds in his hands as treasurer.

It is clear that, under a custom of several years standing, the defendant's board had adopted a plan of issuing warrants for local claims signed only by its secretary, and that Pilger as treasurer had accepted these as sufficient.

The secretary testified: "The board authorized the secretary that when the wages of the teachers or the janitors and firemen at the end of the month came due that the secretary issue a warrant for their pay." These warrants were generally accepted and treated by the holders and banks in the city of Pierce as sufficient to insure payment by the treasurer. Of the warrants involved in this action, about two-thirds were first presented to one of the two banks in the city of Pierce, other than Pilger's bank, where they were treated and cleared as checks drawn on Pilger's bank. The remainder were presented directly to his bank and all were accepted and paid for from its funds. Thereupon Pilger placed upon the warrant his certificate as treasurer that the same had been presented to him for payment. No charge on the bank books was made against Pilger's account as treasurer, although there was then sufficient funds in the account to meet the payment. Pilger's bank then in each instance treated the warrant as a valid warrant belonging to it and sold the same to the plaintiff bank for face value, transferring it by indorsement and delivery in the same manner as was its custom in handling ordinary commercial paper. By this course of procedure, Pilger's bank retained the funds of defendant deposited with it, nor were the funds of the bank depleted for any considerable time, for it is agreed that the warrants were sold and Pilger's bank received credit therefor within 24 hours from the time the same were registered by Pilger as treasurer. In each instance, when the warrant involved was presented to the treasurer and by him registered, he had in his hands and under his control and had on deposit on open account in his bank funds of the defendant more than sufficient to pay the same; and the reserve of the bank on these occasions was sufficient to have paid the treasurer the sum on his check on demand. The treasurer, however, instead of paying the warrant from funds in his hands, undertook to purchase it for his bank.

The warrants of claims in suit were purchased by plaintiff bank in several lots between December 3, 1927, and

February 18, 1928, in the aggregate face value of $7,041.19. On March 5, 1928, the Pierce State Bank became insolvent and closed its doors. There was then on deposit in that bank on open account to the credit of Pilger, as treasurer of the defendant, the sum of $5,751.65, funds belonging to defendant and subject to the order of Pilger as its treasurer. Pilger resigned as treasurer on March 19, 1928. He refused and has failed to turn over to his successor any of the files or records of his office, or any money in his hands or under his control as treasurer; and no part of defendant's funds deposited in his bank when it closed have ben paid.

It was stipulated on the trial that, for more than three years prior to the time plaintiff purchased the warrants in question, the defendant had failed and neglected to audit the accounts of its treasurer or to require him to make a formal monthly statement in writing of the funds of the district or to exhibit or return the canceled, paid or receipted warrants or vouchers from the payees.

Under appropriate pleadings, the district court found that, at the time of the closing of the Pierce State Bank, the district had on deposit in that bank the sum of $5,751.65; that the aggregate amount of plaintiff's claims against the district was $7,041.19, which was based on school district warrants issued by the defendant district not countersigned by the school district president, and that therefore such warrants were void, and were not eligible to registration by the district treasurer; that the plaintiff was the assignee and owner of the original claims which formed the basis of each of these warrants; that the defendant district was entitled to an equitable offset against the total amount of said warrants in the sum of $5,751.65, the amount of the deposit in the Pierce State Bank at the time it closed, which was allowed, and thereupon judgment was entered for the difference between the amount of the claims and such offset, $1,289.54, from which the plaintiff has appealed.

It is conceded that the plaintiff purchased the warrants

without actual knowledge of the facts other than was disclosed by the instruments themselves, and it also seems fairly certain that the school board had no knowledge of the practice of registering and selling the same, but believed that they were being paid from the district's funds in the hands of the treasurer. The treasurer, however, had other plans. He was not only the trusted officer of the defendant, but also the president and managing officer of a bank which was interested in holding possession of defendant's funds. It needs no argument to demonstrate the interest his bank had in retaining these funds, nor can there be any serious doubt that throughout the whole course of his transactions he was acting in the interests of his bank and with little regard for those of the defendant. There is good authority for the proposition that "no man can serve two masters" and Pilger proved no exception to the rule.

There is little, if any, dispute as to the facts. The questions presented are: Did the plaintiff take as assignee subject to defenses the defendant might have against the Pierce State Bank? and, if so, did defendant then have the right to an equitable offset against the plaintiff for the amount of its deposit in that bank at the time it closed?

Plaintiff contends that, the warrants being irregular on their face, the treasurer could not legally pay the same; that it is in the position of assignee of the several claims, subject in its hands only to the equities in force between the original parties at the time it took the assignment, and not to equities accruing thereafter; that, being a remote assignee, it is not affected by equities between the maker and an intermediate indorsee where there could have been no defense to the action against the original payee, and inquires: "Does a nonnegotiable chose in action in Nebraska gather defenses as it rolls along, and must the next holder investigate the transaction between the payor and every intermediate indorsee?" Whatever the rule may be in other jurisdictions, we think this court has already determined that as a general rule it does. In *Henefin v. Live*

Stock Nat. Bank, 116 Neb. 331, where the question of right of an assignee of a chose in action was involved, the court expressly held: "Ordinarily, an assignee of a chose in action acquires no greater right than was possessed by his assignor, but simply stands in the shoes of the latter." We see no reason for declaring a different rule, and under the facts and circumstances here presented have no hesitancy in holding that the plaintiff, by its several assignments, took no greater right than that possessed by the Pierce State Bank and simply stands in its shoes. Where no rule of expediency or necessity controls, such as prompts some of the arbitrary rules pertaining to negotiable instruments, an assignee takes no greater or better right than his assignor. The supreme court of Illinois announces the same rule in *Commercial Nat. Bank v. Burch,* 141 Ill. 519, and in the course of the opinion say: "Each successive assignee of a chose in action takes it subject to the equities existing between the original assignor and his immediate assignee."

This, then, brings us to a consideration of the rights of the Pierce State Bank under which plaintiff claims. If, under the circumstances, the defendant could have asserted an offset against that bank, then it follows that plaintiff is subjected to the same right.

While it is a well-recognized rule that knowledge of an officer of a bank acquired while acting beyond the scope of his authority will not be imputed to the bank, we feel that under the circumstances in this case the knowledge of the treasurer, Pilger, who was president and managing officer of the bank, should be imputed to it. *Brownell v. Ruwe,* 117 Neb. 407; *State v. American State Bank,* 108 Neb. 92; *Emerado Farmers Elevator Co. v. Farmers Bank,* 20 N. Dak. 270. The entire management and control of the bank transactions, so far as the matters involved in this litigation go, were in his hands. While occupying the position of treasurer of defendant district, he placed in the hands of the bank the funds belonging to the district.

The bank, by receiving the deposit with knowledge that

it belonged to the defendant, held it as trustee for the school district. *State v. Midland State Bank,* 52 Neb. 1. All of Pilger's acts in the premises were in the interest of the bank in taking and keeping possession of the fund and in utter disregard of defendant's rights.

It is established beyond question that the defendant, in the issuance of the warrants in question, intended that the same should be paid from the funds held by the treasurer and, in fact, believed that this had been done. This had been the common practice between it and its treasurer. Warrants of this kind had been by him recognized as valid and charged against this fund and the board had been by deceit led to believe that all those presented had been paid. The purchase of these warrants was not intended to and did not benefit the defendant. There was no lawful authority in the treasurer to certify the fact of presentation for payment so that thereafter the warrant should draw interest, and where, under these circumstances, the treasurer made the certificate and then as president and manager undertook to make his bank a valid holder of the same, it gave the bank rights clouded by many doubts.

We have no doubt, had the Pierce State Bank brought suit on these claims, the defendant could have at least insisted that it apply trust funds in its hands and belonging to the defendant toward the satisfaction of the debt. It would seem, under the law and the equities of the case, that the relief granted by the district court covers all to which the plaintiff is entitled, and its judgment should be and is

AFFIRMED.

ROSE RESNICK ET AL., APPELLEES, V. PAUL KAZAKES, APPELLANT.

FILED FEBRUARY 10, 1932. No. 28094.

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

Clement L. Waldron and *David O. Mathews*, for appellant.

Lower & Sheehan and *H. L. Mossman, contra.*

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

PER CURIAM.

This action was begun by Rose Resnick and Hyman A. Resnick, husband and wife, in the district court for Douglas county to enjoin Paul Kazakes, the defendant, from permitting water to run from the roof of his two-story building upon a one-story building owned by them immediately adjacent to the Kazakes property. The plaintiffs prayed for an order requiring the defendant to remove a certain portion of his building which they allege encroaches upon their property. The defendant filed a cross-petition wherein he alleged that the walls and foundation of his building were damaged and weakened by the excavation by plaintiffs for their building. Upon submission, the court found for the plaintiffs and against the defendant and decreed that the defendant be permanently enjoined from maintaining an eave spout or cornice on his building and that he remove all of the projections except the brick wall. The court also found and decreed that the plaintiffs recover $700 as damages from the defendant. The defendant has appealed.

As herein pointed out, the property of the defendant joins that of the plaintiffs. The defendant's building was completed some time before the excavation was begun by the plaintiffs preparatory to the erection of their building.

A surveyor for the city of Omaha testified that the Kazakes building leaned toward the south from two and a half inches at the west end to about six inches at the east end and over the line, including the cornice on the top of the wall. The survey of another engineer is to the effect that the Kazakes building extends two inches over and upon the Resnick property in front, at the base line,

and that near the top the building projects over four and a half inches. He also testified that a gutter projects ten and a half inches. And the building inspector for the city testified that a shelf of concrete extended from the Kazakes building over and upon the Resnick property. He informed the plaintiffs that, under the building code of the city, it would be necessary for them to notify the defendant of their intention to excavate.

The contractor who constructed the Resnick building testified that, when the excavation therefor was completed with the exception of three to five feet near the Kazakes building, he informed Kazakes that he, the defendant, would have to support his building. He testified that the Kazakes foundation did not appear to be "firm work." The record discloses that the excavation for the Resnick building was delayed several weeks in order that the underpinning of the Kazakes building might be completed. From the evidence of this witness it also fairly appears that the Kazakes building settled from the fact that it was on filled ground, and not because of the excavation of the Resnick property.

There is evidence tending to prove that, in the event the Resnick building is extended to a second story in the future, the Kazakes building projects too far to permit the addition of such second story without considerable added expense. Evidence was also introduced tending to prove that water from the tile roof of the Kazakes building seeped through the walls of the Resnick building thereby damaging it to some extent.

On behalf of the defendant, the testimony of his brother discloses that the construction of the Kazakes building was supervised by the city and that the building was plumb at the time of its erection, although the tile roof thereon extended beyond the south edge of the building about two inches. Evidence was introduced tending to prove that the steam shovel used in the excavation for the Resnick building had struck the Kazakes building, thereby weakening the walls to some extent. Witnesses for the plaintiffs on rebuttal, however, denied that the steam shovel at any time struck the wall.

The evidence in respect of some of the material facts is contradictory, but we do not think the court erred in relying on the testimony of plaintiffs' expert witnesses. Upon appeal in actions in equity the issues are to be tried *de novo,* but it is elementary that where the facts are in irreconcilable conflict, as in the present case, this court will take notice of the fact that the trial court heard the witnesses and observed their demeanor while testifying, and had a better opportunity to judge of the weight of the evidence than has a reviewing court on appeal. *Gaunt v. Smith,* 103 Neb. 506; *Greusel v. Payne,* 107 Neb. 84.

It clearly devolved upon the defendant to provide the proper support for his building where timely notice of the plaintiffs' intention to excavate for a building on the adjoining lot was given. And the plaintiffs are not liable in damages to the defendant for the alleged weakening of the walls of the defendant's building where it is shown that the plaintiffs used due care in their excavation. *Wahl v. Kelly,* 194 Wis. 559; *Christensen v. Badger Improvement Co.,* 187 Wis. 598. And where the evidence fairly shows that the defendant's building encroaches upon the land of plaintiffs through no fault of theirs, they are entitled to have such parts of the defendant's building as encroach upon their land removed. The evidence also discloses that the defendant wrongfully cast water from his building upon that of the plaintiffs' and that in consequence thereof plaintiffs have suffered damages in an amount equal to that found by the trial court herein. The judgment is

AFFIRMED.

FRED OLSON, APPELLEE, V. MILO HANSEN, APPELLANT: LLOYD TEXLEY, APPELLEE.

FILED FEBRUARY 10, 1932. No. 28125.

1. **Torts: JOINT AND SEVERAL LIABILITY.** "An act wrongfully done by the joint agency or cooperation of several persons, or done contemporaneously by them without concert, renders them liable jointly and severally." *Schweppe v. Uhl,* 97 Neb. 328.

2. Trial: INSTRUCTIONS. "Where contributory negligence is pleaded as a defense, but there is no evidence to support such defense, it is error to submit such issue to the jury." *Koehn v. City of Hastings*, 114 Neb. 106.
3. ———: ORDER OF PROOF. Ordinarily, a party who would be defeated if no evidence were given on either side must first produce his evidence and rest. Comp. St. 1929, sec. 20-1107.
4. ———: ———: DISCRETION OF COURT. The trial court is invested with a wide discretion in allowing an alteration of the ordinary rules of practice and procedure as to the time and order in which evidence shall be introduced.
5. Appeal: HARMLESS ERRORS. Errors in proceedings, not affecting the substantial rights of an adverse party, will not work a reversal of the judgment.

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

Frederick M. Deutsch and *H. E. Siman*, for appellant.

Carl H. Peterson and *Webb Rice, contra.*

Heard before GOSS, C. J., DEAN and PAINE, JJ., and BROADY and RHOADES, District Judges.

GOSS, C. J.

Plaintiff had judgment against defendants for injuries received when the automobile of defendant Texley collided with plaintiff's team and mower on which he was riding along a public highway. Defendant Hansen appealed.

There was evidence from which the jury might find as follows: Late in the forenoon of September 29, 1930, plaintiff was driving south on the right side of the road ascending a small hill or knoll. Hansen and Texley in the order named were driving their separate cars north. Hansen recognized plaintiff and suddenly either stopped his car or had it nearly stopped to visit with plaintiff when the collision occurred. Texley had followed Hansen's car about a mile and had come up to a position near it some time before the collision. He was driving 30 to 35 miles an hour. The road, which was of dirt, had been newly graded a few days before. Hansen's car was 35 to 45 feet ahead of Texley, about at the top of the hill or knoll,

and commencing to go down, when Texley saw Hansen was slackening his speed or about to stop, as indicated by his red stoplight. Texley undertook to go around Hansen. Some part of the right side of Texley's car struck the left rear of Hansen's car, and then Texley's car struck the mower, throwing plaintiff into the ditch west of the road, breaking plaintiff's leg and otherwise injuring him. There was evidence from which the jury might find that Hansen had stopped or was just stopping his car so that its left side was west of the middle of the highway and that there was not sufficient room between Hansen's car and plaintiff's rig for Texley to pass.

Briefly stated, the petition charged concurrent negligence of defendants, in that Hansen brought his car to a sudden stop in such a position as to block the highway instead of pulling over to the right of the road, and that Texley failed to have his automobile under control, operated it at a greater speed than was proper in the circumstances, and negligently attempted to pass Hansen's car while so approaching plaintiff's team and mower.

The assignments of error that the judgment against Hansen is not sustained by the evidence and that the court should have sustained his motion for a directed verdict raise the question as to whether a case of concurrent negligence of Hansen and Texley was made out. "An act wrongfully done by the joint agency or cooperation of several persons, or done contemporaneously by them without concert, renders them liable jointly and severally." *Schweppe v. Uhl,* 97 Neb. 328. "If one suffers injury and damage as the proximate result of the negligence of two others, and the damage would not have occurred but for the negligence of each of such parties, both are liable to the person so injured." *Koehn v. City of Hastings,* 114 Neb. 106. Both of the above cited cases arose out of the use of automobiles resulting in personal injuries. In the first case the operators of seven cars in an advertising procession were sued and held in damages for causing horses of the plaintiff to be frightened as the cars passed plaintiff

driving his team on the highway. In the second case only the city, as owner of an automobile improperly parked, was sued, though the evidence indicated concurrent negligence of the driver of a taxicab in which plaintiff's decedent was riding. The rule is stated, and cases are cited, in 2 Blashfield, Cyclopedia of Automobile Law, p. 1493, sec. 5, as follows: "When the negligence of any person concurs with that of another to constitute the proximate cause of an injury, they may be held either jointly or severally, and either is chargeable as if solely responsible for such cause, this being true, though the acts of negligence are independent of each other, and the comparative culpability of the two will not affect the joint and several liabilities of either." The same rule is followed in *McDonald v. Robinson*, 207 Ia. 1293, 62 A. L. R. 1419, where, beginning on page 1425, is a valuable annotation as to concurring negligence of drivers of automobiles and as to their liability to third persons.

While there is some conflict in the evidence, it amply supports a verdict and judgment against both defendants because of the concurrence of their negligent acts as the proximate cause of plaintiff's injuries. The judgment must be affirmed unless otherwise required by errors assigned.

Hansen assigns error because the court did not instruct the jury on the question of the contributory negligence of plaintiff. We do not find, nor does Hansen point out, any competent evidence of any negligence of plaintiff, who, with his team and mower, occupied only his own side of the road. It is suggested by appellant, in arguing this assignment, that plaintiff should have avoided the danger by pulling his team and rig over to the right on the shoulder of the road when he saw the coming Texley car. At that instant events happened quickly. Hansen suddenly slowed his car to stop. Then Texley swerved left to pass Hansen. In the circumstances there was no error in refusing to predicate contributory negligence upon plaintiff's failure to get a team of mules drawing a mower uphill at the rate of three miles an hour out of the way of Texley

going ten times as fast. It is the rule that, "where contributory negligence is pleaded as a defense, but there is no evidence to support such defense, it is error to submit such issue to the jury." *Koehn v. City of Hastings,* 114 Neb. 106.

The court gave to the jury six instructions out of twelve requested by appellant and gave twenty instructions on the court's own motion. In one of the latter he told the jury they were all instructions of the court and they should give to those requested the same consideration as the others. The instructions necessary for the guidance of the jury were given. Error is severally assigned because of the court's refusal of six of the instructions requested. To discuss them fully would unduly extend this opinion. We have considered them. They were either covered in the instructions given or contained matter prejudicial to the legal rights of one or the other parties to the suit.

At the conclusion of the testimony of witnesses on behalf of plaintiff, the court permitted plaintiff to rest as against defendant Texley, but to reserve his rest against defendant Hansen until Texley was examined by his separate counsel. Hansen's objection to this procedure was overruled. Thereupon Texley was examined by his counsel, was cross-examined by both other parties, and plaintiff rested generally. Under the statute and the state of the pleadings it was the duty of plaintiff to produce his evidence first. Comp. St. 1929, sec. 20-1107. Conventionally he should then rest his case. The reasons given the court on behalf of plaintiff when the court granted the request to reserve the rest against Hansen included one to the effect that it was because of things said by counsel for Hansen and by counsel for Texley, respectively, in the opening "statement of his counsel to the jury." Those statements were not preserved in the bill of exceptions and so we do not know in its entirety what influenced the court in exercising a discretion to grant the request. Jones, Commentaries on Evidence (2d ed.) sec. 2502, says: "The trial court is, of necessity, invested with a wide dis-

cretion in regard to ordering or permitting an alteration of the ordinary rules of practice and procedure at trials and the time and order in which evidence shall be introduced." And section 2510: "The rulings of the trial judge upon these matters are not, as a rule, reversible for error." While, generally, one who produces a witness impliedly recommends him as worthy of belief (*Nathan v. Sands*, 52 Neb. 660) yet a perusal of the testimony of defendant Texley, whose testimony was produced by himself rather than by plaintiff, does not convince us that his codefendant Hansen has been prejudiced because plaintiff did not produce the particular witness. The evidence on behalf of each defendant seemed to be calculated to cast the liability on the other rather than to defeat the plaintiff's recovery from the other. Moreover, the mandate of section 20-853, Comp. St. 1929, requires us to disregard any error in the proceedings which does not affect the substantial rights of the adverse party. So, while not commending the practice followed by the trial court, we find it was not such a prejudicial use of the court's discretion as to warrant a reversal of the judgment.

We find no error in the court's refusal to grant a mistrial arising out of or connected with the alleged misconduct of a juror; nor do we find prejudicial error in the conduct of counsel for plaintiff in the argument to the jury.

Error is charged in relation to the matter of insurance. During the trial Leo Blank, who was riding with Texley when the accident occurred, and who was a witness for Texley, testified he had gone to a farmhouse to call a doctor and then followed the others who had taken Olson home; that, while he, Hansen and Texley were standing outside waiting for the doctor to come, Hansen said it was his fault, that he had stopped in the middle of the road, and that Mr. Texley had nothing to worry about because he had the insurance company's car, which was covered by insurance, and he also had insurance on it. Hansen himself testified that his defense was made for him by an insurance company and that he was a field

representative of the general agency that has the particular indemnity company. During the argument to the jury some heat developed over statements by counsel for all three parties respecting the subject of insurance. The court ruled that arguments must be confined to the evidence and proper deductions therefrom. From the meager record of the argument, we do not discover that there was misconduct in this matter in view of the testimony to which we have referred above. However, the court gave the jury a written instruction to decide the case solely on its merits under the law, without reference to the question of whether or not there were insurance interests involved, which, he said, had nothing whatever to do as to who, if any one, was at fault in the matter. There was no prejudicial error as to insurance.

The verdict and judgment for $10,000 are attacked as excessive. Plaintiff, 43 years of age at the time of the trial, was living on a rented farm. Before the injury he had been well and strong. His patent personal injuries consisted of two oblique fractures of his right leg, one near the ankle and another below the knee, and of a bruising and numbness of his right arm. His back was sprained, and at the time of the trial—nearly nine months after the accident—he testified it had been hurting him ever since. He also testified that, while he was not so troubled before the injury, yet afterwards he has had to arise from two to four times during the night to relieve his bladder, and that from a sound sleeper the pain in his leg has caused him to be a poor sleeper. There was a good union of the bones. His appetite was subnormal and his weight had been reduced from 160 to 137 pounds. His right leg was shortened one-fourth or three-fourths of an inch, depending on the testimony of two doctors who measured it. He was totally disabled 137 days. His ability to work was still considerably impaired at the time of the trial. Without giving the details, it is sufficient to say that his expenditures and obligations for surgical and hospital services and the injury to his team and mower, for which he

also sued, amounted to considerably less than $1,000. The verdict was admittedly large for the damage resulting from the fractures and the property loss. If that reflected all of plaintiff's damage we might feel disposed to order a remittitur. But in view of the state of the evidence as to his loss of weight, his lessened power to sleep and to work, and his bladder trouble, we are not disposed to disturb the judgment of the court, where the trial judge had an opportunity to observe the plaintiff.

The judgment of the district court is

AFFIRMED.

GEORGE O. MONROE, APPELLEE, V. F. H. PARKER ET AL., APPELLANTS.

FILED FEBRUARY 10, 1932. No. 28130.

Bills and Notes: CONDITIONAL DELIVERY: PAROL EVIDENCE. Under the provisions of section 62-116, Comp. St. 1929, the delivery of a promissory note may be shown to have been conditional or for a special purpose only, and where the allegations of the makers' answer pleaded such defense and it was sought to prove such allegations, *held*, that the court erred in refusing to admit such testimony.

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

Fradenburg, Stalmaster & Beber, Oscar T. Doerr and *P. N. Klutznick*, for appellants.

Battelle, Travis & Strehlow, contra.

Heard before GOSS, C. J., DEAN and PAINE, JJ., and CARTER and RHOADES, District Judges.

DEAN, J.

This action was begun in the district court for Douglas county by George O. Monroe to recover $1,500 upon a promissory note, dated September 24, 1928, and executed and delivered to Monroe by the defendants F. H. Parker and William C. Raapke. The note by its terms is payable

two years after date and bears interest at the rate of 10 per cent. per annum thereafter. A jury was waived and the case was tried to the court. Upon plaintiff's motion the court rendered a judgment in his favor for $1,780 and from the judgment so rendered the defendants have appealed.

The defendants assign as error the ruling of the court in sustaining plaintiff's objection to the introduction of evidence by the defendants on the ground, as stated by the court, that the proposed evidence was "not a proper defense to this note." It was stipulated by the parties that, were other witnesses to testify in behalf of the defendants, their testimony would substantiate the facts pleaded in the answer, and that the same ruling would be made by the court to objections interposed thereto by the plaintiff.

In their answer the defendants allege that the plaintiff, with others, was the owner of all the stock in the Omaha Suburban Theatres, incorporated, and that the corporation operated the Military Theatre in Omaha; that the corporation was in danger of losing its equipment through certain obligations which were then due and unpaid; and that the defendants, with a view of assisting the plaintiff and his associates out of such financial difficulties, received an assignment of 121 shares of stock therein. It is also alleged that, by reason of the financial difficulties of the corporation, the defendants personally advanced large sums of money, but that, notwithstanding such advancements so made, the corporation became insolvent. The defendants allege that the parties did not intend that any personal obligation should be created nor that the defendants would ever be required to meet the payment of the note in suit, and they contend that this note, with others, was executed by them to plaintiff, without consideration, and that the stock was assigned to such defendants merely to lend personal credit to the plaintiff and for no other purpose or consideration whatsoever.

Section 62-116, Comp. St. 1929, so far as applicable here, contains the following provision:

"Every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto. As between immediate parties, and as regards a remote party, other than a holder in due course, the delivery, in order to be effectual, must be made either by or under the authority of the party making, drawing, accepting or indorsing, as the case may be; and in such case the delivery may be shown to have been conditional or for a special purpose only."

As noted above, the defendants alleged that the note in suit was given conditionally and for a special purpose, and they endeavored to prove the allegations contained in their answer by testimony offered in support thereof. The court, however, sustained practically every objection made thereto by the plaintiff.

In *Witte v. Broz,* 111 Neb. 76, we held:

"Under the provisions of the negotiable instruments act, section 4627, Comp. St. 1922, as between the immediate parties and as regards a remote party other than a holder in due course, the delivery of a negotiable instrument may be shown to have been conditional or for a special purpose only, and not for the purpose of transferring the property in the instrument."

And in *People's State Bank v. Smith,* 120 Neb. 29, we also held:

"In an action on a promissory note between the immediate parties thereto, testimony tending to prove the purpose for which a note is given does not violate the 'parole evidence rule.' Such evidence is specifically admissible under the negotiable instruments law. Comp. St. 1922, sec. 4627."

Under the provisions of section 62-116, Comp. St. 1929, the delivery of a promissory note may be shown to have been conditional or for a special purpose only, and where the allegations of the defendants' answer pleaded such defense and it was sought to prove such allegations by the testimony of the defendants' witnesses, the court erred in refusing to admit such testimony.

We conclude that, in view of the record and the law applicable thereto, the judgment must be and it hereby is reversed and the cause remanded for further proceedings consistent with the views herein expressed.

REVERSED.

STATE, EX REL. C. A. SORENSEN, ATTORNEY GENERAL, APPELLEE, V. FIRST STATE BANK OF ALLIANCE: NATIONAL SURETY COMPANY, INTERVENER, APPELLANT.

FILED FEBRUARY 10, 1932. No. 28139.

1. **Banks and Banking**: DEPOSIT OF COUNTY FUNDS. Pursuant to the provisions of section 77-2506, Comp. St. 1929, county treasurers are authorized to deposit county funds in banks only as a general and not as a special deposit, and are required to take as security for such deposits a pledge of assets of the banks or a depository bond.
2. ———: ———. A state bank, receiving a deposit of county funds, pursuant to the provisions of section 77-2506, Comp. St. 1929, and securing such deposit by the pledge of assets and the giving of a depository bond, does not hold such deposit as a trust fund.
3. ———: ———: GUARANTY FUND: PREFERENCES. Where a county deposits its funds in a state bank and exacts as security therefor a pledge of some of the bank's assets, and also exacts a depository bond as further security, such deposit is one otherwise secured and is not entitled to share a lien on the assets of the bank on an equality with depositors in a class not otherwise secured.
4. **Statutes**: CONSTRUCTION. "Where the language of a statute is plain and unambiguous and its meaning clear and unmistakable, there is no room for construction, and the courts are not permitted to search for its meaning beyond the statute itself." 25 R. C. L. 957, sec. 213.
5. **Constitutional Law**: POWERS OF LEGISLATURE: CLASSIFICATION. "The legislature has power to make reasonable classifications of persons and objects for the purposes of legislation affecting diversely the different classes." *State v. First State Bank, ante*, p. 109.
6. ———: ———: BANKS AND BANKING: CLASSIFICATION OF DEPOSITORS. "Legislative classification of depositors in state

banks for the purpose of determining priority of claims in the event of insolvency *held* valid." *State v. First State Bank, ante,* p. 109.

7. ———. Section 8-1,102, Comp. St. 1929, violates neither the state Constitution, prohibiting special and class legislation, nor the Fourteenth Amendment to the federal Constitution, guaranteeing equal protection of the laws.

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

Crofoot, Fraser, Connolly & Stryker, for appellant.

F. C. Radke, Barlow Nye, M. Craft Radke and *C. M. Skiles, contra.*

Howell, Tunison & Joyner, amici curiæ.

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

GOOD, J.

From a judgment of the district court, classifying the claim of intervener against defendant, an insolvent state bank, as a general rather than a preferred claim, intervener has appealed. There is no controverted issue of fact. Only questions of law are involved.

The defendant bank became insolvent and was placed in the hands of a receiver in February, 1930. At the time the bank became insolvent Box Butte county had on deposit in the bank $28,961.67. The bank had secured this deposit by the pledge of $10,000 in liberty bonds and three depository bonds, one of which, for $8,500, was furnished by intervener. The liberty bonds have been sold and applied on the amount of the deposit. Intervener has paid to the county the amount of the bond and has taken from the county an assignment of its deposit account to the extent of $8,500. Intervener filed with the receiver its claim, based on the assignment, asking its allowance as preferred, first, as a trust fund and preferred over claims of depositors, and, in the event the court does not so allow it, that it be classified as a valid preferred depositors' claim.

Intervener contends that county funds, derived from the collection of taxes, are trust funds in the hands of the county treasurer; that a bank receiving same for deposit, with such knowledge, must account for the same as trust funds, and that claims for such trust funds are entitled to payment before the payment of claims of other depositors. In support of this contention, intervener cites section 77-2506, Comp. St. 1929, which, in part, provides that the "county treasurer of each and every county in the state of Nebraska shall deposit, and at all times keep on deposit for safe-keeping in the state, national or private banks doing business in the county, and of approved and responsible standing, the amount of moneys in his hands collected and held by him as such county treasurer." The statute also provides for the payment of interest by the bank upon funds so deposited. It is argued that the words "for safe-keeping" indicate a purpose to make it a special deposit or bailment, and that the identical funds shall be kept and preserved and returned or paid out on warrants issued by the county.

Of what value would a deposit be to a bank if it could not use the same and loan money so deposited? By what process of reasoning can it be supposed that any bank would pay interest upon a special deposit which it was not permitted to use but was required to keep separate and apart from other funds of the bank and be liable therefor without any compensation for the safe-keeping of the fund? The question answers itself. Moreover, intervener in its brief makes this statement: "That the interveners, by executing and delivering their depository bonds to Box Butte county, preserved the assets of the defendant bank by causing Box Butte county to keep on deposit in the bank large sums which were vital to the actual continuance of the bank." How could such funds be vital to the continuance of the bank if it had no use of them? Furthermore, in *Shambaugh v. City Bank of Elm Creek*, 118 Neb. 817, speaking of the authority of county treasurers to make deposits in banks, it is held: "Under the

terms of the statutes referred to, general deposits alone are authorized to be made in county depositories by county treasurers, and such, the evidence discloses, were made in the instant case." Clearly, the statute authorizes the county treasurer to place the county funds in his hands in depository banks on general deposit and provides for taking security therefor. The title to the moneys or other credits deposited passes to the bank and may be used by it as other funds deposited in the bank. It follows that the bank did not hold the deposit as a trust fund, and the court properly so determined.

Intervener contends that, as assignee of the county, it was subrogated to the latter's rights and was entitled to have its claim classified as that of a depositor, notwithstanding the provisions of section 8-1,102, Comp. St. 1929. That section, in part, provides: "The claims of depositors, for deposits, not otherwise secured, * * * 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." Prior to the amendment of the statute in 1925 it read: "The claims of depositors, for deposits, * * * shall have priority," etc. Intervener makes this contention: "That part of paragraph 8-1,102, Comp. St. Neb. 1929, 'not otherwise secured' was intended to cover a situation where a bank has deposited some of its securities as collateral to secure a deposit as distinguished from the depositor having security from an outside source; and also to cover a situation where a bonding company takes collateral from the bank to protect itself, or the assets of the bank are reduced by the pledging of securities with the bonding company, to induce it to execute a depository bond." It is argued that the words "not otherwise secured" were intended solely for the protection of the guaranty fund (now the depositors' final settlement fund).

We do not think the contention sound. It was the in-

tention of the legislature, as expressed in plain language, to classify deposits into two classes, those secured and those unsecured. A deposit in a state bank secured otherwise than by the bank pledging its securities or giving a depository bond is not here involved nor decided. The words "not otherwise secured" were inserted in the statute after numerous holdings by this court to the effect that, where a surety on a depository bond had paid the amount to the depositor, it was subrogated to the rights of the depositor and was entitled to have its claim allowed as preferred and payable out of the depositors' guaranty fund. Among the cases so holding are *State v. Kilgore State Bank*, 112 Neb. 856; *State v. State Bank of Gering*, 114 Neb. 213; *State v. Farmers & Merchants Bank*, 114 Neb. 217; *Rogers v. National Surety Co.*, 116 Neb. 170. However, since those decisions were rendered, the statute has been amended as above noted, and the question now is: Would the county have been entitled to have its claim preferred as that of an ordinary depositor, when it had taken security both by pledge of assets from the bank and by depository bonds given by the bank? Clearly, the language of the statute forbids.

An applicable rule is found in 25 R. C. L. 957, sec. 213, which reads: "A statute is not to be read as if open to construction as a matter of course. It is only in the case of ambiguous statutes of uncertain meaning that the rules of construction can have any application. Where the language of a statute is plain and unambiguous and its meaning clear and unmistakable, there is no room for construction, and the courts are not permitted to search for its meaning beyond the statute itself."

Other states having laws for the guaranty of bank deposits have enacted statutes providing that deposits, otherwise secured, are not protected by the guaranty fund; and the phrase "not otherwise secured" has been the subject of judicial discussion in other jurisdictions. Kansas had such a law, and in *American State Bank v. Wilson*, 110 Kan. 520, decided in 1922, it was determined that any

deposit in the bank which was secured by the bank was not within the protection of the guaranty fund act. Mississippi also had such a law, and in *Board of Levee Commissioners v. Love,* 147 Miss. 183, it was held that deposits, secured by marketable securities and personal bonds, were otherwise secured, under the statute, and were not entitled to participate in the guaranty fund. It was further held that, although the security was inadequate, still the deposit was not within the protection of the guaranty fund. The Kansas decision was published long before the amendment by the legislature of Nebraska, inserting the words "not otherwise secured." No doubt, the legislature of this state placed this phrase in the statute, mindful of the meaning given to it by the supreme court of Kansas.

This court had under consideration the effect to be given this statute in the case of *State v. First State Bank, ante,* p. 109. It was there held: "A city that exacts from a state bank collateral security for deposits, receives the proceeds of the security after insolvency of the bank and presents to the receiver a claim for excess of deposits over such proceeds, is in the class of depositors 'otherwise secured' and not entitled to share the assets of the bank on an equality with depositors in the class 'not otherwise secured,' within the meaning of the statute providing that depositors and holders of exchange in the latter class shall have the first lien." We find no reason to depart from or modify this ruling. It follows that if the statute is valid intervener's claim is not entitled to the same classification as "deposits, not otherwise secured."

It is argued that if the statute is held to mean what its plain language imports then it is special or class legislation and inhibited by the state Constitution; further, that it denies to intervener the equal protection of the law, in violation of the Fourteenth Amendment to the federal Constitution; and that to deny to intervener the same protection as depositors not otherwise secured is inequitable and unjust.

"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. Many years ago the state, by its legislature, in the exercise of its power, undertook to regulate the banking business. It provided that state banking business could only be carried on by duly licensed corporations. It provided for the guaranty of bank deposits by ordinary depositors, and that, upon insolvency of a bank, the depositors and holders of exchange should, subject to certain exceptions, have a first lien on all assets of the bank. It later provided that a depositor, receiving more than a stipulated rate of interest, should not be entitled to this lien, nor to the protection of the depositors' guaranty fund. Later, it enacted the provision which deprived any depositor, whose claims for deposit were otherwise secured, of the right to participate in the guaranty fund or of a first lien on the assets of the bank; and subsequently denied such a depositor the right to participate in the depositors' final settlement fund.

It seems reasonably clear that the legislature was attempting to create a state banking system and to reasonably insure depositors of the safety of funds deposited in state banks, if deposited under certain conditions. The state evidently desired to encourage its citizens to use a state bank and to deposit their funds therein, and, to some extent at least, insure the safety of such deposits if made pursuant to the provisions of the law. It must be observed that no depositor was required to deposit his funds in such a bank, but if he voluntarily did so, in compliance with the law, he would be entitled to the protection; but that, unless he came within the stipulated provisions, he should not be entitled to the same protection.

The rule is well established that "The legislature has power to make reasonable classifications of persons and objects for the purposes of legislation affecting diversely the different classes." *State v. First State Bank, supra.* In

that case it was further held: "Legislative classification of depositors in state banks for the purpose of determining priority of claims in the event of insolvency *held* valid." It seems clear that one who deposits funds in a state bank, relying solely on the solvency of the bank, and, in case of insolvency of the bank, he should have a first lien on the assets and be entitled to participate in the depositors' final settlement fund, is in a distinct class from those persons who are unwilling to make deposits in this manner, but who insist upon receiving from the bank either a pledge of some of its assets as security, or a depository bond from the bank as a guaranty of their deposits. We are satisfied that there is sufficient distinction in the classes to make the classification a valid one, and we adhere to the rule announced in *State v. First State Bank, supra.*

In this connection, it may be observed that a brief *amici curiæ* has been filed in this case, which contends that where a depositor takes an indemnity bond to secure himself, and pays for the bond, and such bond is not paid for by the bank, nor any assets of the bank pledged, either to the depositor or to the surety on the bond, he is entitled to participate in the lien granted to depositors, not otherwise secured, and to participate in the depositors' final settlement fund. That question is not involved in this case and is not here decided. In the instant case there were both a pledge of assets by the bank to the depositor and depository bonds furnished and given by the bank to the depositor.

We are unable to perceive wherein the statute violates the equal protection clause of the Fourteenth Amendment to the federal Constitution. The surety on the depository bond received a premium from the bank for executing the bond. It was aware of the fact that the county had taken a pledge of some of the bank's assets for the protection of the county's deposit, and it also accepted from the bank a depository bond, with intervener as surety. Intervener had the right to demand from the bank a pledge of assets to secure it, or it could have exacted such premium as it

deemed adequate to compensate it for the liability incurred. The statute operates alike on all in each class. In our opinion, the statute does not violate the equal protection clause of the Fourteenth Amendment to the federal Constitution; nor do we perceive wherein it is unjust or inequitable. Intervener is in a similar position to one who loans money and takes no security, although he might have refused to lend the money without security being given. If he chose to lend the money without security, he cannot complain if others, by operation of law which was in force at the time he made the loan, obtain a first lien upon the assets of his debtor.

We are constrained to hold that the judgment is not vulnerable to any of the attacks made upon it.

AFFIRMED.

STATE, EX REL. C. A. SORENSEN, ATTORNEY GENERAL, APPELLEE, V. FIRST STATE BANK OF ALLIANCE: NEW JERSEY FIDELITY & PLATE GLASS INSURANCE COMPANY, INTERVENER, APPELLANT.

STATE, EX REL. C. A. SORENSEN, ATTORNEY GENERAL, APPELLEE, V. FIRST STATE BANK OF ALLIANCE: AMERICAN EMPLOYERS' INSURANCE COMPANY, INTERVENER, APPELLANT.

FILED FEBRUARY 10, 1932. NOS. 28140, 28141.

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

Crofoot, Fraser, Connolly & Stryker, for appellants.

F. C. Radke, Barlow Nye, M. Craft Radke and *C. M. Skiles, contra.*

Howell, Tunnison & Joyner, amici curiæ.

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

GOOD, J.

The above entitled causes involve precisely the same legal questions that are discussed and decided in *State v. First State Bank of Alliance, ante,* p. 502, and, together with that case, were briefed and argued in this court.

For the reasons given in the latter case, the judgment of the district court in each of the above entitled causes is

AFFIRMED.

THOMAS H. WALKER, APPELLANT, V. BEE-NEWS PUBLISHING COMPANY, APPELLEE.

FILED FEBRUARY 10, 1932. No. 28132.

1. Libel: DEFENSE. A newspaper cannot avoid responsibility in a libel suit by proving that a reporter, by mistake, used the wrong person's name. The real question is not, at whom was the article aimed, but whom did it injure.
2. ———: ———: NEGLIGENT WRONGS. In such cases, the law looks at the tendency and consequences of the publication, and not at the intention of the publisher, who may be held to answer for negligent wrongs, as well as those that are intentional.
3. ———: WORDS LIBELOUS PER SE. Words are libelous *per se* when they charge a criminal offense involving moral turpitude, but to state in error that a wrestling match was held in one's barn does not constitute such libel.
4. ———: ———. Words are libelous *per se* when they charge an offense which blackens one's character and exposes him to public ridicule, but the evidence in this case fails to sustain that charge.

APPEAL from the district court for Douglas county: CHARLES E. FOSTER, JUDGE. *Affirmed.*

R. H. Olmsted, for appellant.

Kennedy, Holland & De Lacy, contra.

Heard before GOSS, C. J., DEAN and PAINE, JJ., and BROADY and RHOADES, District Judges.

PAINE, J.

This is a libel suit, in which Thomas H. Walker, appellant, sought to recover $10,000 damages from the Bee-

News Publishing Company, of Omaha, appellee. The court, at the close of the testimony, and after each party had rested, sustained the motion of the appellee for a directed verdict.

Upon March 29, 1929, the Bee-News published in its home edition a large flashlight picture, reaching across four columns, showing a wrestling match in a barn loft. The picture shows some 40 people, including a number of girls, all much interested in the bout. The large-type headline above the picture reads: "Battle in Barn-Days of Old Live Again." In the half-column news write-up under the picture, we find this paragraph: "In Tom Walker's barn, west of Florence, two 'rasslers' rasseled it out Wednesday night. John Hodges of Tech. high, state heavyweight champ, took on John Sheppard, negro, who takes care of pots and pans at a downtown café." To attract attention to this unimportant event, a semi-ludicrous write-up described the meet, at which no admission was charged, and added: "The crowd had a swell time. It proved it by tossing, in the old-time way, $18.31 to the mat, which was divided between the pot massager and the high school student." This libel suit is brought because the reporter inadvertently was in error in stating that the event occurred in "Tom Walker's barn," whereas it was actually held in the barn of D. H. Walker, a few miles away. Appellant contends that said publication was wholly false, and injured appellant's good name and reputation as a citizen, husband and father, and subjected him to ridicule, ignominy and shame.

It is insisted that the large-type heading, heretofore set out, must first be considered, but we find nothing therein libelous. *Sheibley v. Nelson*, 75 Neb. 804; *Fitch v. Daily News Publishing Co.*, 116 Neb. 474.

1. 2. Where one's name is used by mistake, it has been held that there would be no right of action for libel, although the article would be libelous if it was intended to refer to him. Such was the holding in *Hanson v. Globe Newspaper Co.*, 159 Mass. 293, 20 L. R. A. 856. However,

in examining this case, which was decided in 1893, we find a very vigorous dissenting opinion of Justice Oliver Wendell Holmes, then a member of the Massachusetts supreme court. The news article described the conduct of a prisoner under arrest, and named him as H. P. Hanson, a well-known real estate broker, of South Boston. The man who was actually under arrest and fined was A. P. H. Hanson. Justice Holmes, who was not alone in his dissent, insisted that, if an article should allege falsely that A murdered B with a knife, it would not be a very satisfactory answer to a question by A that the article was a description of the conduct of the murderer of B and was true concerning that murderer. He insists that the words used in the article describe the plaintiff, H. P. Hanson, and no one else, and, while the defendant did not intend them to apply to him, the question narrows down to whether such want of intention is enough to constitute a defense against an action for libel, and he cites many early cases from the English courts which hold that one is responsible for negligent wrongs, as well as for those which are intentional.

The leading English case upon this point appears to be *E. Hulton & Co. v. Jones* (1910) App. Cas. (Eng.) 20, 79 L. J. K. B. 198, 16 Am. & Eng. Ann. Cas. 166. E. Hulton & Co., owners of the Sunday Chronicle, in publishing an article concerning the crowds at a motor race at Dieppe, purported to describe the doings and behavior of various types of Englishmen abroad, and the defamatory portion of the article referred to Artemus Jones, a supposedly fictitious person, but there really existed a Mr. Artemus Jones, a barrister, who had in times past published articles over his name in this same Sunday Chronicle. He at once sued for libel, and a jury at Manchester returned a verdict of 1,750 L. (pounds) damages. On appeal, Lord Alverson, C. J., of the court of appeals, reached the same conclusion as Justice Holmes did in *Hanson v. Globe Newspaper Co., supra,* and affirmed the judgment. There being dissent, it was taken to the House of Lords, where, upon

December 6, 1909, it was held that, in an action for libel against the owners of a newspaper who published a defamatory article containing plaintiff's name, the fact that neither the writer of the article nor the editor of the paper had ever heard of the plaintiff, and had no intention of referring to him, and believed the name referred to an imaginary person, was no defense if the circumstances were such that persons who read the article would reasonably think that the language referred, not to an imaginary person, but to a real person, and that those among them who knew the plaintiff would reasonably suppose the language to refer to him.

In Colorado and Kansas cases, it was held: "The fact that neither the reporter nor anybody else connected with the newspaper knew the plaintiff is immaterial to the right to recover. * * * Intent is immaterial except as a part of express malice." *Switzer v. Anthony*, 71 Colo. 291. See *Hatfield v. Gazette Printing Co.*, 103 Kan. 513. Judge Pound, in a leading New York case, held that the fact that a publisher of libelous matter has no actual intention to defame a particular man, or to injure any one, does not prevent recovery of compensatory damages. *Corrigan v. Bobbs-Merrill Co.*, 228 N. Y. 58, 10 A. L. R. 662. See *Cassidy v. Daily Mirror Newspapers*, 2 L. R. K. B. (Eng.) 331, 69 A. L. R. 720.

As Lord Chief Justice Coleridge said in *Gibson v. Evans*, 23 Q. B. 384, it does not signify what the writer meant; the question is, whether the alleged libel was so published by the defendant that the world would apply it to the plaintiff.

An instruction in an action for libel that if, in a circular charging stealing, plaintiff's name "R. Laudati" was used instead of "N. Laudati" as the result of negligence merely, and not intentionally, plaintiff could not recover, was error, as defendant was liable if the accusation in effect applied to plaintiff, regardless of whom it was aimed at. *Laudati v. Stea*, 44 R. I. 303, 26 A. L. R. 450.

A newspaper item reporting arrest of "Harry Kennedy,

an attorney, 40 years old," for forgery, held libelous as to "Harry F. Kennedy," the only lawyer by that name in the district, and about 37 years of age, where the person in fact arrested was "Harry P. L. Kennedy," and from Detroit, though publisher intended to refer to "Harry P. L. Kennedy." *Washington Post Co. v. Kennedy*, 55 App. D. C. 162, 3 Fed. (2d) 207, 41 A. L. R. 483.

3. Having reached the conclusion that the appellee is answerable for the publication in spite of the mistake, we will ascertain whether this article, published, as all agree, without any malice, can support a judgment for damages in favor of the appellant.

A publication is libelous *per se* which charges another with the commission of a criminal offense involving moral turpitude. *Pokrok Zapadu Publishing Co. v. Zizkovsky*, 42 Neb. 64.

It is contended by appellant that holding an unlicensed wrestling match, at which an admission is charged, or at which a prize or purse is given, is forbidden in this state, and is a crime. Comp. St. 1929, sec. 71-3101. While section 71-3103 provides that no private individual may receive a license therefor, yet it is a question whether it would be a violation of this statute to hold such a match where no part of the receipts were paid to any person except to the actual contenders and the officials.

In one of the earliest cases in the United States involving a charge of chastity, it was held: "In case the charge, if true, will subject the party charged to an indictment for crime involving moral turpitude, * * * then the words will be in themselves actionable." *Brooker v. Coffin*, 5 Johns. (N. Y.) 188, 4 Am. Dec. 337. In discussing this case, the Iowa court held that to charge drunkenness was not slanderous *per se*. *Amick v. Montross*, 206 Ia. 51. See notes in 58 A. L. R. 1147, 1159, and 1162.

The published article did not charge that Thomas Walker promoted the match, or that he was present, nor even did it charge that he had knowledge of it, nor is it settled that the event was held in violation of law. Therefore, the

allegation that the article charged a criminal offense against Walker, involving moral turpitude, is not sustained.

4. It is contended that the trial court erred in holding that the publication did not constitute libel *per se*. We have the advantage of having the memorandum opinion of the trial judge set out in full in the transcript. He compares the charge of being a thief, as set out in the majority opinion in *Iden v. Evans Model Laundry*, 121 Neb. 184, with the case at bar, and says: "There is nothing inherently wrong in holding a wrestling bout upon a farm, or nothing that would bring a person into public ridicule or contempt. * * * There isn't a person that knows Tom Walker that would believe anything wrong of him because of the publication of this article, or give it more than a passing thought and that of a humorous character. We think it comes within the rule laid down in *Lamberti v. Sun Printing & Publishing Ass'n*, 111 App. Div. (N. Y.) 437."

This case last referred to by the district judge involved a bit of horse-play, in which a diagram of a black hand in burnt cork was surreptitiously placed upon the back of Janitor Lamberti in the basement of the courthouse, in which he worked. His suit for libel against the New York Sun was based upon their publishing, with embellishments, his horror at the discovery of the ill-fated mark, in these words: "There must be a curse on me, a curse on me, I swear that mark was not there this morning. * * * Remove it from me, even if you have to cut off my flesh." Holding that the publication was not libelous *per se*, the New York court said that an actionable libel cannot be created out of nothing.

It is insisted that any publication injurious to the character of another is libelous *per se*, citing *Williams v. Fuller*, 68 Neb. 354. But in that case a judgment was affirmed in which the Riverton Review directly libeled its new town marshal by calling him "a pot-bellied, beer-guzzling old specimen of a degenerated race," which shows at once it is not in point in the case at bar.

In the case at bar, it is charged that the article blackens Tom Walker's character and tends to expose him to public ridicule, but in *Davis v. Meyer*, 115 Neb. 251, it was held that charging a woman with being "a half-breed Mexican" is not such a charge as subjects a person to public ridicule, ignominy or disgrace. This court is unable to agree with appellant that an article saying that two boys had a wrestling match in one's barn is sufficient to bring it within the law relating to public ridicule and defaming character. *Foster-Milburn Co. v. Chinn*, 134 Ky. 424; *Bigley v. National Fidelity & Casualty Co.*, 94 Neb. 813; *Williams v. Fuller*, 68 Neb. 354.

Words are libelous *per se* when they charge an offense which blackens one's character and exposes him to public ridicule, but the evidence in this case fails to sustain such a charge.

There being no error in the record, the judgment of the district court is

AFFIRMED.

WARREN SHAMBURG, APPELLEE, V. ANNA MATHIESEN ET AL., APPELLEES: OSCAR LUNDBORG, APPELLANT.

FILED FEBRUARY 10, 1932. No. 28087.

1. **Parol Evidence:** ASSUMPTION OF MORTGAGE. "The grantee in a deed containing a clause that the grantee assumes and agrees to pay certain mortgages on the land is ordinarily not estopped from denying such recital, and may show by parol evidence that, in fact, he never made such an agreement." *Peters Trust Co. v. Miskimins*, 115 Neb. 88.
2. **Evidence** examined, and *held* to support the decree of the trial court.

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

Paul L. Martin, Herman Ginsburg and *Joseph Ginsburg*, for appellant.

G. P. Kratz, R. P. Kepler and *E. L. Hyde, contra.*

Heard before GOSS, C. J., EBERLY and PAINE, JJ., and BEGLEY and ELDRED, District Judges.

BEGLEY, District Judge.

Action brought by appellee Shamburg to foreclose a mortgage on certain real estate in Cheyenne county, Nebraska, which plaintiff alleged to be a first mortgage. Plaintiff joined appellant Lundborg as a party defendant, alleging that appellant's mortgage had been paid, and was barred by the statute of limitations. Appellant Lundborg filed a cross-petition setting up his mortgage as a first lien and asking foreclosure thereof. Lundborg admitted that his mortgage was executed and delivered October 30, 1916, due three years after date, and that no payments had been made thereon, but alleged that in a deed from one Sandahl to Andrew Mathiesen, dated May 27, 1922, the grantee assumed and agreed to pay said mortgage, and the statute of limitations only began to run from said date. Plaintiff and the owners of the equity of redemption in this property joined in asserting that appellant's mortgage was of no validity, and was barred by the statute of limitations, and prayed the court to reform the deed of Mathiesen by striking out the assumption clause, which they claimed was inadvertently and by mistake of the scrivener placed therein. The trial court found for the appellee, granted the reformation prayed for, and held that his mortgage constituted a first lien and ordered a foreclosure thereof, and dismissed appellant's cross-petition. The appellant has appealed.

The evidence discloses that on October 30, 1916, D. R. Jones and wife mortgaged the land involved herein which they had recently purchased to the defendant and appellant, Oscar Lundborg, which mortgage was duly filed for record. This mortgage to Lundborg was for $4,000 and was made payable on October 30, 1919, three years after the date of its execution. On the date the mortgage was made, Jones sold the property to Joseph M. Swenson, the deed having a clause whereby the grantee assumed and agreed to pay the Lundborg mortgage. On February 23, 1917, Swenson

conveyed the premises to Frank Vrtatka, in which deed there was also a clause providing that the grantee assumed and agreed to pay the Lundborg mortgage. Vrtatka at this time executed a mortgage to W. P. Miles for $1,600, which mortgage was immediately assigned to Joseph M. Swenson and duly released on June 19, 1923. On February 18, 1918, Vrtatka conveyed the property to Carl F. Sandahl, one of the defendants in this case. The deed of conveyance to Sandahl recited that the land was free from incumbrance, except a mortgage of $5,600 now on the above described land. On March 1, 1918, Sandahl executed a mortgage to Bentley and Fishman for $4,000. On May 27, 1922, Sandahl conveyed the property to Andrew Mathiesen. The named consideration in the deed of conveyance from Sandahl to Mathiesen is $17,600. The deed contained the following clause: "Subject to two mortgages of $4,000 each and one mortgage of $1,600, which grantee assumes." It is this clause that is in controversy in this case. No part of the principal or interest has been paid on the Lundborg mortgage, and without this clause his lien is barred by the statute of limitations. The appellees introduced evidence in the lower court for the purpose of having this clause disregarded or eliminated, on the theory that it was not a part of the contract between Sandahl and Mathiesen, that it was placed in the deed by mistake of the scrivener without knowledge of its presence there or of its significance on the part of the parties to the deed, without consideration or justification, and that it should in no way benefit the defendant Lundborg. Subsequent to this deed Mathiesen on the 1st day of March, 1923, mortgaged the property to the appellee Shamburg for $2,000. Andrew Mathiesen died sometime prior to August 23, 1928. His interest in the premises passed to his heirs. The Shamburg mortgage was due March 1, 1928, and the interest was paid to March 1, 1929. This action was commenced March 18, 1930.

One Charles S. Beebe was the scrivener who drew up the deed between Sandahl and Mathiesen. He was a former

treasurer of Wayne county and a former president of a bank in Wakefield, Nebraska. He testified that on May 27, 1922, at the time when the deed from Sandahl to Mathiesen was executed, he resided in Wakefield, Nebraska; that he knew both parties and was acquainted with their business affairs intimately; that they were customers of his bank; that they talked to him regarding it and that he knew the details of the transaction; that about the time the above mentioned deed from Sandahl to Mathiesen was made, Sandahl was indebted to a bank at Wayne; that Mathiesen had guaranteed the payment of said debt, which was around $5,000 and in consideration of such guarantee of payment Sandahl deeded the land involved herein to Mathiesen; that at the request of the parties he drew up an agreement in writing between said parties whereby if there was any equity in the land when it could be sold or might be sold, this equity was to revert to Mr. Sandahl; that the deed was signed in his office and delivered to Mathiesen; that it took Mathiesen some time to make arrangements to get the cash for Sandahl's debts and that he let Mathiesen have some of it; that he inserted the clause, "subject to two mortgages of $4,000 each and one mortgage of $1,600, which grantee assumes;" that he had no instructions to put the same in the deed and that he made same in accordance with his usual custom and from the entries on the abstract; that he just did that on his own understanding of what should be done in that kind of cases; that he did not know the real meaning of the terms nor did either of the parties to the transaction; that Sandahl always contended there was one mortgage that was paid, which was the Lundborg mortgage. No discussion was ever had that he recalled about Mathiesen having assumed the payment of the two $4,000 mortgages.

Mr. Sandahl testified that he was present when the deed was drawn by Beebe; that he did not know the clause, "subject to two mortgages of $4,000 each and one mortgage of $1,600, which grantee assumes," was in the deed; that the land was deeded to Mathiesen as security for two notes

owed by Sandahl to the Bank of Wayne, which Mathiesen paid prior to the execution of the deed; that no other money was paid for the land; that there was no agreement of any kind between him and Mathiesen that Mathiesen would pay the Lundborg mortgage; that Beebe was his banker and he relied upon him to draw the deed; that there was a written agreement between him and Mathiesen whereby he, Sandahl, was to have the land back under certain circumstances, Mathiesen only holding same as security, but he has never redeemed it; that Lundborg never made demand for payment of his mortgage, nor was he able to locate Lundborg, and he thought his mortgage had been paid.

Appellant contends that the evidence is insufficient to justify the court in granting reformation. We do not deem it essential that reformation be had by the court. In the case of *Crane v. Leclere,* 206 Ia. 1270, it is held that the real assumption contract between the grantor and grantee may be shown by oral evidence, and as between the assuming grantee and the mortgagee, reformation of contract is not essential to the defense, where oral evidence contradicts the writing. In the case of *Peters Trust Co. v. Miskimins,* 115 Neb. 88, the court held: "The grantee in a deed containing a clause that the grantee assumes and agrees to pay certain mortgages on the land is ordinarily not estopped from denying such recital, and may show by parol evidence that, in fact, he never made such an agreement."

The evidence in this case shows that the assumption clause in the deed was placed there by the mistake of the scrivener and without the knowledge or consent of the parties to said deed; that it was no part of the consideration for said deed and is not binding upon the parties thereto. The court properly struck the same from the deed and held that the mortgage of the appellant Lundborg was barred by the statute of limitations.

The decree of the district court is therefore

AFFIRMED.

NEBRASKA STATE BANK OF VALPARAISO, APPELLEE, V. CITIZENS STATE BANK OF THEDFORD ET AL., APPELLANTS.

FILED FEBRUARY 10, 1932. No. 27609.

1. **Abatement**: SPECIAL APPEARANCE. "If the lack of jurisdiction over the person of the defendant does or does not appear on the face of the record, it may be raised by special appearance, and error, if any, committed in the overruling thereof is not waived by answering over, where the objection is pleaded in the answer." *Gaines v. Warrick*, 113 Neb. 235.
2. **Appearance**: JURISDICTION: WAIVER. "An objection to the jurisdiction of the court over the person of the defendant is waived by joining with it an objection to the jurisdiction over the subject-matter." *Bodge v. Skinner Packing Co.*, 115 Neb. 41.
3. **Bankruptcy**: DISCHARGE: LIABILITY FOR CONVERSION. The supreme court of the United States has held that a discharge in bankruptcy, under the federal bankruptcy laws, does not release the bankrupt from liability to respond in damages, to the person entitled thereto, for a wrongful conversion of personal property of another by the bankrupt prior to such discharge. And this court is bound by the construction of the federal bankruptcy laws adopted by the supreme court of the United States.
4. **Conspiracy**: EVIDENCE: ADMISSIBILITY. It is only those acts and declarations of a conspirator which are done and made while the conspiracy is pending and in furtherance of its object that are admissible in evidence against his associates. After the conspiracy has come to an end, the subsequent declarations and admissions of one conspirator, by way of narrative of past events, are not admissible in evidence against others.
5. **Evidence** examined, and *held* not to sustain the verdict and judgment.

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

I. D. Evans, Squires, Johnson & Johnson, Stevens & Stevens and *H. N. Mattley*, for appellants.

George I. Craven and *Joe F. Berggren, contra.*

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

HORTH, District Judge.

The plaintiff, appellee herein, commenced this action in the district court for Furnas county, Nebraska, seeking to recover from the defendants, Otto J. May, a resident of Furnas county, Nebraska, Citizens State Bank of Thedford, Nebraska, and J. H. Figard, a resident of Thomas county, Nebraska, appellants herein, the value of nineteen registered white face cattle, upon which plaintiff claimed a mortgage lien under a mortgage, or mortgages, given by the defendant Otto J. May, then a resident of Lancaster county, Nebraska, to the Farmers State Bank of Agnew, Nebraska, and by it assigned to the plaintiff, and which cattle plaintiff charges the defendant Citizens State Bank unlawfully converted to its own use, and that the other defendants conspired with said Citizens State Bank in bringing about such conversion.

A trial was had to the court and a jury resulting in a verdict and judgment in favor of the plaintiff, from which the defendants appeal, setting forth numerous assignments of error, including those herein discussed. Any assignments of error not discussed are either not well taken, or, if well taken, their determination has become unnecessary by reason of the conclusions here reached.

The transcript discloses that the defendant Otto J. May was served with summons in Furnas county, Nebraska, and the defendants Citizens State Bank and J. H. Figard were served with summons in Thomas county, Nebraska. The defendants Citizens State Bank and J. H. Figard joined in filing a special appearance objecting to the jurisdiction of the court over their persons for the reason that they were both residents of Thomas county, Nebraska, and that their codefendant, Otto J. May, was a resident of Furnas county, Nebraska, and that no issuable controversy existed between the plaintiff and the defendant May, and that said Otto J. May was not a necessary or proper party to this action and was named as such for the sole purpose of obtaining service upon the defendants Citizens State Bank and J. H. Figard; and to such special appearance is at-

tached certain exhibits disclosing that said defendant Otto J. May had been discharged in bankruptcy from the indebtedness for which the mortgages covering the cattle claimed to have been unlawfully converted by the defendants were given to secure. The special appearance was overruled. Thereupon the defendant Citizens State Bank interposed a general demurrer to plaintiff's petition, and, this being overruled, filed its answer, in effect a general denial of the allegations of plaintiff's petition, coupled with an endeavor to preserve its rights under its special appearance, and in so doing used the following language:

"Not waiving its special appearance heretofore filed herein, but all the while insisting upon the same, and alleging that this Honorable Court has no jurisdiction over the person of this answering defendant, *or the subject-matter of this action.*"

The answer of the defendant J. H. Figard denies the allegations of plaintiff's petition and pleads the statute of limitations. This answer makes no mention of the special appearance in which he joined. The answer of the defendant Otto J. May is a general denial of the allegations of plaintiff's petition, and a plea of his discharge in bankruptcy.

1. The defendant, Citizens State Bank assigns as error the overruling of its special appearance.

By the pronouncement in *Gaines v. Warrick*, 113 Neb. 235, this court is committed to the doctrine that "If the lack of jurisdiction over the person of the defendant does or does not appear on the face of the record, it may be raised by special appearance, and error, if any, committed in overruling thereof is not waived by answering over, *where the objection is pleaded in the answer.* All holdings of this court to the contrary overruled."

In *Perrine v. Knights Templar's and Masons' Life Indemnity Co.*, 71 Neb. 273, it is said: "An appearance for the purpose of objecting to the jurisdiction of the court of the subject-matter of the action, whether by motion or formal pleading, is a waiver of all objections to the juris-

diction of the court over the person of the defendant, whether the defendant intended such waiver or not."

And in *Bodge v. Skinner Packing Co.*, 115 Neb. 41, it is said: "An objection to the jurisdiction of the court over the person of the defendant is waived by joining with it an objection to the jurisdiction over the subject-matter."

The present action is a transitory one, and the district court for Furnas county had jurisdiction of the subject-matter, and the defendant Citizens State Bank, having, in its answer, joined with its plea to the jurisdiction of the court over its person an objection to the jurisdiction of the court over the subject-matter of the action, thereby waived all rights under its special appearance.

2. The defendant Citizens State Bank complains of the overruling of its demurrer to plaintiff's petition, and all the defendants urge that the trial court erred in permitting plaintiff to amend its petition. The petition states a cause of action and the demurrer was rightfully overruled. The amendment to the petition did not change the issues, and there was no abuse of discretion on the part of the trial court in allowing the amendment.

3. The plea contained in the answer of the defendant Otto J. May, that prior to the commencement of the present action plaintiff had recovered a judgment against the defendant Otto J. May in the district court for Lancaster county, Nebraska, upon the promissory notes mentioned and referred to in the sixth paragraph of plaintiff's petition, and that said judgment had been satisfied and released by his discharge in bankruptcy, under an order duly entered in the district court of the United States for the district of Nebraska, states no defense to the cause of action set forth in plaintiff's petition. The judgment, satisfied by defendant May's discharge in bankruptcy, was founded upon the promissory notes, while the present action is one to recover damages for the alleged unlawful conversion of the chattels pledged, by way of mortgage, to secure the payment of such notes, and, notwithstanding the recovery of a judgment upon the promissory notes and

its subsequent release by the defendant May's discharge in bankruptcy, plaintiff is still entitled, as against the defendant May, to the benefit of the property pledged as security for the payment of the notes. In an action to recover damages for the unlawful conversion of bonds, pledged as security for the payment of a debt, and wherein the defendant pleaded his discharge in bankruptcy as a defense, the supreme court of the United States, in *McIntyre v. Kavanaugh*, 242 U. S. 138, said:

" 'A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as * * * (2) are liabilities for obtaining property by false pretenses or false representations, or for wilful and malicious injuries to the person or property of another.' * * * A wilful disregard of what one knows to be his duty, an act which is against good morals and wrongful in and of itself, and which necessarily causes injury and is done intentionally, may be said to be done wilfully and maliciously, so as to come within the exception. * * * The circumstances disclosed suffice to show a wilful and malicious injury to property for which plaintiff in error became and remains liable to respond in damages."

The supreme court of Nebraska is bound by the construction of the federal bankruptcy laws adopted by the supreme court of the United States.

4. For the purpose of establishing the conspiracy charged in plaintiff's petition, and over the objections of the defendants Citizens State Bank of Thedford and J. H. Figard, plaintiff was permitted to introduce in evidence a large number of questions propounded to the defendant Otto J. May, and his answers made thereto on the 24th and 25th days of January, 1927, as a witness in an action pending in the district court for Lancaster county, Nebraska, which answers contained statements, declarations and admissions prejudicial to the defendants Citizens State Bank of Thedford and J. H. Figard. These questions and answers are too numerous to be set out in full in this opinion; but, for illustration, a few of the questions, the

objections interposed thereto upon the trial of this case, the rulings of the court thereon, and the answers of the witness, follow:

"By Mr. Craven: (Reading from exhibit No. 43) * * * 'In other words, that bill of sale did not mean anything, did it?'

"By Mr. Stevens: Objected to as calling for a conclusion.

"By the Court: Overruled. Defendants except.

"By Mr. Craven: (Reading from exhibit No. 43) A. 'It did not mean a thing; no, sir.' Q. 'It was to cover up?' A. 'It was to cover a deficiency judgment that Mr. Bivens got against me on the ranch.' Q. 'And the Citizens State Bank at Thedford knew that the bill of sale was a cover-up, didn't they?'

"By Mr. Stevens: Objected to as calling for a conclusion and not the best evidence.

"By the Court: Overruled. Defendants except.

"By Mr. Evans: And not a statement of facts.

"By the Court: Overruled. Defendants except.

"By Mr. Craven: (Reading from exhibit No. 43) A. 'Yes, sir; absolutely.'"

In *Farley v. Peebles,* 50 Neb. 723, Mr. Irvine, Commissioner, in writing the opinion, said:

"What is merely narrative of a past occurrence, or what is merely expressive of a future purpose, would not generally be so admissible; but an act performed, a declaration made, a writing made or delivered, as a part of the matter in dispute, that is, in itself tending to advance the common purpose or object of the alleged conspiracy, is neither hearsay nor merely the admission of one of the parties. It is an overt act in pursuance of the object. From such overt acts of each of the alleged conspirators the jury may, together with other evidence, infer the existence of the conspiracy itself. We are aware that it is the established rule that the acts or declarations of one of the alleged conspirators are not admissible as against the others unless the conspiracy itself be established, in which

case the act or declaration of one becomes that of all; and we are aware, also, that it has sometimes been stated that such acts or declarations are not admissible in evidence until the conspiracy itself is first *prima facie* established."

In *Zediker v. State*, 114 Neb. 292, it is held:

"Wherever the writings or words of any of the parties charged with, or implicated in, a conspiracy can be considered in the nature of an act done in furtherance of the common design, they are admissible, not only against the party himself, but against all of his coconspirators, whether present or not. Wherever the writings or words of such party amount to an admission merely of his own guilt, and cannot be deemed acts done in furtherance of the common design, they can be received in evidence only against the party making or uttering them. Held, under the facts as reflected by the record in the case, statements set forth in this opinion, testified to over objection, were the recital or narration of a past transaction merely, and were not made in furtherance of the common design."

In the body of the opinion, Justice Eberly says:

"On this subject the supreme court of the United States has laid down the following rule: 'Doubtless, in all cases of conspiracy, the act of one conspirator in the prosecution of the enterprise is considered the act of all, and is evidence against all. *United States v. Gooding*, 25 U. S. 460, 469. But only those acts and declarations are admissible, under this rule, which are done and made while the conspiracy is pending, and in furtherance of its object. After the conspiracy has come to an end, whether by success or failure, the admissions of one conspirator, by way of narrative of past facts, are not admissible in evidence against others.' *Logan v. United States*, 144 U. S. 263, 308. * * * It follows that the conversation set forth herein was a mere narration of a past event, and not forming a part of, or connected with, anything then being done in furtherance of the object of the conspiracy. It is incompetent as against the defendant who was not present, and its introduction constitutes reversible error."

The statements, declarations and admissions made by the defendant Otto J. May, while testifying as a witness in the case in Lancaster county, more than fifteen months after the unlawful conversion is alleged to have taken place, were mere narrations of past events and did not form a part of anything then being done in furtherance of the alleged conspiracy, and were incompetent evidence against the defendants Citizens State Bank and J. H. Figard, and their admission in evidence is reversible error. And again adverting to questions No. 622 and No. 624, above quoted, both call for conclusions of the witness, and the answers were mere conclusions, and were prejudicial to the rights of the defendants Citizens State Bank and J. H. Figard, as tending to mislead the jury, and for this reason, also, their admission in evidence is reversible error.

5. Complaint is made that the court erred in submitting to the jury the question of damages for conversion, when no sufficient identification of the chattels alleged to have been converted had been established.

Concerning the cattle, claimed by plaintiff to have been wrongfully converted by the defendants, the second paragraph of plaintiff's petition, in substance, alleges that, on or about the 14th day of March, 1922, the defendant Otto J. May executed and delivered to Farmers State Bank of Agnew, Nebraska, his promissory note for $2,000, and as security therefor executed and delivered to said Farmers State Bank a chattel mortgage covering the following described property: Four registered white face cows, about 4 years old; 5 registered white face cows, about 8 years old; 9 registered white face calves, about 1 year old; and 1 registered white face bull, 5 years old. The mortgage here referred to was not received in evidence and, its existence being denied by the defendants Citizens State Bank and J. H. Figard, there is nothing in the record, so far as they are concerned, showing the plaintiff ever had a chattel mortgage upon the 19 registered white face cattle alleged to have been wrongfully converted by defendants.

The description of the cattle, incumbered by the two

mortgages of later date, mentioned in the third and fourth paragraphs of plaintiff's petition and introduced in evidence upon the trial as plaintiff's exhibits 19 and 20 are of no assistance in identifying the 19 registered white face cattle with the conversion of which the defendants are charged. The former, exhibit 19, describes the cattle therein mortgaged as follows: Five calves about 5 months old, red, weight 450 pounds; 5 heifers, about 1 year old, red, weight about 900 pounds; 3 bulls, about 1 year old, red, weight about 900 pounds; 2 heifers, about 2 years old, red, weight about 1,100 pounds; 9 cows, 6 to 10 years old, red, weight about 1,400 pounds; and 1 bull, about 5 years old, red, weight about 1,700 pounds; and the latter, exhibit 20, describes the cattle therein mortgaged as follows: Eight cows, 7 to 12 years old, spotted, weight 1,400 pounds each; 2 cows, 4 years old, spotted, weight 1,100 pounds; 5 cows, age 3 years, spotted, weight 900 pounds; 2 heifers, 1 year old, spotted, weight 500 pounds; 2 bulls, 1 year old, weight 500 pounds; one bull, 8 years old, weight 1,600 pounds; 5 heifers coming yearlings and 3 bulls coming yearlings. There is nothing in these two mortgages that would enable a third person, aided by inquiries which the mortgages themselves suggest, to identify the cattle therein described as being the 19 registered white face cattle for the conversion of which plaintiff here seeks a recovery. This conclusion, together with the finding that the testimony of the defendant May, given upon the trial of the case in Lancaster county and introduced in evidence upon the trial of this case, is incompetent as against the defendants Citizens State Bank and J. H. Figard, leaves the record barren of any competent evidence identifying the cattle alleged to have been converted, or connecting the defendants Citizens State Bank and J. H. Figard, or either of them, with their conversion, or establishing the conspiracy charged in plaintiff's petition.

For the errors herein mentioned, the judgment of the district court must be reversed as to all the defendants, and in so doing we are not unmindful of the rule of law

that, where several defendants are proceeded against as conspirators in the commission of a tort, which would be actionable if committed by one alone, the damage done and not the wrongful confederation is the gist of the action, and a judgment against one or more of the defendants may be sustained without proof of the conspiracy. With all of his statements and admissions construed most strongly against him, the evidence does not connect the defendant May with the conversion alleged in plaintiff's petition.

REVERSED AND REMANDED.

IN RE ESTATE OF JOHN BACKES.
ETTA BRUMMETT, APPELLEE, V. JOHN W. BACKES ET AL., ADMINISTRATORS, APPELLANTS.

FILED FEBRUARY 10, 1932. No. 28025.

1. **Bills and Notes.** The instrument set forth in appellee's petition *held* to be a promissory note evidencing a present and existing indebtedness at the time of its execution and delivery.
2. ———: TIME OF PAYMENT. Where a promissory note provides for its payment when the maker sells a specified tract of land, the note will become due and payable after lapse of a reasonable time in which to make such sale. Six years is more than such reasonable time.
3. **Evidence** examined and *held* to sustain the findings and decree of the trial court.

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

Schaper & Runyan, for appellants.

Sullivan & Wilson, contra.

Heard before ROSE, GOOD and DAY, JJ., and FROST and MESSMORE, District Judges.

MESSMORE, District Judge.

Appellee, claimant below, brought suit on a promissory note in the district court for Custer county. The case was

tried to the court, which found for appellee in the sum of $899, with interest at 7 per cent. and costs of action.

Appellee's petition alleges the promissory note, the subject-matter of this action, as follows:

"Arnold, Nebr., January 11, 1924.

"Upon the date of sale or transfer by me of the east one-half of the southeast quarter of section 34, town 17, range 25, after date, we promise to pay to the order of Etta Backes, eight hundred forty-two and 50/100 dollars at Arnold, Nebraska, with interest at the rate of 1/10 of 1 per cent. per annum, payable annually from date until due.

"Should any of the principal or interest not be paid when due, it shall bear interest at the rate of 7 per cent. per annum, payable annually, until paid. The makers, sureties and indorsers hereof waive demand, notice and protest and agree to any extension of time of payment.

"John Backes."

Appellants' answer is to the effect that no debt existed; that there was no consideration for the note; that the land in question, which was deeded back to John Backes, the maker of the note, had decreased in value; and the right of redemption applied to the holder of this note and that the same was not redeemed. The reply was a general denial.

The evidence discloses that appellee and her former husband, Andrew Backes, by their joint efforts had accumulated different properties and that the moneys of both of them went into the purchase of said properties; that the last property purchased by them was from John Backes, now deceased, the father of Andrew Backes, for the sum of $6,000, on which $2,000 had been paid by grantees; that there had been trouble between Andrew Backes and his wife, appellee; that they were contemplating a divorce and had agreed to divide the property; that appellee desired that the said John Backes take back this land. Several conversations in reference to the manner of taking the land back were offered for the record. The net result of the

negotiations was that John Backes gave the note hereinbefore set out. The conversations with reference to the execution of the note and pertinent to the case were properly admitted by the trial judge.

The principal assignment of error which will be discussed in this opinion, holding the other assignments of error to be without merit, is that the court interpreted the instrument sued on as representing a present and existing indebtedness at the time of its execution, rather than an indebtedness to arise only upon the performance of a condition which was never performed.

John Backes executed the note on January 11, 1924. He died intestate June 9, 1930. The note was filed as a claim against his estate. The contention of appellee is that the note was a debt at the time of its execution and that a reasonable length of time had expired and that the claim therefore is a just claim as against the estate of deceased. The question is whether John Backes should sell or transfer the land as a condition to be complied with before the note could be considered valid.

Appellants contend that the contract should be construed in the light of surrounding circumstances and the condition of the parties at the time it was made. *Singer Mfg. Co. v. Doggett,* 16 Neb. 609; *Nebraska Hardware Co. v. Humphrey Hardware Co.,* 81 Neb. 693; *Frerking v. Thomas,* 64 Neb. 193.

In *Nebraska Hardware Co. v. Humphrey Hardware Co., supra,* it was held: "In interpreting a written contract, the meaning of which is in doubt or dispute, the court, in order to determine its meaning, will consider all the facts and circumstances leading up to and attending its execution, and will consider the relations of the parties, the nature and situation of the subject-matter, and the apparent purpose of making the contract. The court will, so far as possible, put itself in the place of the parties and interpret the contract in the light of the circumstances surrounding them at the time it was made and the object which they had in view."

In *Frerking v. Thomas, supra,* it was held: "In reviewing a cause on appeal, where the findings and decree of the trial court cannot be reconciled with any reasonable construction of the testimony, the same will be set aside as unsupported by sufficient evidence."

At the time of the death of John Backes he had the land, and in addition thereto had the sum of $1,685, after deducting $315 for interest and taxes, which represented the amount he had been paid by appellee and her husband. As evidence of this indebtedness appellee had the instrument in question. This instrument is one which is conditional on its face, the condition being that "upon the date of sale or transfer by me (meaning John Backes)" of the land described in the note, "after date," then a promise to pay to the order of Etta Backes, now appellee in this case, "eight hundred forty-two and 50/100 dollars * * * with interest at the rate of 1/10 of 1 per cent. per annum, payable annually from date until due. Should any of the principal or interest not be paid when due, it shall bear interest at the rate of 7 per cent. per annum, payable annually, until paid." Then there are indorsements of interest on the instrument as follows: "Paid Jan. 12, 1926 Int. to date $1.68. Pd. 4-28-27 Int. to 1-11-27 .84." The execution of the instrument is not attacked and no dispute can arise between the parties in that behalf. The circumstances which led up to the making of the instrument constitute evidence for its consideration.

In construing an instrument of this nature it cannot be contemplated upon a condition that might run for an indefinite period of time. Equity and good conscience would demand a construction of it to run for a reasonable length of time.

In *Crooker v. Holmes,* 65 Me. 195, 20 Am. Rep. 687, a promissory note was made payable "when I sell my place where I now live." Held, that the maker was bound to sell his place within a reasonable time and, failing in that, the note was due. In this case Appleton, Judge, states: "It is claimed that the debt will never become payable,

and can never be enforced. The maker of the note promises to pay when he shall sell the place he lives on in Oxford, Maine. The debt is due *in præsenti.* Its payment is postponed to a future time, but the debt none the less exists. The debt is absolute, the time of its payment indefinite."

In *De Wolfe v. French,* 51 Me. 420, the court decided that, where a debt is due absolutely and the happening of a future event is fixed upon as a convenient time for its payment merely, and the future event does not happen as contemplated, the law implies a promise to pay within a reasonable time.

In *Hicks v. Shouse,* 17 B. Monroe (Ky.) 483, it was held that, where an obligation was to pay $500 "so soon as I sell my house and lot in the city of Lexington, and until said sale is made, I promise to pay 8 per cent. interest on said sum," said sum was due in a reasonable time, and seven years, which was the time that had elapsed before suit, was long enough for payee to wait.

In *Smithers v. Junker,* 7 L. R. A. 264 (41 Fed. 101) it was held: "A note for value received promising to pay a certain sum at the maker's convenience and upon this express condition that 'he is to be the sole judge of such convenient time of payment' may be enforced by an action after the expiration of a reasonable time on demand and refusal of payment. It does not give the maker the sole right to pay when it would suit his convenience to pay it."

In *Page v. Cook,* 41 N. E. 115 (164 Mass. 116) it was held: "Where a demand note is made payable when the payor and payee mutually agree, the payee may, if the payor refuse within a reasonable time to agree when the note shall be paid, demand payment, and, upon refusal, proceed to collect it."

In interpreting this contract, was it not the meaning that John Backes would sell this land within a reasonable time? Is not the conclusion irresistible that appellants knew appellee so understood the contract? The maker of the note, John Backes, had the land, had the money which

was paid to him by appellee and her husband, and when this instrument was made another just like it was made and handed to Andrew Backes. The instrument in question is nothing more or less than a promissory note which could be and was, in our opinion, understood by the parties. John Backes, now deceased, agreed to pay this money on the sale or transfer of the land, recognized it as a debt, agreed to pay interest on it, and did so. The note was a legal instrument. The provision in the note, "should any of the principal or interest not be paid," would then be a recognition by its maker that at some time the note would be due. The note begins, "upon the date of sale or transfer," indicating in itself an intention on the part of the maker to sell or transfer this land. The instrument is not ambiguous nor vague, and the record portrays nothing to show the right of redemption applies either to appellee or Andrew Backes, nor that this right expired at any time, nor that there was a date of maturity.

Appellee brought this action in the lower court after a period of six and a half years had expired between the date of the note and the date of the death of its maker. Such an action is not premature. In applying the decisions, we are convinced that a reasonable time for the sale of the land in payment of the debt, as existed under the circumstances of this case, would not extend beyond this period of time. Under the decisions obtainable, the character of the instrument and the transaction, it is clearly indicated to us that after a period of more than six years we can well apply the rule that a reasonable length of time within which to pay the note has been had by appellants.

We feel that justice has been done and that the decree of the district court should be, and is, hereby,

AFFIRMED.

CLARENCE G. BLISS, RECEIVER, APPELLANT, V. H. C. BACKEMEYER ET AL., APPELLEES.

FILED FEBRUARY 10, 1932. No. 28083.

1. **Bills and Notes:** COMPROMISE AND SETTLEMENT. Payment and acceptance of less than the full amount due on a note, though tendered as a settlement in full, does not bar recovery of the remainder, in the absence of a *bona fide* dispute over the amount claimed.
2. **Evidence** examined, and *held* not to support the verdict.

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

George E. Hager, for appellant.

Burkett, Wilson, Brown, Wilson & Van Kirk and *W. A. Robertson, contra.*

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

THOMSEN, District Judge.

This is an action upon a promissory note for $4,692.78 upon which the plaintiff alleges some payments and asks for a judgment for the remainder of $3,450. The note was executed by the appellees.

Two appellees, H. C. Backemeyer and T. V. McCartney, filed separate answers. The other appellee, H. S. Westbrook, did not appear and a default was entered against him. The answers of appellees Backemeyer and McCartney are substantially the same. In substance, they claim that the note in suit was a renewal of several predecessors, and that the original note was given for money borrowed of the Ashland State Bank by the Ashland-Wyoming Oil Company, a corporation, of which the appellees were directors; that the original note and the subsequent renewals were all executed by the appellees as directors of the corporation, and not for the purpose of binding themselves personally; that of this oil company, Walton, the cashier of the bank, was a stockholder, and that Walton represented to them that they were executing the several notes

in a proper manner to bind the corporation, and that they were not personally liable thereon; that later a controversy arose between Walton, the cashier, and appellees as to the liability on the note, and the controversy was settled by defendant McCartney paying $1,900 and defendants Backemeyer and Westbrook each paying $49, which sums were accepted in full settlement.

The reply admits that appellees were directors of the Ashland-Wyoming Oil Company, admits the payments made, and admits that Walton was at one time cashier of the Ashland State Bank, but denies all the other allegations.

In the course of the trial all evidence as to the relationship of appellees to the Ashland-Wyoming Oil Company, the capacity in which they claimed to have signed various notes, and that they were not to be personally bound, was excluded, and the court submitted the case to the jury on the issue as to whether or not there was a *bona fide* dispute as to liability, apparently as to other matters than the before-mentioned claims. The jury returned a verdict for the defendants.

Accepting the view most favorable to the appellees, the testimony shows that the exact amount due on the note was difficult of ascertainment, but the exact amount was not the source of any dispute upon which a settlement was based. It seems to be settled law that the payment of an amount less than that for which the debtor is liable does not constitute an accord and satisfaction unless a *bona fide* dispute or controversy as to the debtor's liability or as to the amount due from him arises. *Treat v. Price*, 47 Neb. 875; 3 Williston, Contracts, secs. 1851, *et seq.* We have searched the record in vain for testimony indicating a dispute which gave rise to the settlement. It seems clear that the appellees wanted to settle the note for less than the total amount due, and into whatever relationship they may have entered on behalf of the oil company the outcome may have merited an honest desire to escape liability. But the present testimony fails to show

any lawful means of escape. No useful purpose would be served in relating the evidence in detail. It would require a review of the whole record in this opinion, since the evidence fails to show that a dispute over the amount gave rise to a settlement, nor is the admitted evidence sufficient to raise a doubt of liability. The most that can be said is that, in proving the amount due, the plaintiff had difficulty in determining the exact amount, but no settlement was based upon any discussion as to a difference between the parties in the amount claimed by the plaintiff.

We were strongly tempted to enter upon a discussion of the admissibility in evidence of testimony tending to show the excluded facts alleged in the answer, upon which it is claimed the actual dispute arose and upon which the claimed settlement was made, the proposition resolving itself into whether such evidence, varying the terms of a written instrument, is admissible for the purpose of showing an accord and satisfaction in which the parties themselves recognize the possible invalidity of the note, and in which the facts, generally excluded from evidence to avoid a controversy over matters held in law self-evident, form the basis of a contract of settlement separate and distinct from the contract giving rise to the cause of action; but this question is not discussed in the briefs, nor in the nature of things is it before us on this appeal, and we therefore decline to pass on it. A new trial may result in having this issue adequately and thoroughly presented. Counsel so able as these will see that the proposition is exhaustively briefed.

In view of the fact that the evidence does not support the verdict, the judgment is reversed and the cause remanded.

REVERSED.

CARL PLOOG, APPELLANT, V. ROBERTS DAIRY COMPANY ET AL., APPELLEES.

FILED FEBRUARY 11, 1932. No. 28100.

Monopolies: ACTION FOR DAMAGES: PETITION: SUFFICIENCY. Petition for damages in restraint of trade under antitrust laws, sections 59-801, 59-803, 59-806, and 59-818, Comp. St. 1929, examined, and found vulnerable to demurrers.

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

Lawrence I. Shaw, for appellant.

J. W. Weingarten, contra.

Heard before GOSS, C. J., DEAN and PAINE, JJ., and CARTER and RHOADES, District Judges.

PER CURIAM.

This is an action at law, brought by the appellant to recover damages in the sum of $15,000 from the appellees, on account of alleged violations of the Nebraska antitrust law, as set out in sections 59-801 and 59-802, Comp. St. 1929, covering the subject of unfair local discrimination by any person, firm or company doing business in the state of Nebraska, and providing penalties for the violation thereof. Demurrers were filed to the original petition, and sustained, after which the appellant amended his petition, and the demurrers were allowed to stand by agreement as demurrers to the amended petition, and the demurrers being again sustained and the appellant electing to stand on the petition as amended, the action was dismissed by the district court.

The petition alleges, in substance, that the Roberts Dairy Company is a corporation, buying and selling fresh milk at Omaha; that the defendant, Floyd S. Pegler, is its manager at Omaha, and Lloyd Wright is the assistant manager, and that the defendants Chris Bull, Fred Glessman and John Harder are residents of Sarpy county, engaged in the same business, of trucking milk, as the appellant; that the appellant, a resident of Sarpy county, for two

years had been engaged in the business of hauling fresh milk with his truck equipment, in which he had invested some $2,000; that his customers consisted of some 19 farmer producers, located in the vicinity of Chalco, and that he hauled the milk of said customers daily to the Roberts Dairy Company in Omaha, Nebraska, and there the milk was purchased by the Roberts Dairy Company from the producers, for a price agreed upon between them; that the appellant was paid for hauling such milk by the farmers at a rate agreed upon, the amount of compensation varying in the case of each producer; that the said dairy company, with the other defendants, combined and conspired to restrict and restrain the trade and competition of the appellant and to drive him out of business, and to monopolize and control the daily hauling of fresh milk from the area from which the plaintiff had been hauling the same, and notified the farmers that, beginning within a day or two immediately following, the said dairy company would refuse to purchase or to accept fresh milk from them unless the same was transported by one of the defendants, Harder, Bull, or Glessman; that the three defendants, Wright, Bull, and Harder, notified the appellant that the said dairy company would no longer purchase fresh milk from the producers if the same was hauled or transported by the plaintiff. Appellant further alleged that, because of the distance hauled and the necessity for an immediate sale of fresh milk, it was impossible to make negotiations to sell the same to other persons without serious loss and damage to the producers, and that a majority of the producers acquiesced in the demands of the defendants and permitted said defendants to haul their milk, and therefore the plaintiff's business was absolutely destroyed; that appellant's average profits had been $160 a month, which were wholly cut off, and the value of his trucks greatly depreciated, all to his actual damage in the sum of $5,000, and appellant therefore prayed, as provided by law, that he be allowed to recover three-fold damages, in the sum of $15,000, and reasonable attorney's fees.

The appellees insist that contracts for the performance of service, without any definite or specific period of duration, are generally terminable at the will of either party (*Smith v. Bailey*, 105 Neb. 754) and that such antitrust laws should be reasonably interpreted and applied.

Appellees state that, as set out by Judge Sanborn in *Whitwell v. Continental Tobacco Co.*, 125 Fed. 454, such statutes cannot be taken too literally or it would defeat all competition, and insist that appellant has, during the period of two years, monopolized the business of hauling fresh milk from these customers by an arrangement and agreement or combination between himself and the farmer producers and the said dairy company, and admits that the said dairy company can only displace him by making another agreement between the producers and themselves with another milk hauler, and that the present arrangement is no different from the arrangement made with the appellant, and that obviously the appellant would not be entitled to employment as long as he lived, but that the producers and the dairy company would have a right to terminate at will the arrangement with him and make the same arrangement with another hauler.

It was held in *State v. Employers of Labor*, 102 Neb. 768, in the text of the opinion: "If there is no contract for any fixed term of employment, the employer may discharge, or the employee stop work, at his own pleasure."

In *Smith v. Bailey*, 105 Neb. 754, we find a rule stated by this court: "That contracts for the performance of services or for the continuous furnishing of commodities are, when the contract itself specifies no period of duration, terminable, upon reasonable notice, at the will of either party to the contract."

Judge Lacombe, of the circuit court of appeals, wrote the opinion in the case of *Great Atlantic & Pacific Tea Co. v. Cream of Wheat Co.*, 227 Fed. 46, in which case it was stated that the Cream of Wheat Company purchased in the open market a by-product in the manufacture of flour, and known as "purified middlings," which it put up in

packages and labeled "Cream of Wheat." This was its copyrighted trade-name, and by extensive advertising there was a large demand for the product. It sold this product only to wholesalers, with the one exception of selling to the Great Atlantic & Pacific Tea Company, plaintiff, which company had a large number of retail stores. When the Cream of Wheat Company decided to discontinue selling to the plaintiff, the court said: "There was no contract between the two which bound defendant to sell to complainant for any specified period of time. This suit is really brought to force defendant to continue to sell to this single retailer, as it sells to the wholesalers who trade with it." Because of the fact that the purchases of the Cream of Wheat Company of purified middlings only amounted to 1 per cent. of the total purchases of that commodity, the plaintiff did not prevail. Judge Lacombe further said: "We had supposed that it was elementary law that a trader could buy from whom he pleased and sell to whom he pleased, and that his selection of seller and buyer was wholly his own concern." And Judge Lacombe then quotes from Cooley on Torts, 278, this statement: "It is a part of a man's civil rights that he be at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason, or is the result of whim, caprice, prejudice, or malice."

In the case on trial, we believe that the defendants acted within their legal rights, and while the notice given the plaintiff that they would discontinue business relations with him was exceedingly short, yet in the nature of the business it would be difficult to give a longer notice.

The aim of our antitrust laws is to preserve inviolate the principle of free, fair and open competition. At the same time, these laws seek to protect the consumer, so that he may purchase his commodity at competitive prices in a free and open market, and the courts seem to have taken the position that no person, firm or corporation may obstruct, impede or retard any one from carrying on a lawful business except by fair competition or persuasion, or by a peaceful severance of business relations.

We have examined the cases of *Cleland v. Anderson*, 66 Neb. 252, *Marsh-Burke Co. v. Yost*, 98 Neb. 523, and *State v. Interstate Power Co.*, 118 Neb. 756, and we find that the facts alleged in this case do not bring it within the holdings of those opinions. No error is found in the record of the district court in sustaining the demurrers to the amended petition, and its judgment is hereby

AFFIRMED.

ARTIE BOOTH V. STATE OF NEBRASKA.

FILED FEBRUARY 11, 1932. No. 28109.

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

Dale P. Stough, for plaintiff in error.

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

Heard before GOSS, C. J., DEAN and PAINE, JJ., and CARTER and RHOADES, District Judges.

PER CURIAM.

Artie Booth was informed against in the district court for Richardson county and there charged with having maliciously and unlawfully caused to be destroyed by fire, on May 27, 1931, a barn then and there being the property of Lavina Michel. The jury found the defendant guilty as charged in the information. Thereafter the court upon inquiry, and pursuant to an admission made by the defendant in open court, found that he had previously been convicted and had served sentences for three other offenses. Thereupon the court, upon the verdict of guilt and "because of the defendant's prior convictions," sentenced him to the penitentiary for 10 years at hard labor. The defendant prosecutes error.

We do not find merit in the defendant's contention that, inasmuch as there is no allegation in the information that he was an habitual criminal, the sentence herein is void.

No such allegation was necessary. It was within the court's jurisdiction before imposing sentence to inquire of the defendant in respect of his past history, and, as noted above, the defendant admitted that he had previously been convicted of other criminal offenses. Under section 28-501, Comp. St. 1929, one convicted of arson may be sentenced to a term of from 1 to 20 years in the penitentiary. The defendant was found guilty of the crime of arson and the sentence imposed herein was punishment for such offense, with added severity because of prior convictions. Clearly, it was within the court's discretion to sentence the defendant to 10 years, in view of the conduct disclosed, and warranted by his past record. Prejudicial error does not appear in the sentence herein. The judgment is

AFFIRMED.

FIRST NATIONAL BANK OF OMAHA, APPELLANT, V. JOHN M. FLANNIGAN ET AL.: FIRST NATIONAL BANK OF NAPER ET AL., APPELLEES.

FILED FEBRUARY 11, 1932. No. 28124.

Evidence examined, and *held* to sustain the judgment of the trial court.

APPEAL from the district court for Boyd county: ROBERT R. DICKSON, JUDGE. *Affirmed.*

Finlayson, Burke & McKie and *J. A. Donohoe,* for appellant.

John A. Davies, contra.

Heard before ROSE, GOOD and EBERLY, JJ., and CARTER and CHASE, District Judges.

PER CURIAM.

This is a proceeding in equity in the district court for Boyd county, Nebraska, to impress a trust in favor of the First National Bank of Omaha, as plaintiff, upon certain property alleged to be in the possession of the defendants.

At the trial of the case, by agreement of all parties, it was stipulated (so far as the questions before us are concerned) "that the only issues to be tried and considered * * * were the issues between the plaintiff, the First National Bank of Omaha, Nebraska, and the defendant, Robinson, as receiver of the First National Bank of Naper, Nebraska, as to the ownership of said sum of $1,737 paid to the clerk of the district court of Boyd county" by the First National Bank of Butte, Nebraska, representing two checks aggregating $1,737, of which G. W. Short and Walter S. Peacock were the makers.

Upon the issues, thus limited, a trial on the merits resulted in a finding in favor of the First National Bank of Naper that "the money heretofore paid into court, to wit, the sum of $1,737, by Walter S. Peacock and G. W. Short was the property of the First National Bank of Naper," and a judgment in favor of the latter institution thereon. Thereupon, after motion for a new trial had been denied, the plaintiff bank appeals.

The controversy grows out of the following facts: On June 19, 1930, Bert Hoyt and Jesse Hoyt executed and delivered to John M. Flannigan their promissory note for $9,450, secured by a mortgage on 266 head of mixed cattle. The mortgage was properly filed. Before the maturity of the note it was sold and indorsed by the payee to the First National Bank of Omaha, which thereby became the *bona fide* holder thereof for value. The chattel mortgage was also assigned to this bank.

After maturity of this note, the Hoyts, on October 27, 1930, executed and delivered to E. F. Jepsen, an assistant cashier of the First National Bank of Omaha, a bill of sale of the mortgaged cattle, and also a written agreement which permitted the Hoyts to retain possession of the mortgaged cattle, and to sell the same at any time up to November 15, 1930, and to account for the proceeds of such cattle to the First National Bank of Omaha. This written agreement further provided: "In the event that the same are not so sold, prior to said date (November 15, 1930),

said parties of the first part (the Hoyts) agree to sell all of said cattle hereinabove described, and not sold as provided in paragraph 3 hereof, at public sale on November 15, 1930, the proceeds of such sale to be remitted to said E. F. Jepsen at once to be applied on the indebtedness of said parties of the first part to the First National Bank of Omaha up to the amount of said note.

"5. It is further agreed that, in the event said parties of the first part fail to sell said cattle as provided in paragraphs 3 and 4 hereof, then said parties of the first part agree to deliver said cattle so remaining unsold to said E. F. Jepsen either at the farm of said parties of the first part, or at Newport, at the option of said E. F. Jepsen."

Jepsen never made demand for possession of the cattle under the paragraph last above quoted. A sale of all the cattle was held at public vendue on the 17th of November. The reason given in the record for this extension of the time of the sale was that as November 15, 1930, was on Saturday, it was deemed "a poor sale day," and by mutual consent the sale was advertised for and held on Monday, November 17. This sale was evidently satisfactory to all parties. Appellant states in its brief: "As a matter of local convenience, and in order to prevent the impression that the sale was forced, the cattle were advertised in the handbills of the sale as the cattle of Bert Hoyt and Jesse Hoyt."

One of the sale bills in the record before us shows that John M. Flannigan and Fred A. Putnam were advertised as the clerks thereof, and all parties admit they acted as such. E. F. Jepsen, an assistant cashier of the Omaha bank, and its trustee under the bill of sale, one of the witnesses in this case, testified in reply to questions propounded by the trial court, on this subject, substantially as follows: That Flannigan represented him and his bank at this sale. That Putnam came to it at the request of John M. Flannigan. That Flannigan was his (Jepsen's) representative and his clerk, and "was really the clerk." That Jepsen did not know that Putnam was coming until he saw

the bills advertising the sale, and that he understood the latter was merely Flannigan's assistant and took his instructions from Flannigan, the chief clerk. The evidence, as an entirety, plainly discloses that Putnam had no contractual relations with either Jepsen or with his bank, and that his employment was as a mere assistant to Flannigan, and was thought desirable because of his more extended acquaintance with the inhabitants of the neighborhood wherein the sale was held. The sale, as already disclosed, took place on November 17, and Jepsen, representing himself and the bank, was present. All of the property was sold. Certain purchases required bills of sale executed by Jepsen for the Omaha bank, and these were furnished by Jepsen. The sheriff of the county collected some four hundred odd dollars in personal taxes of the Hoyts, the payment of which was authorized by Jepsen out of the proceeds of the sale. Jepsen also knew that the purchasers of the property sold were paying for the same in part by their checks, drawn in favor of the clerks, a course of business to which Jepsen, at the time of the sale and at the time of the purchases, made no objection. About the close of the sale Jepsen asked Flannigan as to the delivery of the proceeds of the sale, and to this question Flannigan replied that he would turn over the proceeds as soon as they had been entirely collected, and that he would make settlement with Jepsen in Stuart. Jepsen offered no protestation to this proposed plan of procedure. At the close of the sale Flannigan proceeded to Naper, and at the First National Bank at that place turned into that bank certain checks which had been received from purchasers at the sale. Some of these checks were drawn upon the Naper bank. Some were checks on other banks which were convenient for the Naper bank to handle in the course of collection. For convenience in taking the proceeds of the sale to Stuart, Flannigan asked that the First National Bank of Naper issue to him a cashier's check to cover the checks so cashed. The evidence discloses that this bank is a small one, and had not been in the habit of making

use of this class of negotiable instruments in its business, and was without the necessary blanks. It also appears quite evident from the record that it was short in cash and exchange, and in lieu of a cashier's certificate, and for the purpose of transmitting the proceeds of the checks that had been turned over to it, it issued to Flannigan a negotiable certificate of deposit, payable on demand and to his order, in payment for the checks drawn on itself, as well as those drawn on other banks which it had cashed for Flannigan, and which totaled $4,967.01. Included in this sum was the $1,737, the amount in suit, represented by checks drawn by Peacock and Short on the First National Bank of Butte, Nebraska, and which, duly indorsed, were turned over and delivered to the First National Bank of Naper, Nebraska, as part of the transaction just related.

Payment of these checks was refused on their presentation by the First National Bank of Butte, because of insufficient funds. This occurred on the 18th of November, 1930, and on the 20th following the checks were again presented for payment and again refused; at this time because of the demand made on behalf of the First National Bank of Omaha for the proceeds thereof. Ultimately the sum of $1,737 was, by order of court, paid to the clerk of the district court for Boyd county, where it remained awaiting the determination of its ownership by the trial court. On the 1st day of December, 1930, the certificate of deposit issued to John M. Flannigan was satisfied by the First National Bank of Naper. Evidence in the record sustains the conclusion that the entire proceeds of the Hoyt cattle sale, the facts of which have been heretofore recited, were deposited in the Citizens Bank of Stuart on November 20, 1930, to the credit of the Hoyts, where, so far as disclosed by the record, this sum still remains. It thus appears that John M. Flannigan was the agent of the appellant bank in the cattle transaction; that every act which was done at the sale was in pursuance to their express authority and indeed ratified and confirmed by their representative on the ground, and with knowledge of

the facts. The checks received were payable to the order of the person acting as clerk; the representative of the appellant bank made no objection to Flannigan's purpose, known to him, of retaining the checks and collecting them prior to making complete settlement. The $4,967.01 in checks was turned over to the First National Bank of Naper to accomplish this plan. A negotiable instrument for the convenience of Jepsen's agent was issued by the Naper bank to Flannigan, then acting as the agent of both Jepsen and the First National Bank of Omaha, for use in the transmittal of these proceeds to the Citizens Bank of Stuart, at which Flannigan was to make settlement with the Omaha bank's representative. It was actually deposited in the Citizens Bank of Stuart on the 20th day of November, 1930, to the credit of the Hoyts, and, so far as disclosed by the record, still remains in that condition. Wholly irrespective of the question of notice as to the consideration for which the checks were given, nothing has occurred which subjects the assets of the First National Bank of Naper to any charge on account of the business it transacted. In a manner contemplated and authorized by his instructions, Flannigan admittedly received and, in the usual course of business, cashed the checks, the proceeds of which are in suit. Under the circumstances the Naper bank became the *bona fide* owner thereof. There is nothing in the entire transaction upon which a right to a preference as the owner of a trust fund can be sustained against this defendant, the First National Bank of Naper.

It follows, therefore, that the action of the trial court in its finding and judgment for that institution is correct, and it is

AFFIRMED.

ESTHER JENNINGS, APPELLEE, V. FRANK BIURVALL, APPELLANT.

FILED FEBRUARY 11, 1932. No. 28088.

1. Trial: EVIDENCE AS TO INDEMNITY INSURANCE: INSTRUCTION. It is permissible in a personal injury suit to inquire of the defendant upon cross-examination whether or not he carries liability insurance, and whether he employed the attorneys acting in his behalf. It is proper, when an attempt is made to enlarge upon this limited field of inquiry, or if unsolicited evidence is volunteered by a witness, for the trial court to strike it out and instantly instruct the jury to disregard it.
2. Automobiles: "RECKLESS OPERATION." To constitute reckless operation of an automobile under the Iowa law, there must be such heedless rashness of conduct as manifests indifference to the consequences to the life, limb, health, or property of another.

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

Crofoot, Fraser, Connolly & Stryker, for appellant.

B. J. Boyle and *Wear, Moriarty, Garrotto & Boland, contra.*

Heard before GOSS, C. J., EBERLY and PAINE, JJ., and BEGLEY and ELDRED, District Judges.

PAINE, J.

The plaintiff and appellee, Esther Jennings, brought an action for personal injuries against Frank Biurvall, the defendant and appellant, who was driving an automobile which plunged off the road and into a gully about two miles northwest of Hinton, Iowa, on Saturday evening, January 17, 1931. The case was submitted to a jury, which returned a unanimous verdict for $3,000 upon May 28, 1931, for which amount a judgment was entered, and motion for new trial overruled.

The evidence in this case discloses that, at the time of the accident, the appellee, an emancipated minor, 19 years of age, was a stenographer in the Federal Land Bank at Omaha, earning $65 a month; that the appellant secured

the Viking sedan, in which they were riding, from his father, Adolph Biurvall, its owner, who died before the trial, and started from Omaha at about 3:00 p. m. on a week-end trip with the appellee, Esther Jennings, and Grace Kathan, who were roommates, who went as his guests, paying none of the expenses. They planned to go to Beresford, South Dakota, to visit the mother of the appellee. They reached Sioux City in three hours, and in leaving there got off the main highway by mistake.

All three of the parties were riding in the front seat, and were proceeding on a dark night, at about 6:30 in the evening, on a strange, unmarked and unimproved country cross-road, over which none of the parties had ever driven before, and which appellant admitted at the trial was the hilliest road coming out of Hinton that he had ever driven over, having in addition a number of turns in it. Appellant remarked at the time that they would have to hurry to reach Beresford at the time they had planned to get there, and the appellee looked at the speedometer and noted that they were driving 55 miles an hour, and immediately told the appellant that there was no need to hurry, that her folks would be there when they got there. The appellant replied that there was no danger, but diminished his speed slightly. They passed a Ford coupé going in the same direction, and the testimony of the father and two sons, named Schuttpelz, in the Ford was that the appellant was driving 40 to 45 miles an hour when he passed their car, which was within a quarter of a mile of a sharp turn, with a bridge just beyond; that the rails on the bridge were painted white, and while the car was being driven at about 50 miles an hour, Miss Kathan, seeing the bridge from 150 to 300 feet ahead, shouted, "My God! Frank, be careful." Appellant testifies that with his hydraulic brakes he could have stopped the car, going at that speed, in 30 feet, but he paid no heed and disregarded the warning entirely. The testimony discloses that the appellant, just before crashing through the guard-rail leading to the bridge, dropped his hands from the steering

wheel, and the car went through the guard-rail, which was a bridge plank 3 inches thick by 12 inches wide and 16 feet long, and down into a gully about 20 feet deep, turned over, headed in the opposite direction, and was nearly demolished. The farmers in the Ford car, upon arrival at the scene of the accident a moment later, found appellant crawling out and the two girls in the top of the car, which was upside down. They took all of the parties to the St. Joseph hospital in Sioux City. When asked in the hospital why he dropped his hands from the steering wheel, the appellant answered by saying that he had always heard that a baby didn't get hurt in an accident because it was relaxed, and therefore he dropped his hands and relaxed his body, without attempting to put on the brakes or slow down the car.

The appellee remained in the hospital in Sioux City for ten days, was then taken to her mother's home in Beresford, South Dakota, and upon returning to Omaha she attempted to return to her work as stenographer, but a few days later she fell over in a faint while at her work. She then placed herself under the care of Dr. Herman Johnson, of Lord, Schrock & Johnson, orthopedic specialists. They treated her at St. Catherine's hospital, applied traction to her head and neck, secured a neck-brace for her, which she wore for some time, but when she removed the brace the pain was so severe that she had to continue its use, and was wearing it during the trial. Her most serious injury was an injury of the neck vertebræ, near the base of the skull, which made an irritation to the spinal cord, because of which injury she was compelled to wear the neck-brace, and suffered great pain. In addition to this, she had an injury to her right leg, which remained more or less numb for ten days, and in which the reflexes were affected, due to nerve trouble. She was troubled with severe pains and headaches, but Dr. Johnson was not able at the time of the trial to tell whether her injuries would be permanent or not. In addition to her pain and suffering, plaintiff suffered the loss of all garments she had on,

which were ruined by battery acid, the loss of her handbag, with $15 in cash, and other financial losses for hospital and doctor bills made her total expense up to the time of the trial amount to $700.

1. The assignments of error set out by appellant are as follows: (1) That the court refused to give a directed verdict; (2) that the court admitted improper evidence over defendant's objection; that the appellant was being defended by attorneys employed by an insurance company; (3) that the court erred in refusing to give instruction No. 3 offered by the appellant, which defined the word "reckless;" and (4) that the damages awarded by the jury are excessive.

The second assignment of error is directed to evidence which was brought out in the direct examination of the witness Grace Kathan. She was asked whether the appellant had ever given her any directions after the accident, and she replied that he had given her a slip of paper with Attorney Connolly's name on it and told her she was to see Mr. Connolly. "Q. Did he tell you who Mr. Connolly was? A. Yes. He said he was the claim agent for the insurance company, and I was to talk to him for a settlement." Motion was made by Mr. Connolly to strike out the answer on the ground that it was incompetent, irrelevant and immaterial, and given for the sole purpose of prejudicing this jury against the defendant, upon which Judge Redick made the following ruling: "I will strike it out, and the jury will pay no attention to that testimony; it is improper; I supposed it was for an admission of the defendant."

This court has held that it is permissible in a personal injury suit to inquire of the defendant upon cross-examination as to whether or not he carries liability insurance, and whether he personally employed the attorneys for the defense. *Miller v. Central Taxi Co.*, 110 Neb. 306; *Jessup v. Davis*, 115 Neb. 1; *Sloan v. Harrington*, 117 Neb. 809; *Sorensen v. Grand Island Clinic*, 119 Neb. 280; *Combs v. Owens Motor Co.*, 121 Neb. 5. This is for the sole pur-

pose of informing all parties as to the true status in reference to these matters. Until modified, it is binding upon the trial court. But this court has not enlarged the rule as first laid down, and when it is violated a reversal followed, as in *Lewis v. Beckard*, 118 Neb. 533. The ruling of the trial court in striking out evidence in reference to liability insurance not warranted by the rule is approved.

2. The assignment of error based upon the refusal of the trial judge to give a long instruction defining recklessness can only be clarified by setting out instruction No. 4 given by the trial judge, which reads as follows:

"The jury are instructed that the accident in question occurred in the state of Iowa, and the rights of the parties are governed by the laws of that state as set forth in the pleadings. The statute of Iowa provides as follows:

" 'The owner or operator of a motor vehicle shall not be liable for any damages to any passenger or person riding in said motor vehicle as a guest or by invitation and not for hire, unless damage is caused as a result of the driver of said motor vehicle being under the influence of intoxicating liquor or because of the reckless operation by him of such motor vehicle.'

"It is not claimed that the defendant was intoxicated; the only ground of recovery alleged by plaintiff is that she suffered the injuries of which she complains because of the reckless operation by defendant of the automobile at or about the time of the accident.

"With regard to this term 'reckless' in the statute, you are instructed that it was the evident intention of the legislature to exempt the driver of an automobile from liability for injuries suffered by the guest because of ordinary negligence of the driver and permit his recovery only when such injuries were the result of recklessness (or intoxication). It is therefore necessary to distinguish between negligence and recklessness in the determination of this case. Negligence is the doing of some act under the circumstances of the accident that an ordinarily prudent person would not have done, or the failure to do some act

or to take some precaution which a person of ordinary prudence would have done or taken. Recklessness is heedlessness, or indifference to the rights of others or of the consequences of one's acts; it signifies the driving of an automobile carelessly and heedlessly in a reckless disregard of the rights of others, or of the consequences.

To constitute reckless operation of an automobile, there must be such heedless rashness of conduct as manifests indifference to the consequences to the life, limb, health or property of another. All of these elements are contained within the instruction of the trial court. Admitting that the instruction submitted contains nothing improper, yet the trial court is not bound to give a long instruction submitted if he has covered its main points in one of his own. We have held in another case involving this Iowa guest law that whether the reckless operation of an automobile caused injuries to a passenger is a question for the jury to determine. *Graham v. Higgins,* 121 Neb. 211.

The finding of gross negligence which made a motorist liable for injuries to a guest has been held warranted by excessive speed and driving in a zigzag manner. *Smiddy v. O'Neil,* 177 N. E. (Mass.) 809.

The defendant acted in such utter disregard of the dictates of prudence as amounted to a complete neglect of the safety of his guests and warranted a finding that the accident and injury were caused by the defendant's gross negligence. *Cole v. Morse,* 155 A. (N. H.) 694.

All of the facts in the case at bar, the speed of this car over an unknown, unmarked country road, which was hilly and had many turns, driving after dark, approaching a sharp turn, not banked, with a bridge immediately beyond, without slackening speed, the wrecking of the car, the injuries sustained, all these facts were submitted to the jury under proper instructions, and the verdict of $3,000 returned by the jury is sustained by the evidence, and the same is hereby

AFFIRMED.

STATE BANK OF OMAHA, APPELLANT, V. F. P. TODD, APPELLEE.

FILED FEBRUARY 11, 1932. No. 28010.

Bills and Notes: ACCOMMODATION NOTE: SET-OFF. Where a defendant without consideration executes and delivers an accommodation note to a bank for the purpose of enabling said bank to obtain money or credit thereon, and said bank did obtain credit thereon from the plaintiff bank with full knowledge and consent of plaintiff and that plaintiff agreed to such arrangement, and that said accommodated bank thereafter became insolvent and passed into the hands of a receiver, then the defendant, when sued, would be entitled to an equitable set-off of any indebtedness due from plaintiff to said accommodated bank, if any, which was due at the time said bank was closed and passed into the hands of the receiver.

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

E. D. Crites and *F. A. Crites*, for appellant.

J. E. Porter, contra.

Heard before GOSS, C. J., EBERLY and PAINE, JJ., and BEGLEY and ELDRED, District Judges.

BEGLEY, District Judge.

This is an action brought by the State Bank of Omaha to recover on a note for $2,000, executed and delivered to plaintiff by defendant. The defendant in its answer admitted execution and delivery of the note, denied consideration therefor, and further alleged that same was a renewal of a note for like amount, given as an accommodation note to the Farmers Bank of Crawford as a part of the same transaction, to enable said bank to pledge same as collateral security for a note for the loan of $15,000 from plaintiff to said bank, and that said principal note has been fully paid and there is nothing due or owing on the note herein sued upon. The reply was a general denial, with allegations to the effect that the note is complete on its face; that plaintiff is a holder in due course, and that by reason of renewals defendant is estopped to deny liability thereon.

The following facts are established by the evidence: In June, 1922, the defendant was a stockholder in the Farmers Bank of Crawford; said bank was in financial difficulties; the state guaranty fund commission had taken charge of and temporarily closed it. Negotiations were begun with the commission for the purpose of reopening same. One J. P. Palmer, an attorney and agent for the guaranty fund commission, Erwin Kleeman, president of the Farmers Bank of Crawford and defendant and others, met in Omaha at the offices of plaintiff, with Mr. Schantz, its president, and the sum of $15,000 was raised and paid into said bank in the following manner: Mr. Palmer and Mr. Kleeman executed and delivered to plaintiff their note for $15,000. Plaintiff loaned them the $15,000 which was deposited on a time certificate of deposit in the Farmers Bank of Crawford and then assigned to the plaintiff as collateral. Other notes and certificates were made and assigned to plaintiff, also as collateral, including an accommodation note of $2,000 from defendant to the Farmers Bank of Crawford and also assigned to the plaintiff. When this note came due it was renewed twice by defendant, the renewals being made payable direct to plaintiff.

The bank was reopened and continued as a going bank for a short period and was finally declared insolvent and liquidated out. All parties to said transaction assumed that the certificate of deposit of $15,000 would, in case of insolvency of the bank, be held to be a valid deposit and be payable from the state guaranty fund; but, after the bank was closed, Mr. Palmer filed same as a claim and it was disallowed; this court holding that the transaction constituted a loan from plaintiff to the Farmers Bank of Crawford, and not a valid deposit against the guaranty fund. The amount of the $15,000 was reduced to $4,100 before the Farmers Bank was closed.

The evidence shows that plaintiff bank was the city correspondent of the Farmers Bank of Crawford and at times had various deposits in its bank to the credit of the Farmers Bank of Crawford. There is a discrepancy in the books

of the different banks as to the balance on hand at the time of the closing of the Farmers Bank. The books of the plaintiff show an overdraft in the sum of $4,027.31, while the books of the Farmers Bank show a balance due it at the date of closing of $5,342.69. This difference is explained by the evidence of defendant in showing that one F. M. Stapleton was formerly cashier and general manager of the Farmers Bank and at such time gave his personal note to plaintiff amounting to the sum of $9,370; that he defaulted in payment of the same and that on January 3, 1922, the plaintiff, without authority of the Farmers Bank and without its knowledge, charged against and deducted from the Farmers Bank account the amount of this note, leaving an overdraft on the plaintiff's books in the sum of $4,027.31. Stapleton kept the transaction covered in the Farmers Bank and it was never shown as a debit on that bank's books. There is no evidence that the note was an obligation of the bank or that Stapleton acted other than in his individual capacity in the transaction, and in view of the provisions of our statute that no officer or employee of a state bank shall be permitted to borrow any of the funds of the bank, directly or indirectly, it will be presumed to have been his personal obligation.

The only issue submitted by the court to the jury was the defense raised by the defendant as to payment and the right to an equitable set-off. The court submitted the following instruction, of which the plaintiff complains:

"You are instructed that if the defendant has established by a preponderance of the evidence that the original note for $2,000, of which the note in suit is a renewal, together with the notes of Smith, Palmer and Kleeman were given without consideration therefor passing to said makers, and for the purpose of lending their names to the Farmers Bank of Crawford, and for the purpose of enabling said Crawford bank to obtain money or credit thereon from the plaintiff bank and as collateral therefor, and that said Crawford bank did obtain credit thereon from the plain-

tiff in the sum of $15,000, and it issued its certificate of deposit therefor as security for said loan; and if the defendant has further established by a preponderance of the evidence that all of this was done by and with the full knowledge and consent of the plaintiff herein, and that said plaintiff bank agreed to said arrangement, then the defendant would be entitled to offset the indebtedness due from the plaintiff to the Farmers Bank of Crawford that is now due and that was also due at the time said bank was closed and passed into the hands of the receiver, if any. And even if the defendant has established the foregoing propositions by a preponderance of the evidence, then before he is entitled to a verdict herein he must further establish by a preponderance of the evidence that at the present time, and at the time the Farmers Bank of Crawford was closed and passed into the hands of the receiver, the plaintiff bank was indebted to said Crawford bank in the sum in excess of $4,100, and interest, claimed by plaintiff to be the balance due on the original loan of $15,000.

"If the defendant has failed to establish each one and all of the foregoing propositions by a preponderance of the evidence, or if the evidence thereto be evenly balanced or preponderates in favor of the plaintiff, then your verdict must be for the plaintiff for the sum of $2,000 with interest thereon at 8 per cent. per annum from the 5th day of June, 1923."

Appellant alleges error on the admission of oral testimony to dispute the terms of its note and also evidence to show that defendant is entitled to an equitable set-off. The notes were all made as part of the same transaction and not as collateral for any antecedent debt. The plaintiff bank had full knowledge of all the circumstances; took active part in the negotiations, and took the note direct to itself. It cannot under such circumstances complain of the admission of this evidence. 3 R. C. L. 870, sec. 54; 49 C. J. 1022. In the case of *Benton v. Sikyta*, 84 Neb. 808, this court held: "If the note is invalid between the

immediate parties, one who holds it as collateral security may only recover the amount of his claim to which said note is collateral." The case of *National Bank of Commerce v. Bottolfson*, 55 S. Dak. 196, is somewhat similar as to the order of pleading. The court held: "Where plaintiff suing on note alleged title as owner, but facts shown by plaintiff at trial demonstrated plaintiff was holder of note for purposes of collateral, plaintiff had burden of proving amount, if any, due on main obligation from payee to plaintiff." See, also, 49 C. J. 1030. Under our Code of Civil Procedure the distinction between actions at law and suits in equity is abolished. Comp. St. 1929, sec. 20-101. The defendant had the right to plead and prove an equitable set-off in this action, where the Farmers Bank of Crawford is shown to be insolvent. *Pierce v. Atwood*, 64 Neb. 92.

The case was properly submitted to the jury by the trial court and we find no prejudicial error in the record. The judgment of the district court is therefore

AFFIRMED.

PRUDENTIAL INSURANCE COMPANY, APPELLEE, V. CLARENCE G. BLISS, RECEIVER, APPELLANT.

FILED FEBRUARY 11, 1932. No. 28031.

1. Courts: CONCURRENT JURISDICTION. Where property is in actual or constructive possession of and subject to the jurisdiction of one court, another court of concurrent jurisdiction cannot interfere with that possession.
2. Mortgages: FORECLOSURE: RECEIVERSHIP. Where property is in the possession of a receiver appointed in proceedings to liquidate an insolvent bank, the statutory proceedings relating to the appointment of a receiver in a foreclosure suit are inapplicable.
3. ———: ———: ———. Where such statutory provisions are inapplicable, it is error for the court in the foreclosure action to name a trustee "to hold" the rents and profits in an endeavor to accomplish the same purpose. The mortgagee must look to the court having jurisdiction of the liquidation of the insolvent bank for any relief which involves an interference with the possession of the receiver of the latter.

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

Moyer & Moyer and *F. C. Radke,* for appellant.

Williams & Williams, Raymond J. Gibbons and *Quintard Joyner, contra.*

Heard before ROSE, GOOD and DAY, JJ., and FROST and MESSMORE, District Judges.

FROST, District Judge.

This is a foreclosure suit commenced in the district court for Boone county in which the mortgagee, plaintiff, applied for the appointment of a receiver. A hearing was had and the trial court made a finding that the mortgaged property was probably insufficient to discharge the mortgage and that the plaintiff would, under ordinary circumstances, be entitled to a receiver. However, the court further found that the Newman Grove State Bank held the title to the real estate involved in the foreclosure suit, and that that bank was in the hands of a receiver, and the court was in doubt whether a receiver could be appointed under such circumstances. The court then ordered Harry Henatsch, the assistant to the receiver in charge of said bank, "to hold the 1931 and subsequent rents and profits from said real estate pending this litigation, and if said real estate at the foreclosure sale sells for less than the total liens found against it in this suit, then and in such case the plaintiff or any cross-petitioner who has obtained a deficiency judgment may apply to any court having jurisdiction over the matter for an order to apply any proceeds in his hands derived from the 1931 and subsequent crops to said deficiency."

The evidence shows that Clarence G. Bliss, secretary of the department of trade and commerce, in 1929 had been appointed receiver of the Newman Grove State Bank by the district court for Madison county; also that at the time of the commencement of the foreclosure suit Bliss, as such receiver, had possession and control of the real estate

covered by the mortgage. The bank receivership, therefore, was already functioning in January, 1931, when the Prudential Insurance Company, the appellee herein, commenced the foreclosure suit. In February, 1931, the insurance company applied for the appointment of a receiver to take charge of the real estate and to collect the rents and profits, claiming that the property was probably insufficient to pay the mortgage debt. Due notice was given of this application to Bliss as receiver and a hearing was had in the district court for Boone county, and on March 25, 1931, the court made the order already referred to. Bliss, as receiver, has appealed from that order.

The first receiver had been appointed under the provisions of the statute relating to the liquidation of an insolvent bank. No question has been raised as to the regularity of the appointment of the secretary of the department of trade and commerce as such receiver or of the order for the liquidation of the Newman Grove State Bank as an insolvent institution. Mr. Bliss' duties as receiver required him to take possession of the assets of the insolvent bank and in this way he acquired the possession of the real estate involved in the foreclosure suit.

The real estate is located in Boone county and the foreclosure suit, in accordance with section 20-2139, Comp. St. 1929, was commenced in the district court for that county. The court found that the mortgaged property was probably insufficient to pay the debt, with which finding we have no complaint. But to have appointed a receiver, the only way to give the rents to mortgagee pending the foreclosure, would have resulted in a conflict of jurisdiction.

Because of conflicts of similar character it has been necessary for the courts to work out a rule of comity. The rule thus evolved is a sensible one, to wit: Where property is in actual or constructive possession of and subject to the jurisdiction of one court, another court of concurrent jurisdiction cannot interfere with that possession. *Moran v. Sturges,* 154 U. S. 256; *Terry v. State,* 77 Neb.

612; *Ryan v. Donley,* 69 Neb. 623; *Leigh v. Green,* 62 Neb. 344.

Chief Justice Fuller in *Moran v. Sturges, supra,* states the rule as follows: "It is a rule of general application that where property is in the actual possession of one court of competent jurisdiction, such possession cannot be disturbed by process out of another court."

In *Terry v. State, supra,* the same rule is expressed, as follows: "It is a well-settled rule that where one court of competent jurisdiction in a proceeding *in rem* obtains jurisdiction of the *res,* or, in other words, the thing in controversy, no other court can acquire jurisdiction over it. 'It is a rule well known to the profession that where two courts have concurrent jurisdiction, that which first takes cognizance of the case has the right to retain it to the exclusion of the other; that where property is *in gremio legis,* if it be a court of rightful jurisdiction, no other court can interfere and wrest from it the jurisdiction first obtained.' "

In *Leigh v. Green, supra,* there is an excellent discussion of the rule covering the jurisdiction of different courts over the same property. In that case Commissioner Albert sustains the validity of a tax foreclosure which was carried on, although a prior attachment suit was pending in the federal courts. He admits that the doctrine of the supreme court of the United States is: "When two courts have concurrent jurisdiction, that which first takes cognizance of the cause has the right to retain it to the exclusion of the other; that where property is *in gremio legis,* if it be a court of rightful jurisdiction, no other court can interfere and wrest from it the possession and jurisdiction first obtained; and that a sale, under an order of one court, of property in the custody or possession of another conveys no title." He then cites a large number of authorities from the supreme court of the United States. Judge Albert's opinion then continues: "This rule has its foundation, it would appear, not merely in comity, but in necessity; for were it otherwise, the orders of one court

might be offset by those of another, and the parties left without any remedy; besides, in their rivalry for possession of property in controversy, a conflict would arise that would not only be embarrassing in the administration of justice, but would be liable to lead to unseemly strife and personal conflicts between the officers of the different courts. A study of the cases cited shows that in each case the property was in the actual or constructive possession of the court whose jurisdiction was invaded. The decisions are based, in most cases, upon the facts that the subsequent proceedings in another court would interfere with such possession." Judge Albert, after recognizing the general rule of comity between courts covering their jurisdiction over the same property, then differentiates the position of the parties in *Leigh v. Green,* and concludes that the distinction is that in the attachment the federal court, by its levy, did not obtain possession of the real estate.

The failure of the court in the foreclosure to appoint a receiver is a recognition of the legal principle involved in the decisions just referred to; that is, that one court cannot interfere with the property already in the possession of another court. The mortgagee argues that as the findings of the trial court would entitle it to a receiver in the foreclosure suit, except for the priority of possession in the bank insolvency case, it was entitled to the relief given by the order of March 25, 1931. We fully concur in the mortgagee's contention that it is entitled to relief that it might have received through a receivership. However, we cannot agree with the method by which the court undertook to give those rights. The difference, then, is one of procedure. When it developed in the foreclosure suit that another court had possession of property involved and that a receiver could not be appointed as provided by statute in a foreclosure suit, the court in that suit was powerless to give the mortgagee possession through the appointment of a receiver, notwithstanding that was the only method for granting relief open in the foreclosure suit. *Huston v. Canfield,* 57 Neb. 345.

We agree with the bank receiver's contention that the only assignment of error of the appellant that need be considered is that relating to the order of March 25, 1931, which authorized Henatsch to hold the rents pending the conclusion of the foreclosure suit. Does this order interfere with the rule of comity between courts? The order directs him "to hold the 1931 and subsequent rents and profits from said real estate pending this litigation." In order to hold these rents he must in some way come into possession of them. With a receiver already in possession, no legal method was open to Henatsch to carry out this order without interfering with the prior possession of that receiver.

We are not unmindful of the claim of the insurance company, mortgagee, that Henatsch is referred to in the order as "assistant to the receiver in charge of said bank," but this designation is simply descriptive and the order deals with Henatsch as an individual. *Andres v. Kridler*, 47 Neb. 585; *Western Wheeled Scraper Co. v. McMillen*, 71 Neb. 686. Both of these cases are suits upon promissory notes wherein the signers are identified following their signatures as directors of companies which they represented. Notwithstanding these identifications, the court in both cases hold that such designations should be rejected as *descriptio personæ* and that the defendants are sued as individuals.

A recent decision of this court fully justifies the trial court in refusing to appoint a receiver. We refer to the case of *Wells v. Farmers State Bank*, 121 Neb. 462. This case is quite similar to the one at bar, in that the property involved in the mortgage foreclosure was already in possession of the receiver appointed to liquidate the affairs of an insolvent bank. In the opinion this court said that the statute authorizing the appointment of a receiver in a mortgage foreclosure action is inapplicable where such property was at the time under the control of another receiver. The court also in the *Wells* case decided that there was no valid reason why the receiver in the bank insolvency case could not also act in the foreclosure suit.

The supreme court of South Dakota in handling a similar situation held that the exclusive possession and control of property of an insolvent bank are in the superintendent of banks after such bank is taken over by him, subject to the authority of the circuit court of the county of the bank's domicile. That court, in concluding its opinion, suggests the remedy that is available to the mortgagee when such legal complications develop: "We can see no reason why a mortgagee, who, under the provisions of subdivision 2 of section 2475, Rev. Code 1919, would in an ordinary case be entitled to relief through the appointment of a receiver, may not get the same relief by application to the court in the insolvency proceedings. If he can, and we so hold, then the machinery provided for securing relief under that section must give way to the machinery provided for winding up the affairs of an insolvent bank. Not only will there then be no conflict of jurisdiction between courts and between the superintendent on the one hand and a receiver on the other, but the estate of the insolvent bank will be saved the expense of the receivership." *Hanson v. Sogn*, 50 S. Dak. 44.

We therefore conclude that the order of March 25, 1931, must be and hereby is reversed and the cause remanded, with directions to the district court to vacate the order of March 25, 1931, and to dismiss the application for the appointment of a receiver at the cost of the applicant.

REVERSED.

O. C. ELLIS, APPELLEE, V. OMAHA COLD STORAGE COMPANY, APPELLANT.

FILED FEBRUARY 11, 1932. No. 27847.

Appeal: REVERSAL. "Where a verdict is against the clear weight of evidence so that it cannot be sustained on any principle of right or justice, it is the duty of the court to set it aside." *Clark v. Gell*, 17 Neb. 284.

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

Brogan, Ellick & Van Dusen, for appellant.

Leon & White, contra.

Heard before GOSS, C. J., DEAN and EBERLY, JJ., and RAPER and RYAN, District Judges.

RAPER, District Judge.

The appellee, plaintiff below, in his amended petition alleges that he was employed by the defendant company, appellant, in its office from 1920 to March 31, 1928; that the fiscal year of defendant company during said period commenced on April 1, and ended March 31 of the year following; that about May, 1927, the plaintiff received a bonus from defendant of $450 in cash, for the fiscal year preceding March 31, 1927; that about June, 1927, the defendant company by its general manager and vice-president entered into an oral agreement with plaintiff that if plaintiff would remain in the employ of defendant until March 31, 1928, the defendant would pay to plaintiff a bonus at the end of that fiscal year, not less than $450, and would be equal to the bonus paid plaintiff for the previous year, provided the defendant made a profit during the year and paid a bonus to other office employees for said fiscal year; that pursuant to said agreement plaintiff did remain in the defendant's employ until March 31, 1928, and defendant did make a profit and did pay a bonus to other office employees. Plaintiff asks judgment for $450 with interest.

The defendant company in its answer denies the allegations in the petition, except certain admissions. It admits the employment of plaintiff, and that plaintiff received a bonus for the year ending March 31, 1927, of $450, and alleges that defendant has been paid all amounts due him as such employee. The defendant further alleges that plaintiff on September 19, 1929, began an action on said alleged claim for the bonus in the municipal court in Omaha, wherein he based his said claim upon an oral agreement that, if plaintiff would remain in the employ of the defendant continuously from some time in June, 1927,

to March 31, 1928, the defendant company would pay to plaintiff a bonus at the end of the fiscal year ending March 31, 1928, which bonus would be based on his weekly salary and extra monthly check drawn from April 1, 1927, to March 31, 1928, and that in addition said bonus would be in a sum based on the defendant's profits, and upon bonuses paid to other employees who received a salary during said period in an amount equal to the salary received by plaintiff. The defendant resisted that claim and denied the alleged agreement, and defended said action in said municipal court; and on a trial of said cause on October 2, 1929, plaintiff testified under oath in said court that said oral contract was as set forth in his petition, and was his complete agreement with the defendant; that during the course of the cross-examination of plaintiff he voluntarily dismissed the action; that thereafter the plaintiff, on October 2, 1929, commenced an action in the district court for Douglas county, upon the same claim, wherein plaintiff in his petition based his claim upon the agreement as alleged in the petition in the municipal court. The defendant answered said petition denying the alleged agreement, and upon a trial to a jury in the district court, on January 27, 1930, said plaintiff again testified that the contract as made by him with defendant was as set forth in his petition filed therein; that during the course of the examination of plaintiff and upon said trial, the court indicating that said contract was too indefinite and uncertain for enforcement, plaintiff voluntarily dismissed said action without prejudice, and thereupon brought this action, alleging said agreement as set forth in the petition, and defendant pleads that plaintiff is estopped from asserting said oral agreement to be as alleged in the petition filed in this case. Plaintiff replied and the cause was tried to a jury, and verdict and judgment given in favor of plaintiff for amount claimed. Defendant company appeals. At the close of the testimony, the defendant moved the court to direct a verdict in its favor. The motion was overruled.

At the trial it was admitted that the defendant made a profit for that year and paid bonuses to other office employees. The plaintiff, Ellis, testified in the trial to substantially the facts alleged in the petition. His testimony was disputed by Mr. Hyson, the vice-president and manager of the defendant company, the person with whom Ellis said he made the agreement. Mr. Hyson denied that he had any such agreement, and denied that he promised or agreed to pay any bonus, and said nothing was mentioned in the conversation about paying a bonus to Ellis. Ellis voluntarily quit the employ of the company on the 31st day of March, 1928, and was paid his salary to that date, without anything being mentioned about a bonus. The first reference to a bonus was in a letter written by appellee to Mr. Hyson on July 20, 1929, in which he said: "Would like to have you review your record of salary paid me during the period April 1, 1927, to March 31, 1928, and believe you will find that in line with your verbal agreement an additional amount is due me, based on considerations accorded employees as of record March 31, 1928; also conforming to practices of the previous year, as well as years prior to that. You appreciate that I completed the full year and should have been given consideration the same as others, at least to the extent of equaling my salary the previous year." Mr. Hyson did not reply to this letter. Mr. Ellis was paid a larger salary for that year.

About six or seven weeks after March 31, 1928, Mr. Ellis talked to Mr. Hyson about getting his job back, and at that time made no mention of a bonus. On September 19, 1929, appellee began an action against appellant in the municipal court in Omaha, and in that case alleged his employment, and that it was the practice and custom of the company, and particularly with plaintiff, to pay such employees in a three-fold manner, to wit, (1) a regular weekly salary; (2) an additional monthly salary; (3) a lump sum payment at the end of each fiscal year ending March 31, known as a bonus, based on the profits of the defendant company for the fiscal year immediately preceding; that plaintiff's

salary and manner of employment was based on said threefold manner of payment; that about the month of June, 1927, the defendant company by and through its vice-president and general manager entered into an oral agreement that if plaintiff would remain in the employ of the defendant company until March 31, 1928, then the company would pay plaintiff a bonus at the end of that fiscal year, which bonus would be based on his weekly salary and extra monthly check drawn from April 1, 1927, to March 1, 1928, and that in addition said bonus would be in a sum based on the profits of the company on the fiscal year and based on the bonus paid to other employees of the defendant company who received a salary during said period in an amount equal to the salary received by plaintiff. He then alleges the amount of his salary, and that the company did earn a profit, and the petition continues: "That based upon the agreement of June, 1927, the profits of the company during said fiscal year ending March 31, 1928, and the bonus paid to the other office employees for said period receiving a salary in an amount equal to plaintiff's salary, and based upon the general practice and custom of previous years, plaintiff was entitled to receive a bonus of $750." And he prayed for judgment of $750 and interest. The defendant answered and trial had.

Appellee was examined as a witness in that case, and testified to substantially the allegations of that petition, and that in the conversation Mr. Hyson told him, " 'We cannot pay bonuses unless we make profits.' And he says, 'Bonuses are based on our profits.' And he says, 'In the event we don't make profits, and we pay anybody else bonuses, we will give you the same consideration as we give others in accordance with the salary you draw.' " (The word "don't" as above quoted evidently means "do.") And Mr. Hyson stated that if plaintiff remained in the employment of the company for the remainder of the year and they made a profit then the company would pay plaintiff a bonus and give him the same consideration they gave other employees. Plaintiff was questioned as to whether

he had stated all the conversation and said he had told what he remembered and had gone over his testimony with counsel in preparation for the trial. At the conclusion of his testimony in municipal court, his counsel dismissed the case without prejudice. Immediately after that dismissal plaintiff filed a verified petition in the district court alleging the identical cause of action in almost the exact words of the municipal court petition. The defendant answered, and went to trial in district court before Judge Wright, about January 27, 1930. At that trial plaintiff again testified and gave the verbal agreement with Mr. Hyson in the same language as his testimony in municipal court, and again stated the agreement about the bonus, and that Mr. Hyson said: "If I would stay he would give me the salary as I had been having in the past; and on any bonus it would be based on what they paid the other employees; also as to whether or not they made a profit, and that bonus would be commensurate with the profit that they did make for that year." At the close of plaintiff's direct testimony, plaintiff dismissed the action without prejudice.

On January 31, 1930, appellee herein, as plaintiff, began this action.

In neither of the first two cases he brought did appellee allege or testify that anything was said in the conversation or agreement with Mr. Hyson about appellee receiving the same bonus as the previous year, nor did he mention the sum of $450 as the bonus he was to receive. He admitted in his examination that the reason he did not mention the $450 or that he was to receive the same bonus as the previous year, was because he felt that he drew more salary and would be entitled to $750, and did not want to prejudice his claim for the $750 by mentioning the part of the conversation that would limit his claim to $450. In the first two actions he admits he omitted to state the particular and necessary part of the alleged agreement that would give him the right to recover in order to gain an advantage of the $300, additional to what he was claiming in his last petition.

Appellant stated in his testimony that the practice of the company in previous years was to give bonuses in an amount not determined by either the salary or anything else except what the company thought the employees should have, and the bonus paid to the employees in former years was not uniform as to amounts, nor uniform as to salaries, but was based on what the company determined ought to be given. It may be said that under the practice of the company in former years the bonus paid was a mere gratuity and not based on any agreement, and appellee was aware of it. In his letter asking for bonus, while it does mention a verbal agreement, he evidently was urging his claim upon the said practice of previous years, and not upon any express agreement to receive any definite amount.

In the first two petitions he bases his claim upon the practice of the company to pay employees in the three-fold manner alleged, and his testimony in those two cases shows beyond question that he was not basing his cause of action upon any express agreement as to the amount of the bonus, as he now claims in this, his third attempt to establish a case that would be definite enough to sustain a judgment.

The appellee in the first two cases, if he is to be believed in this case, purposely did not tell the whole truth. The wilful suppression of a material fact is as inexcusable and unjustifiable in a witness as to wilfully misstate a material fact. And there is a strong inference from his letter, and his petitions and testimony in the first two cases, that no statement was made by Mr. Hyson that appellee would be paid $450, or a bonus equal to the bonus paid for the previous year. Only two persons were present at the conversation and only the one conversation was had. Mr. Hyson denies it. He is an interested witness, but had no greater interest than Mr. Ellis.

The appellee insists that the credibility of the testimony of the plaintiff in the case was exclusively for the jury to determine, and that the decision of a question of fact by a jury upon conflicting evidence should not be disturbed on appeal. Courts are careful to avoid invading the province

of a jury, and it is the general rule that where the evidence as to any material issue is such that different conclusions might reasonably be drawn therefrom the issue is one of fact for the jury, and not of law for the court. But there are limitations to this rule. In *Caniglia v. Vacanti*, 106 Neb. 793, the rule is thus stated: "A verdict of a jury, based upon sufficient evidence to support it, and which cannot be said by the court to be clearly wrong, will not be set aside merely because it appears to be against the weight or preponderance of the evidence, as the weight of the testimony is for the jury, and not for the appellate court." In *Trute v. Holden*, 118 Neb. 449, it is held as the law of this state: "A verdict so clearly wrong as to induce the belief on the part of the reviewing court that it must have been found through passion, prejudice, mistake, or some means not apparent in the record, will be set aside." In *Urban v. Novotny*, 107 Neb. 384, the court held that the jury disregarded material facts, and the verdict must be set aside. Again, in *Exchange Bank v. Gifford*, 102 Neb. 324, a verdict was set aside because the jury disregarded material evidence. In that case the defendant testified positively that he did not sign the note sued upon, but this court found that his evidence was overcome by opposing testimony and the verdict was set aside. That case is a good illustration of the application of the rule announced in *Trute v. Holden, supra*. And in *Clark v. Gell*, 17 Neb. 284, this court said: "Where a verdict is against the clear weight of evidence so that it cannot be sustained on any principle of right or justice, it is the duty of the court to set it aside." There are a great many cases reported in our state both in civil and criminal cases, and indeed in all the other states, to the same effect.

A principle of law applicable in this case is given in *Smith v. Boston Elevated R. Co.*, 184 Fed. 387, 106 C. C. A. 497, 37 L. R. A. n.s. 429, which arose on the second trial of the action. In the second trial plaintiff testified to a version of the accident that was inconsistent with her testimony at the first trial. The opinion says: "As the incon-

sistency is in the testimony of a party, a stricter rule is applicable than where the inconsistency is in the testimony of an ordinary witness. * * * While it is true that upon a second trial the plaintiff's case may be changed or strengthened by new testimony, yet the right of a plaintiff at a second trial to make by his own testimony a complete departure from the case presented at the first trial is not unlimited. A plaintiff, we think, after having sworn to facts resting in his own observation and knowledge before one jury, should not be permitted to swear to facts directly inconsistent and to obtain from a second jury a verdict in his favor which will involve the conclusion that his testimony at the first trial was knowingly false. A party testifying under oath is more than a mere witness. He is an actor seeking the intervention of the judicial power in his behalf, and thus subject to the rule *'allegans contraria non est audiendus,'* which, as stated in Broom's Legal Maxims, page 130, 'expresses in technical language the trite saying of Lord Kenyon that a man should not be permitted to "blow hot and cold" with reference to the same transaction, or insist at different times, on the truth of each of two conflicting allegations according to the promptings of his private interest.' " The court refused her right to recover on her changed testimony.

There is another feature that cannot be overlooked. The appellee in the first two cases was experimenting or toying with the courts. Two futile attempts were made by suppressing material evidence to get favorable judicial action on a claim that he later found could not be sustained, and the defendant was put to the trouble and expense of preparation and participation in those two cases. Such conduct on the part of appellee cannot be sanctioned. To do so would encourage any number of actions on one theory of a transaction, and on failure to get a favorable opinion of the trial judge, to dismiss without prejudice, and start anew on the same or an inconsistent cause of action, and thus harass a defendant without limit, and further to sanction the indefensible feature that one has the right by

repeated efforts to impose on the courts by a false claim and then change his position to meet the exigencies of his case by allegations and testimony inconsistent with the claims and testimony in his prior cases. This of course does not imply that a plaintiff may not dismiss an action without prejudice, nor do we mean to state that when a party has more than one remedy he may not pursue one without being estopped from maintaining another if defeated on his first action. There have been no cases cited, nor has independent research found a case parallel to this.

The evidence is such that the verdict cannot be sustained and for that reason is set aside. Inasmuch as appellee's testimony cannot be corroborated, or substantiated by additional testimony, the judgment is reversed and the cause remanded, with instructions to render judgment against the appellee and dismiss his petition at his cost.

REVERSED.

JAMES W. AULD, APPELLEE, V. JESSICA C. AULD, APPELLEE: STEWART, STEWART & WHITWORTH, APPELLANTS.

FILED FEBRUARY 11, 1932. No. 28072.

1. **Divorce**: ATTORNEY'S FEES. In a divorce action, some pleading or application by the wife must first be filed before the court can be justified in entertaining allowances for her counsel.
2. **Evidence**: PRESUMPTIONS. Ordinarily, in a civil action, a presumption is not evidence, but a mere rule of law, and disappears when evidence on the subject is given.

APPEAL from the district court for Webster county: J. W. JAMES, JUDGE. *Affirmed.*

Stewart, Stewart & Whitworth, pro se.

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

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

THOMSEN, District Judge.

This is an appeal from an order of the district court striking from the files an application for allowance of attorneys' fees in a divorce action. Appellants were consulted and employed by the wife June 25, 1930. No action was begun until the husband filed a petition September 24, 1930. September 30, pursuant to a letter from appellants, the clerk of the court entered on the record appellants' appearance as attorneys for defendant. No pleading on behalf of their client was ever filed by them. Five days later the wife notified appellants that she had concluded to hire other attorneys. Later such other attorneys filed on behalf of the wife a motion to the petition and an application for allowance *pendente lite*. On this application the wife was allowed alimony and fees for her then attorneys by an order entered January 10, 1931. April 12, 1931, appellants filed their own application for fees. It was this application which, on motion of plaintiff's attorneys, was stricken.

Appellants claim to have rendered legal services to defendant from June 25, 1930, to October 5, 1930. The services are stated to have been in preparing for an action for divorce and alimony to be brought by the wife, in preparing to defend a threatened action if and when brought by the husband, and preparing all such litigation incidental to disposition of property rights valued at $500,000. Appellants claim various members of their firm spent 43 days' time in this work. Though offered to the wife, no use of the fruits of their labors was ever made. She paid them $100. They ask for $1,700 more from the husband.

Do these facts entitle appellants to fees from the husband? By the weight of authority the law recognizes no right to bind a husband to pay fees to a wife's attorney in the absence of a contract with him or a statute creating such right. 25 A. L. R. 354; 42 A. L. R. 315. The Nebraska statute creates such right, but the allowance is to the wife to enable her "to carry on or defend the suit during its pendency." Comp. St. 1929, sec. 42-308. The

husband is not liable directly to the attorney for any services rendered. *Zent v. Sullivan,* 47 Wash. 315, 13 L. R. A. n. s. 244; *Yeiser v. Lowe,* 50 Neb. 310; *Burnham v. Tizard,* 31 Neb. 781. The allowance is only for the purpose expressed. If the wife has property of her own so that without such allowance this purpose can be accomplished, the reason and necessity for this allowance disappears, and, ordinarily, in that event she must look to her own purse to pay her attorney. *Wilkins v. Wilkins,* 84 Neb. 206. She may, however, contract and bind herself to pay fees. *Tyler v. Winder,* 89 Neb. 409. But the marriage relationship does not create an agency by which her husband can be bound. It is upon the wife's request that an allowance is considered. We find no authority under our law to compel the husband to pay fees to an attorney on the attorney's own application. The right created for the wife's benefit being statutory, decisions from other jurisdictions having different statutes are of no value.

Here the wife has made no application for allowance to these attorneys, nor on her behalf have these attorneys set the wheels of justice in operation for her. If the processes of the court had for her been set in motion by them, a definite interest in the suit would have been established and no action of the wife would then have deprived the attorneys of a hearing for fees on an application which she may have made. *Kiddle v. Kiddle,* 90 Neb. 248. We take it as essential that some pleading or application by the wife must first be filed before the court can be justified in entertaining allowances for her counsel. Our statute gives a married woman independent rights. Comp. St. 1929, sec. 42-202. She may choose as counsel whom she will, and the burden of fees is her own concern; it does not become the concern of the husband without the intervention of the court and then only upon her application for the purpose of enabling her "to carry on or defend the suit during its pendency." Neither such application nor purpose is shown in the record. On the other hand, the wife has attached no value to appellants' work; it has not

enabled the wife to carry on or defend the suit. Appellants probably well performed the tasks at which they were set by the wife and for this she may be personally liable, but if she decides to reject the results before the court is called upon to act for her the husband is not bound. Furthermore, it may well be doubted whether any allowance could properly be considered for such services as appellants claim to have performed preceding the beginning of the suit (19 C. J. 233), but this we are not called upon to decide. Under the circumstances the motion to strike the appellants' application for fees was properly sustained.

The appellants further claim that the court could not sustain the motion to strike appellants' application for fees, because they had already entered their appearance as attorneys for the defendant, and as a consequence thereof they were presumed under the law to be acting for her; and that because of this presumption the burden was upon the one who asserted the contrary to establish that fact by evidence, citing as authority *Curtice Co. v. Estate of Jones,* 111 Neb. 166; *Jordan v. Evans,* 99 Neb. 666; and *In re Gasser,* 104 Fed. 537. The rule is correct, and, strictly as a legal proposition, if the record had been devoid of other facts the trial court may have consistently overruled the motion. However, such presumption disappears when evidence on the subject appears, and appellants' own showing is that no pleading or application was filed on their client's behalf, and that they were discharged by her on October 5, 1930; and the record further shows that other attorneys acted for her, performed services, filed a pleading and an application, and that on such application the court made an allowance for alimony and fees. When the record shows facts to the contrary, such presumption has no application. *First Nat. Bank of Elgin v. Adams,* 82 Neb. 801; *Eggeling v. Chicago, R. I. & P. R. Co.,* 119 Neb. 229; *Lincoln v. French,* 105 U. S. 614; *Peters v. Lohr,* 24 S. Dak. 605, 609; 22 C. J. 124; 1 Elliott, Evidence, secs. 91-93; 5 Wigmore, Evidence (2d ed.) secs. 2490, 2491.

Thus the merits of the controversy were properly before the court on a motion to strike.

The action of the trial court in striking appellants' application from the files is correct and is

AFFIRMED.

G. A. ERICSON, APPELLEE, V. MUTUAL BENEFIT HEALTH & ACCIDENT COMPANY, APPELLANT.

FILED FEBRUARY 19, 1932. No. 28111.

Insurance: NOTICE OF LOSS: WAIVER. When an insurance company which has timely notice of a claim or loss is sued upon an alleged claim and denies liability, it waives proof of loss.

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

Cleary, Horan & Skutt, for appellant.

Ritchie, Swenson & Arey, contra.

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

PER CURIAM.

This is an action by the beneficiary to recover the benefits under a policy of health and accident insurance. The insurer seeks to avoid liability for payment of the death benefit on account of the failure of the beneficiary to furnish formal proofs of loss within the time provided by the terms of the policy. At the close of the plaintiff's testimony, the defendant moved for a directed verdict. The motion was overruled and the defendant elected to stand on the motion. The plaintiff thereupon moved the court to direct a verdict in his favor, which was done, and from a judgment on said verdict the insurance company appeals.

It is the contention of the plaintiff that the insured was injured October 7 and that as a result of said injury he died about two weeks later. At the time of the injury deceased was employed in a lumber camp near West Yellow-

stone, Montana. He was taken to Rexburg, Idaho, for hospitilization on October 8. On October 11, his doctor, at the request of the insured, notified the insurance company. On October 20, the same doctor notified the insurance company that insured died that day. This seems to be sufficient notice under the policy. The policy provides that the company will furnish proof blanks to the beneficiary, which was never done. The accident occurred in a lumber camp near West Yellowstone, Montana. The insured died in a hospital in Rexburg, Idaho. He was employed by the Globe Lumber Company, the office of which is in Salt Lake City, Utah. The beneficiary lived in Sweden, a foreign country, thousands of miles away, and was notified by the doctor of his son's death. The distances involved in this case are impressive.

The principal contention of the defendant is that the proofs of loss were not filed within the time provided by the policy. The question presented is whether the proofs of loss were waived by the company. The petition of the plaintiff alleges that the insured died as a result of an accident; that he gave prompt notice to the insurance company of the fact; and that the insurance company waived the proof of loss. The answer admits the issuance of the policy, but denies each and every allegation of the petition. This was a denial of all liability under the policy. This case is clearly within the rule announced in *Western Travelers Accident Ass'n v. Tomson,* 72 Neb. 661; 72 Neb. 674; 72 Neb. 680. This court approved the rule in *Tomson v. Iowa State Traveling Men's Ass'n,* 88 Neb. 399. See, also, *Hilmer v. Western Travelers Accident Ass'n,* 86 Neb. 285. The rule is that when an insurance company which has timely notice of a claim or loss is sued upon an alleged claim and denies liability, it waives proof of loss. The judgment of the district court should be approved.

This case has been vigorously contested by the defendant. It has been necessary to take depositions in widely separated places—Santa Monica, California, Rexburg, Idaho, and Sweden. The plaintiff's attorneys were required

to and did perform an unusual amount of work in this case. This was necessitated by the resistance of the company to the claim. The trial court allowed a fee of $300. The amount of the judgment was approximately $2,342.44. There is no uniform holding of this court to the effect that attorney's fees will not exceed a certain percentage of the recovery, but each case is considered upon its merits. The record in this case is before the court and is the best evidence to support a motion for an attorney's fee. The plaintiff's attorneys are allowed as fees in this court the sum of $350, in addition to the fees allowed by the trial court.

AFFIRMED.

STATE, EX REL. C. A. SORENSEN, ATTORNEY GENERAL, V. STATE BANK OF TOUHY: E. H. LUIKHART, RECEIVER, APPELLEE: FRANK J. ZETOCHA, INTERVENER, APPELLANT.

FILED FEBRUARY 19, 1932. No. 28179.

Banks and Banking: INSOLVENCY: TRUST FUNDS. Converted proceeds of a check delivered to and received by a bank for the sole purpose of paying a specific debt of the payee *held* trust funds payable in full from bank assets in the hands of the receiver, and not deposits.

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

Julius J. Zitnik, for appellant.

F. C. Radke, Barlow Nye and *M. Craft Radke, contra.*

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

ROSE, J.

In a proceeding in the district court for Saunders county to wind up the affairs of the State Bank of Touhy, an insolvent banking corporation, Frank J. Zetocha, intervener and claimant, presented a petition for the allowance of

$4,305.78 as a preferred claim for a trust fund payable in full out of the general mass of assets in the hands of the receiver. The trial court found that the proceeds of the check were not trust funds but deposits entitling claimant to share bank assets as a depositor. From a judgment based on that finding intervener appealed.

The question presented by the appeal is the validity of the claim for a trust fund. The material facts are not in dispute. The claim arose in the following manner: Claimant owed the Prudential Insurance Company a debt of $4,305.78. To make payment he borrowed that amount, received from the lender a check therefor, turned the check over to the bank and directed the officer in charge to remit the money to the Prudential Insurance Company's agent at Fargo, North Dakota. The check in possession of the bank was the equivalent of money, which it used for its own benefit, without making the remittance directed by claimant. Later the bank went into the hands of a receiver.

The receiver takes the position that the check was deposited by claimant and relies on evidence that it was so entered on the bank records; that claimant had a checking account in the bank; that he accepted a duplicate deposit slip therefor.

It is a stipulated fact that claimant instructed the officer in charge of the bank to remit the $4,305.78 to the agent of the Prudential Insurance Company at Fargo. Claimant used the check for the sole purpose of paying his debt by bank remittance. What the banker entered on the books and on the so called "deposit slip" to the contrary was the work of the bank and did not record the consent of claimant to a deposit. If the amount of the check was a mere credit on the checking account of claimant, the bank could not have used the funds for the remittance directed by him without his personal check, which was never drawn. What was called a "deposit slip" amounted to no more than a receipt for the check delivered to the bank for the sole purpose of providing the means for the re-

mittance ordered. The bank received the check as a trustee, converted the proceeds, used them for banking purposes, and is accountable as trustee. The proceeds constituted trust funds which belonged to claimant pending the execution of the trust—an unperformed duty of the trustee. The trust funds never became the property of the bank and are not assets distributable to depositors. The ruling on intervener's claim is controlled by the opinion in *State v. Farmers State Bank*, 121 Neb. 532.

The judgment of the district court is reversed and the cause remanded for a decree directing the receiver to pay intervener's claim in full out of assets of the bank.

REVERSED AND REMANDED FOR SPECIFIC DECREE.

PAINE, J., concurs in the result.

GOOD and EBERLY, JJ., dissent.

IN RE ESTATE OF BRUNO SCHELLENBERG. FRANK J. DUFACK, APPELLANT, V. ESTATE OF SCHELLENBERG, APPELLEE.

FILED FEBRUARY 19, 1932. No. 28167.

Sales: BREACH OF WARRANTY: WITNESSES: COMPETENCY: COMMUNICATIONS WITH DECEASED PERSONS. When a purchaser of certain corporate stock seeks to recover the purchase price of such stock from the estate of the former owner thereof, since deceased, on the ground of a breach of warranty, such purchaser is precluded, under section 20-1202, Comp. St. 1929, from testifying in respect of representations made to him in respect of such stock by the decedent.

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

Willard E. Stewart, for appellant.

W. C. Parriott, contra.

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

DEAN, J.

Frank J. Dufack filed a claim in the county court of Lancaster county against the estate of Bruno Schellenberg to recover $275, that being the purchase price of five shares of stock in the Western Paint & Glass Company which was owned by Schellenberg and from whom the plaintiff purchased the stock January 25, 1928. Plaintiff contends that there was a breach of implied warranty and a failure of consideration in the stock so sold to him. From an order of the county court disallowing his claim, the plaintiff appealed to the district court, where the judgment was affirmed. He now appeals to this court.

A stipulation discloses the following facts. On July 21, 1925, the voting power of the above named company was given to a representative of one of its creditors who operated the business for the benefit of other of the creditors. On May 1, 1928, the entire assets of the company were placed under the control of a committee of the company's creditors to liquidate its affairs. At a later date the assets of the company were sold, but it appears that the stockholders received no part of the proceeds of such sale. The plaintiff testified that, when he purchased the stock, he understood it was of the par value of $500 for the five shares and that he did not know that the company was then under the control of its creditors. No other testimony than that submitted by the plaintiff appears in the record.

The plaintiff cites and relies on section 69-436, Comp. St. 1929. This section, however, is a part of the uniform sales act and refers to an implied warranty as relating to documents of title in the sale of goods and the like, and it does not appear to be applicable to the facts involved herein. And it may be noted that no fraud was alleged by the plaintiff in the sale of the stock to him.

Section 20-1202, Comp. St. 1929, provides:

"No person having a direct legal interest in the result of any civil action or proceeding, when the adverse party is the representative of a deceased person, shall be permitted to testify to any transaction or conversation had be-

tween the deceased person and the witness, unless the evidence of the deceased person shall have been taken and read in evidence by the adverse party in regard to such transaction or conversation or unless such representative shall have introduced a witness who shall have testified in regard to such transaction or conversation, in which case the person having such direct legal interest may be examined in regard to the facts testified to by such deceased person or such witness, but shall not be permitted to further testify in regard to such transaction or conversation."

We conclude that when a purchaser of certain corporate stock seeks to recover the purchase price thereof from the estate of the former owner thereof, since deceased, on the ground of a breach of warranty, such purchaser is precluded, under section 20-1202, Comp. St. 1929, from testifying in respect of representations made to him in respect of such stock by the decedent.

Reversible error does not appear herein. The judgment is

AFFIRMED.

ANCIENT AND ACCEPTED SCOTTISH RITE OF FREEMASONRY, APPELLANT, V. BOARD OF COUNTY COMMISSIONERS, APPELLEE. CONSOLIDATED IN DISTRICT COURT WITH ANCIENT AND ACCEPTED SCOTTISH RITE OF FREEMASONRY, APPELLANT, V. BOARD OF EQUALIZATION OF LANCASTER COUNTY, APPELLEE.

FILED FEBRUARY 19, 1932. No. 27568.

1. **Taxation**: EXEMPTIONS. Under the evidence in this case, the property of the Ancient and Accepted Scottish Rite of Freemasonry of Lincoln, to wit, the Scottish Rite Temple, and lots 7, 8, and 9, of block 92, of the original plat of Lincoln, Lancaster county, Nebraska, on which the same is situated, is not subject to taxation for the years 1926, 1927, 1928, and 1929.
2. **Cases Overruled.** *Scottish Rite Building Co. v. Lancaster County*, 106 Neb. 95, and *Mt. Moriah Lodge, A. F. & A. M., v. Otoe County*, 101 Neb. 274, in so far as conflicting with this opinion, overruled.

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

Peterson & Devoe, for appellant.

Max G. Towle and *Farley Young, contra.*

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

EBERLY, J.

In complaints before the board of county commissioners and the board of equalization of Lancaster county, the Ancient and Accepted Scottish Rite of Freemasonry of Lincoln, complainant, prayed for an order striking from the tax lists for 1929 the real estate consisting of the Scottish Rite Temple and grounds at the northeast corner of Fifteenth and L streets in the city of Lincoln, on the statutory ground that the property described is exempt from taxation, for the reason that it is used exclusively for educational, religious or charitable purposes, and not for financial gain or profit to either the owner or user. Comp. St. 1929, sec. 77-202. The legal title to the real estate is held by the Scottish Rite Building Company and in that name the property was entered on the tax lists in 1926 at the assessed valuation of $110,000 and will remain thereon for the year 1929, unless stricken off. The equitable or beneficial owner is alleged to be the Ancient and Accepted Scottish Rite of Freemasonry, the legal title being held for convenience in the name of the Scottish Rite Building Company. The county board dismissed the complaints and allowed the property to remain on the tax lists for the purposes of taxation. Complainant appealed from the decision of the county board to the district court, where the alleged facts upon which the claims for exemption are based were put in issue by formal pleadings. Upon a trial the district court found that the Scottish Rite Temple and grounds were not used exclusively for religious, charitable or educational purposes within the meaning of the constitutional and statutory provisions re-

lating to exemption of property from taxation, refused to strike the property from the tax lists, and dismissed the complaints. From the judgment of the district court complainant appealed to the supreme court.

The question presented by the appeal is the asserted right of complainant to a decree in equity striking from the tax lists the Scottish Rite Temple and grounds as property exempt from taxation under the following constitutional and statutory provisions:

"The legislature by general law may exempt property owned by and used exclusively for agricultural and horticultural societies, and property owned and used exclusively for educational, religious, charitable or cemetery purposes, when such property is not owned or used for financial gain or profit to either the owner or user." Const. art. VIII, sec. 2.

"The following property shall be exempt from taxes: * * * Property owned and used exclusively for educational, religious, charitable or cemetery purposes, when such property is not owned or used for financial gain or profit to either the owner or user." Comp. St. 1929, sec. 77-202.

The evidence discloses that the appellant is a subordinate body to the Supreme Council of the Ancient and Accepted Scottish Rite of Freemasonry of the Southern Jurisdiction of the United States of America, the governing organization, and is a part of the general masonic structure; that the foundation or Blue Lodge of masonry has three degrees; that appellant confers the degrees from fourth to thirty-second inclusive. Another branch of masonry exists in the York Rite, commonly understood as Knight Templarism, which confers degrees peculiar to itself. The Scottish Rite Building Company is a Nebraska corporation, and holds title to the property here in suit for the sole use and benefit of appellant as representative of the subordinate bodies of the Valley of Lincoln, and has no power to devise or dispose of the same without the consent of the members of appellant organization and of the supreme authority governing subordinate bodies. The ap-

pellant, as a practical matter, exercises full and complete control of the property in controversy, which consists of a building of stone and brick construction covering about 100 feet by 142 feet of ground. This building contains general office quarters used solely for the administration of the order's affairs, a reception room or parlor, a lobby, a small and also a large lodge room, a banquet hall, together with paraphernalia rooms, music room, rooms for storage and for coal and heating apparatus. It is ordinarily referred to as the Temple and will so be hereinafter designated. It also appears that no portion of this Temple building is ever used for commercial purposes, but is devoted exclusively to the furtherance of the purposes of masonry. It is built with special reference to requirements of the work carried on by the Scottish Rite bodies, and is, with its appointments, absolutely necessary to the efficient and appropriate accomplishment of their purposes. In it is conferred the Scottish Rite degrees from the fourth to the thirty-second, and there is also held therein the business meetings of the included Scottish Rite masonic bodies. It is also used without charge by the Order of De Molay, which may be said to be approved, sponsored, and promoted by appellant, and having as its purpose, in part, the training of young men and boys for a better life, and which will tend to qualify them later to meet the requirements of masonry. It is also used by the Order of the Nobles of the Mystic Shrine (a masonic order), to whom none but Scottish Rite masons of the thirty-second degree and Knights Templars are eligible, for their business meetings and their biennial ceremonial sessions. The Shrine band maintained by this last named organization use it as their place of instruction and practice. The Temple building is also used by the Order of the Eastern Star, without financial remuneration, for their lodge purposes. This order may be said to be in the nature of an auxilliary masonic organization. Excepting the Shrine band, these societies are all ordinarily known as secret orders, and the only affairs carried on therein pertain or

are incidental to their lodge work. Educational and charitable activities and purposes are common, in fact identical, in both craft masonry and that of Scottish Rite, and to that extent they work together.

It is also unquestioned in the record that the Temple property is not owned or used for financial gain of either the owners or users, or of the individuals of the membership comprising the same.

The appellant, considered as a "lodge," is supported, maintained and carries on its work wholly out of the initiation fees, annual dues paid in by its membership, and voluntary contributions by them made. But membership as such, it appears from the evidence, is not the source of any financial return to the member.

A certain portion of the funds so received are, however, remitted to the Supreme Council, the parent body already mentioned. Indeed, the co-ordinated bodies of the Supreme Council, of whom the appellant is one, are the money gatherers of that body, and, excluding devises and other incidental contributions, are the sole and ultimate source of the funds distributed by that supreme organization. A summary of these expenditures comparatively recently made discloses not only the extent of this work on the part of the "co-ordinated bodies," but also the purposes to which the proceeds of the same were largely devoted by the Supreme Council, and is as follows: Paid directly for educational purposes $1,285,413.22 (including one million dollars to George Washington University, Washington, D. C.); for maintenance of hospitals $205,125.76; for masonic and other charities $307,779.22; for charitable relief $165,740; for disasters, floods, fires, wherever occurring, $111,565.09. The total of contributions so made to strictly educational and charitable purposes aggregates $6,318,016.15.

As to the portion of appellant's income not thus employed, it may be said that within the local orders, and as an instrumentality thereof, there is an organization known as the Scottish Rite Educational Welfare Association, separately incorporated, to which contributions are

made by appellant, the sole object and purpose of which is to assist worthy students in the completion of their education. This instrumentality now has at its disposal $60,000, all of which at the time of the hearing of this case in the district court, save and except the sum of $13,500, was in active use for the purposes supplied. There is also another subsidiary organization known as the Scottish Rite Relief Board, now possessing a balance of approximately $15,000 contributed by the appellant's membership, devoted wholly to charitable relief. All revenues received by appellant not used for maintenance of its building and defraying necessary costs and legitimate expenses in the administration of the Order's affairs are placed in a fund to be used when called for or required for educational and charitable purposes. In addition, there is a system of voluntary charitable contributions provided for, made by the membership in addition to regular and stated dues. Then, too, the evidence discloses without dispute that its charities are not limited to the membership of the Order, but extend to worthy objects without reference to their institutional affiliations.

If it be said that the matter of determining the precise and essential nature of the use of the Temple property by appellant as a lodge or fraternal society, excluding from consideration such portion of such use so far as the same pertains to the creation and perpetuation and administration of the charities enumerated, still remains to be accomplished, the answer is to be found in undisputed evidence submitted in this case. An epitome of the record on this point would include the following facts: (The term "masonry" as employed by the witnesses pertains to and embraces the work of appellant considered as a lodge or fraternal secret society.) Masonry is traditionally and generally described as a system of morality veiled in allegory and illustrated by symbols. It teaches as a foundation principle faith in God and immortality of the soul. Masonry is not sectarian in its religious teaching. It aims to bring its devotees a deeper and more conscious

contact with spiritual things. To the extent that religious purposes include the field of morals, masonry makes common cause with organized religion. Masonry is tolerant of all faiths and builds a moral and spiritual fellowship on the foundations of fundamental morality common to them. It brings its members to the altar of prayer, and by its every teaching and effort seeks to make real the invisible power of love, the intrinsic worth of harmony, and the beauty and eternal reality of the ideal. Outside of the activity of masonry which is devoted to charity, which constitutes a very substantial and major part of its endeavors, all of its activities in all of its bodies are devoted to those purposes which properly fall within the definition of "educational" and "religious." The positive testimony based upon the positive knowledge of the witnesses testifying in summarizing is that, measured by its purpose as exemplified by appellant, and as applied in its work as a lodge or society (to quote from the record before us), "Masonry falls entirely, without exception, within the three catagories of charity, educational purpose, and religious purpose. It has no other function or purpose and does no other work." Further, that the statements thus made "may be fully verified in every particular by reference to a large body of masonic literature available to any one who is interested in studying it, open to everybody, representing the best masonic thought for centuries back in time."

It further appears that these results are accomplished by and through the teachings of its rituals as employed in the conferring of its degrees, and in the transaction of its business, as well as by its literature.

On this evidence the trial court, in effect, held that a "religious purpose," within the meaning of the statutory and constitutional provisions involved in this case, requires an organization whose primary purpose is a sectarian organization holding open meetings, open to the public, and teaching a faith and belief in some particular or special doctrine of faith of some kind, as distinguished from other

accepted religious faiths; and that as the property was not used "exclusively for a religious purpose," as thus restricted, and by an owner identified with a class thus described, it was not subject to exemption, and as it was not used exclusively for charitable purposes it could not be exempted on that ground. In the disposition of appellant's claim based on the alleged use of the property for "educational purposes," the court, in effect, determined, in the light of *Young Men's Christian Ass'n v. Lancaster County,* 106 Neb. 105, that the building must be used for scholastic purposes, a "school." And appellant's property, not being devoted exclusively to a purpose within the judicial definition thus announced, was for this reason not subject to the exemption claimed.

It is to be observed that the case last referred to involved taxes assessed in 1917 and 1918, and a claim of exemption based in part on the words "school purposes," as those words were used in the statutes and Constitution then in force. Conceding that "school" is a generic term, and denotes an institution for instruction or education, a collective body of pupils in any place of instruction under the direction of one or more instructors (35 Cyc. 811), still the decision relied on, as to the present question, is wholly devoid of the force of precedent in the instant case. By constitutional amendment effective January 1, 1921, followed by a statutory amendment, the word "school" was eliminated and the word "educational" substituted therefor in both Constitution and statute controlling. Therefore the question of educational purposes was not, and could not have been, presented and decided in *Young Men's Christian Ass'n v. Lancaster County,* 106 Neb. 105. Furthermore, lexicographers and the courts agree in defining "educational" as pertaining to "education." The latter word taken in its full sense is a broad, comprehensive term and may be particularly directed to either mental, moral or physical faculties, but in its broadest and best sense it embraces them all, and includes not merely the instructions received at school, college, or university,

but the whole course of training—moral, intellectual, and physical.

An educational purpose is synonymous with an educational undertaking, and whatever educates is within the meaning of an "educational undertaking." 19 C. J. 1015; *Conley v. Daughters of the Republic,* 106 Tex. 80.

It would seem also to follow that if the achievements of this Order are dependent upon, or are in fact due to, instruction and training received by its initiates and membership, directed either to their mental or moral faculties, and in which the Temple is employed, to the extent of such use an educational purpose would be involved.

It would seem also a serious question is involved in the view announced by the trial court, in effect that the term "religious purpose" requires as a prerequisite to its application a society, approximating a sectarian organization, formed and maintained exclusively for religious purposes and using the property claimed as exempt, in the conduct of open meetings devoted to teaching a belief in some particular or special doctrine of faith, after the manner of the sectarian churches of the present day.

It is to be noted that the controlling language determines the exempt character of property solely by the "purpose" to which it is devoted. The identity and character of the owner is not in express terms constituted an element of the right involved nor made a prerequisite to its exercise.

Indeed, the pronouncement of the trial court appears wholly incompatible with the spirit of section 1, art. I of the Constitution; to the conceded "natural and indefeasible right" of the citizen "to worship Almighty God, according to the dictates of his own conscience;" as well as being a clear transgression of the constitutional inhibition which directs that "no preference shall be given by law to any religious society." Const. art. I, sec. 4.

"Religious purpose" is indeed synonymous with "religious worship," though of wider scope. On this subject a court of high standing has said: "Prayer is always worship. Reading the Bible and singing may be worship.

* * * If these exercises of reading the Bible, joining in prayer and in the singing of hymns were performed in a church there would be no doubt of their religious character, and that character is not changed by the place of their performance." *People v. Board of Education,* 245 Ill. 334, 339. See *State v. Scheve,* 65 Neb. 853.

The conclusion follows that neither the profession of a sectarian creed, nor the formal dedication or occupation of property to promote the objects and purposes of a faith thus expressed, is an essential element of a "religious use," nor a necessary prerequisite to and of an "exclusive religious purpose."

The question of primary importance in this case, upon which all others must depend, is to determine what "uses" and "purposes" are exclusively "educational," "religious," and "charitable," as these terms are employed in the Constitution and statutes here applicable. In both it will be noted that connecting the terms "educational," "religious," and "charitable," the conjunction "or" is employed or implied. So used, "or" may be construed to mean "and" when necessary to make the statute express the true legislative intent; and similarly "or" may be construed as meaning "and" in constitutional provisions. 46 C. J. 1127; 2 Lewis' Sutherland, Statutory Construction (2d ed.) 756; 25 R. C. L. 977, sec. 226. Therefore, in the instant case, in view of the general purpose to be promoted, it may not be said that the right of exemption is dependent on the fact that the property involved was used for purposes exclusively educational, or exclusively religious, or exclusively charitable, construing the three conditions to be distinct and mutually exclusive. Reason would dictate that, if property is in fact used for no other purposes than those which are educational, religious, and charitable, it is plain that the conditions of the exemption have been strictly complied with, irrespective as to the matter of proportion which any one of these distinctive purposes may bear to the others.

It is also to be noted that our constitutional provision

and the statute passed pursuant thereto evidence a development. At the organization of the state, tax exemptions were not made a matter of constitutional regulation. They were first created and defined by the adoption by the territorial legislature of Nebraska of 1857, "of the thirty-seventh chapter of the Code of Iowa, entitled Revenue." This enactment provided in substance that the following should be exempt from taxation: "The grounds and buildings of library, scientific, benevolent and religious institutions or societies devoted solely to the appropriate objects of these institutions (within limits specified). * * * The books, papers, furniture, scientific, or other apparatus pertaining to the above institutions," and "money and credits belonging exclusively to such institutions, and devoted solely to sustaining them." Laws 1857, p. 147. Section 1, art. XI of the Constitution of 1866, continued this legislation "in force until altered, amended, or repealed by the legislature." And this enactment, as amended, still being in force at the time of the adoption of the Constitution of 1875, was further continued by the effect of section 1, art. XVIII thereof, in terms providing "that all laws in force at the time of the adoption of this Constitution, not inconsistent therewith, and all rights * * * of this state, individuals, or bodies corporate, shall continue and be as valid as if this Constitution had not been adopted." In this connection it will also be remembered that in 1873 there was duly enacted "An act for the incorporation of charitable societies," providing for their organization and incorporation "for any charitable purpose," and defining the "charitable purposes" to which their powers might be applied. This was also continued in force and effect by the constitutional provisions last referred to, and, as now amended, provides: "Charitable societies within the meaning of this chapter shall be construed to include only societies intended to assist those suffering from any disease, infirmity or necessity, and societies for the prevention of cruelty to children and animals and for their protection and for other humanitarian or benevolent purposes."

Comp. St. 1929, sec. 24-601. So, also, since 1907 the legislature has provided for the incorporation of "All state, grand, supreme or national, secret, fraternal, benevolent or charitable orders, lodges," etc., and their respective subordinate bodies, without any precise definition of the terms "benevolent" and "charitable," etc., as employed in this act, but expressly including the following: "The Grand Lodge, Ancient Free and Accepted Masons; The Grand Chapter of the Order of the Eastern Star, of the State of Nebraska," etc. Comp. St. 1929, sec. 24-607.

It is to be observed that the terms of the exemption statute and the constitutional restriction as between the incorporated "charitable society" organized under the laws of 1873, as amended, and the benevolent or charitable order or lodge incorporated under the laws of 1907, as amended, are strictly impartial, and both are placed upon a plane of absolute equality. As to each the test for tax exemption prescribed was, and is, that the "property" be "owned and used exclusively for educational, religious, charitable or cemetery purposes," and "not owned or used for financial gain or profit to either the owner or user." Though these terms are undefined, by context their meaning is identical as applied to the two classes of corporations.

When the legislature later defined "charitable purposes," as employed in the act of 1873, as including assistance to "those suffering from any disease, infirmity or necessity, * * * and for other humanitarian or benevolent purposes," it necessarily became a legislative construction to the extent expressed (but not exclusive, however) of the identical words as applied to the incorporated charitable order or lodge. This conclusion is in accord with the usual and accepted canons of statutory interpretation.

In the construction of the controlling statute in this case it must be remembered that "No single statute should be interpreted solely by its own words. Upon enactment it becomes a part of, and is to be read in connection with, the whole body of the law. Its interpretation is to be

in the light of the general policy of previous legislation and of the long-established principles of law and equity. * * * Even statutes on cognate subjects, though not strictly *in pari materia,* may be referred to, in order to elucidate the intention of the legislature in enacting any given statute." 25 R. C. L. 1052, sec. 277.

Indeed, this jurisdiction is committed to the doctrine that, in a case where the proper interpretation of the statutory terms is involved, in order to ascertain the proper meaning of a statute, later as well as earlier legislation upon the same subject may be referred to. All existing acts should be considered, and a subsequent statute may often aid in the interpretation of a prior one. *Campbell v. Youngson,* 80 Neb. 322; 36 Cyc. 1142.

And so, while it is a well-settled general rule that exemptions from taxation are to be strictly construed, and their operation is never to be extended by construction, the power and the right of the state to tax are always presumed, and the exemption must be clearly granted. This does not mean that there should not be a liberal construction of the language used in order to carry out the expressed intention of the fundamental lawmakers and the legislature, but, rather, that the property which is claimed to be exempt must come clearly within the provisions granting such exemption. 25 R. C. L. 1093, sec. 309; *Y. M. C. A. of Omaha v. Douglas County,* 60 Neb. 642; *House of the Good Shepherd v. Board of Equalization,* 113 Neb. 489; *Young Men's Christian Ass'n v. Lancaster County,* 106 Neb. 105.

In determining the legislative intent evidenced by the term "charitable purposes," as employed in, but not defined by, the constitutional and statutory provisions quoted, "in the light of the long-established principles of law and equity," we inescapably recur to the "Statute of Charitable Uses" (43 Eliz. cap. 4) enacted by the parliament of England in 1601, in part in the following language:

"Whereas lands, tenements, rents, annuities, profits,

hereditaments, goods, chattels, money and stocks of money have been heretofore given, limited, appointed and assigned, as well by the Queen's most excellent majesty, and her most noble progenitors, as by sundry other well-disposed persons; some for relief of aged, impotent and poor people, some for maintenance of sick and maimed soldiers and mariners, schools of learning, free schools, and scholars in universities, some for repair of bridges, ports, havens, causeways, churches, sea-banks and highways, some for education and preferment of orphans, some for or towards relief, stock or maintenance for houses of correction, some for marriages of poor maids, some for supportation, aid and help of young tradesmen, handicraftsmen and persons decayed, and others for relief or redemption of prisoners or captives, and for aid or ease of any poor inhabitants concerning payments of fifteens, setting out of soldiers and other taxes; which lands, tenements, rents, annuities, profits, hereditaments, goods, chattels, money and stocks of money, nevertheless have not been employed according to the charitable intent of the givers and founders thereof, by reason of frauds, breaches of trust, and negligence in those that should pay, deliver and employ the same: (2) for redress and remedy whereof, be it enacted by authority of this present parliament."

And as further evidencing the approved and ancient legislative employment of the term "charitable purposes," chapter 79, part V, 39 Geo. III, an act for the suppression of certain societies, expressly excludes lodges of freemasons from the sanctions thereof for reasons therein stated, as follows: "Whereas certain societies have been long accustomed to be holden in this kingdom under the denomination of lodges of freemasons, the meetings whereof have been in great measure directed to charitable purposes," etc.

True, the statute of 43 Elizabeth quoted created no new law on the subject of charitable uses, but merely provided a new and ancillary jurisdiction for their enforcement, which in due time, in England in fact, was largely super-

seded by an equitable procedure on information by the attorney general (3 Story, Equity Jurisprudence [14th ed.] sec. 1536), and ultimately repealed in 1908; and while its provisions for the administration of charitable uses are not now, and never have been, in force in this jurisdiction (*St. James Orphan Asylum v. Shelby*, 60 Neb. 796; *In re Estate of Nilson*, 81 Neb. 809) still it remains historically true that the preamble of the statute of Elizabeth quoted contains an accurate, though incomplete, enumeration of charitable objects or purposes recognized as such by the courts of equity of the English speaking nations, not only of that time, but during the years that have since intervened. It must, however, be admitted that "This list omits some most important and familiar charitable objects. * * * The English and American courts have never regarded this enumeration as exhaustive, but as designed to be merely illustrative. * * * The doctrine is settled that all particular objects embraced within the general spirit, intent, and scope of the statute are to be considered as charitable, unless they violate some rule of public policy or the provisions of some positive statute." 3 Pomeroy, Equity Jurisprudence (4th ed.) sec. 1020. "Numerous trusts for purposes of benevolence are upheld as charitable, although not mentioned in the statute, since they are within its spirit and intent." 3 Pomeroy, Equity Jurisprudence (4th ed.) sec. 1022. So, too, "gifts, devises, and bequests in trust for educational purposes are valid, since they are all clearly within the spirit of the statute." 3 Pomeroy, Equity Jurisprudence (4th ed.) sec. 1023.

In view of the import accorded the words "charitable purposes" since time immemorial, as evidenced by the ancient statutes, and as recognized, approved and applied by the general principles of equity, as well as the use, definition and employment thereof by our own legislature, we are constrained to the view that the words descriptive of the purposes which the controlling statute exempts must be construed not in their restrictive, but in their comprehensive, sense. So construed, the activities of appellant

fairly fall within the tax exemption provisions of our statute and Constitution.

In addition, it may be said that outside of this jurisdiction the courts of this country, proceeding "in the light of the long-established principles of law and equity," have, even before the adoption of our Constitution of 1875, almost universally recognized the benevolent and charitable purposes of Freemasonry, and adjudged it to be a charitable institution. *King v. Parker,* 9 Cush. (Mass.) 71; *Burdine v. Grand Lodge of Alabama,* 37 Ala. 478; *City of Indianapolis v. Grand Master, etc.,* 25 Ind. 518; *State v. Addison,* 2 S. Car. 499; *Mayor v. Solomon's Lodge, etc.,* 53 Ga. 93; *State v. Board of Assessors,* 34 La. Ann. 574. See, also, *Mayor v. Grand Lodge,* 60 Md. 280; *Morris v. Lone Star Chapter,* 68 Tex. 698; *City of Philadelphia v. Masonic Home of Pennsylvania,* 160 Pa. St. 572; *Fitterer v. Crawford,* 157 Mo. 51.

It appears, however, that under constitutional provisions restricting exemptions from taxation to "public charities" the following courts have held that masonic bodies that restricted their charity to their own were private as distinct from a "public charity," and therefore not exempt. *Bangor v. Masonic Lodge,* 73 Me. 428; *Morning Star Lodge v. Hayslip,* 23 Ohio St. 144; *City of Newport v. Masonic Temple Ass'n,* 108 Ky. 333; *Vogt v. City of Louisville,* 173 Ky. 119.

However, this court, in *Plattsmouth Lodge v. Cass County,* 79 Neb. 463, as opposed to the reasoning of the cases last above cited, held, under circumstances similar to those here set forth, that the property thus used was for a charitable purpose and exempt.

So, too, section 2, art. VIII of the Nebraska Constitution of 1875, as originally adopted, was exactly as heretofore quoted herein, except that, in lieu of the word "educational," the word "school" appears. As a matter of history it was adopted from the Illinois Constitution of 1870, and constitutes a verbatim copy of the tax exemption clause (section 3, art. IX) of that instrument. It will be

noted that the word "public" forms no part of this section, nor of the laws of this state enacted for carrying the same into effect. It will also be remembered that in the act of 1877, which was passed for carrying into effect the language of this constitutional provision, the legislature used the exact language of the Constitution. Also, when the constitutional amendment of 1920 of this section was adopted, the succeeding legislature immediately, by amendment to the existing revenue law, likewise employed the exact language of the Constitution as amended. This fact not only necessitates but accentuates the conclusion that the plain legislative intent, fairly expressed, is to exempt from taxation all property that the Constitution as now amended permitted them to exempt.

In the case of *Grand Lodge v. Board of Review*, 281 Ill. 480, the supreme court of that state had occasion to pass upon "what constitutes a 'public charity.'" While it appears that the constitutional provision of the state of Illinois relating to tax exemptions was at that time identical with the one later adopted by Nebraska, the statute passed by the legislature of Illinois pursuant thereto differed from the one before us, enacted by Nebraska, in that, as will be seen from the following quotation, the word "public" was employed therein. The discussion of the Illinois court on this branch of the case is as follows:

"The seventh clause of section 2 of the 'Act for the assessment of property and for the levy and collection of taxes,' as amended in 1915, exempts from taxation 'all property of institutions of public charity, * * * when such property is actually and exclusively used for such charitable or beneficent purposes, and not leased or otherwise used with a view to profit.' Laws 1915, p. 576. It has been quite uniformly held by the courts that the primary objects of a Masonic lodge being benevolence and charity, such a lodge is a charitable institution. *Morrow v. Smith*, 145 Ia. 514; Ann. Cas. 1912A, 1183, and note. That the Masonic Home is a charitable institution and that the property in question is devoted to charity is beyond ques-

tion and is not denied, but the objection made before the board of review and now insisted upon is that the home is not a public charity because its benefits are restricted to Master Masons, their widows and orphans, and that such limitation deprives the institution of the character of a public charity. That question has been argued by counsel (here follows a discussion of the proposition as presented) * * * A different conclusion was reached in *Widows and Orphans Home of Odd Fellows v. Commonwealth,* 126 Ky. 386, and *City of Indianapolis v. Grand Master of Grand Lodge of Indiana,* 25 Ind. 517, for reasons which appear to us to be sound.

"It is the duty of the public to care for the indigent and the poor who are sick and afflicted, and while the public burden is not for the relief of aged and indigent Masons as such, the public is not relieved from the burden because they are Masons, and any institution which serves no selfish interest, but discharges, in whole or in part, any such duty, is a public charity. To constitute a public charity the benefits must not be conferred upon certain and defined individuals but must be conferred on indefinite persons composing the public or some part of the public, but the indefinite class may be of one sex or the inhabitants of a particular city, town or county or members of a particular religious or secular organization. 5 R. C. L. 293; 11 C. J. 338. The fact of such discrimination among those members of the general public who need relief does not deprive the charity of its public nature."

The final conclusion of the Illinois court was: "The primary objects of a Masonic lodge being benevolence and charity, such a lodge is a charitable institution, and the Masonic Home of the grand lodge of Masons of Illinois, together with the land used for its maintenance, is exempt from taxation as the property of a public charity."

See, also, *Masonic Home v. Sedgwich County,* 81 Kan. 859; *Morrow v. Smith,* 145 Ia. 514; *Cumberland Lodge v. Mayor and City Council of Nashville,* 127 Tenn. 248; *State v. Packard,* 35 N. Dak. 298; *Hardin v. Rock Springs Lodge, A. F. & A. M.,* 23 Wyo. 522.

In this jurisdiction it is not the character of the owner but the nature of its use which must in each individual case furnish the test for determining the tax exempt character of the property involved. If that use be truly and exclusively religious, or exclusively educational, or exclusively charitable, or a combination of the three uses, and involves no other use, for the reasons expressed in the cases cited, we are not concerned as to whether it be strictly a public charity or a private charity in the technical sense of these terms. *Plattsmouth Lodge v. Cass County,* 79 Neb. 463; *Young Men's Christian Ass'n v. Lancaster County,* 106 Neb. 105.

So, too, we are committed to the doctrine that, in determining whether or not property falls within a tax exemption provision, the primary or dominant use, and not an incidental use, will control. *House of the Good Shepherd v. Board of Equalization,* 113 Neb. 489; *St. Elizabeth Hospital v. Lancaster County,* 109 Neb. 104; *Central Union Conference Ass'n v. Lancaster County,* 109 Neb. 106; *Mary Lanning Memorial Hospital Ass'n v. Adams County,* 117 Neb. 618.

It follows that it fairly appearing from the evidence that the ownership as well as the primary and dominant use to which the Temple was devoted, at and for a number of years prior to the assessment of the taxes in suit, were exclusively for educational, religious, and charitable purposes, and that it was not owned or used for financial gain or profit to either owner or user, the district court erred in denying the claim for exemption.

It is to be noted that the material facts established by the evidence in the instant case differ in some important particulars from those recited in the opinion in *Scottish Rite Building Co. v. Lancaster County,* 106 Neb. 95. So, too, the controlling statute and constitutional provision relating to the subject of the action have both been amended since the case last referred to was decided. The case of *Mt. Moriah Lodge, A. F. & A. M., v. Otoe County,* 101 Neb. 274, determines only the insufficiency of the evidence

in that case to establish the right to exemption. However, to avoid any uncertainty which might otherwise arise, *Scottish Rite Building Co. v. Lancaster County,* 106 Neb. 95, and *Mt. Moriah Lodge, A. F. & A. M., v. Otoe County,* 101 Neb. 274, so far as in conflict with the conclusions here announced, are overruled.

For the foregoing reasons, the judgment of the district court is reversed and the cause remanded, with directions to enter a decree in conformity with this opinion.

REVERSED.

GEORGE SALISBURY, APPELLEE, V. BERRY MOTOR COMPANY: LEO BERRY, APPELLANT.

FILED FEBRUARY 19, 1932. No. 27942.

1. **Pleading**: DEMURRER: "DEFECT OF PARTIES." A "defect of parties" means an absence of necessary parties, and the objection to a pleading that there are too many parties, or unnecessary parties, cannot be raised by a demurrer on the ground that there is "a defect of parties defendant."
2. **Instruction** given by the trial court, set out in part in the opinion, *held* erroneous.

APPEAL from the district court for Dawes county: EARL L. MEYER, JUDGE. *Reversed.*

Nichols & Johnson and *W. M. Elmen,* for appellant.

W. P. Rooney, Allen G. Fisher and *Charles A. Fisher, contra.*

Heard before GOSS, C. J., DEAN, EBERLY and PAINE, JJ., and REDICK, District Judge.

EBERLY, J.

This is an action at law by George Salisbury, as plaintiff, against the Berry Motor Company, a copartnership consisting of Leo Berry and Lyle Berry, Leo Berry, and Lyle Berry, defendants, on an alleged oral contract of employment at a definite wage. To the amended petition of plaintiff the defendant Leo Berry demurred on the

grounds: First, that the petition disclosed that there was "a defect of parties defendant;" and, second, that it did not allege facts sufficient to constitute a cause of action. The demurrer was overruled, and the defendant then filed a pleading containing an answer and cross-petition, the allegations of which were traversed by plaintiff's reply. There was a trial to a jury resulting in a verdict against the defendant Leo Berry in a sum stated, a finding for plaintiff on defendant's cross-petition, and judgment was entered thereon. From the judgment overruling his motion for a new trial, the defendant Leo Berry appeals.

The first assignment of error here presented challenges the correctness of the trial court's ruling upon the demurrer. So far as the general demurrer is concerned, it is of course waived by the subsequent answer of the demurrant. It is insisted, however, that the demurrer for "misjoinder of parties defendant" should have been sustained. An inspection of the record discloses, however, that no demurrer on this ground appears therein. "Misjoinder of parties defendant" is not the legal equivalent of "a defect of parties defendant."

"A defect of parties means an absence of necessary parties and the objection that there are too many parties cannot be reached by a demurrer on this ground." 6 Standard Ency. of Procedure, 899. See, also, *Boldt v. Budwig*, 19 Neb. 739.

The cross-petition of the defendant set up a claim for damages alleged to have been caused by negligence of the plaintiff in driving defendant's automobile, which it is alleged resulted in wrecking and injuring the same, causing damages in the sum set forth. The trial court in its instruction No. 12 epitomized the allegations of defendant's cross-petition, including a number of specific and distinct allegations of negligence on the part of the plaintiff set forth therein, and added to this summary this direction: "If the defendant has failed to prove *each one and all* of the foregoing allegations of his cross-petition by a preponderance of the evidence, or if the evidence thereto be

evenly balanced, * * * then the defendant cannot recover upon his cross-petition and your verdict should be for the plaintiff thereon." (Italics ours.)

It is manifest that a defendant does not have to prove everything he alleges in his cross-petition, provided what he does prove constitutes a good cause of action against the plaintiff. In view of the evidence before us, we are convinced that instruction No. 12, in the form given, was both erroneous and prejudicial, and the defendant was thereby deprived of a fair submission of his cross-petition to the jury.

It follows that, for the reasons stated, the judgment of the trial court should be, and hereby is, reversed and the cause is remanded for further proceedings in harmony with this opinion.

REVERSED.

AMERICAN GAS CONSTRUCTION COMPANY, APPELLEE, V. ROBERT Y. LISCO, JR., APPELLANT: C. I. TENNEY, GARNISHEE, APPELLEE.

FILED FEBRUARY 19, 1932. No. 28185.

Corporations: ESTOPPEL. When a party contracts with an imperfectly organized corporation, he is estopped to deny its corporate existence and is precluded from recovering from its members individually as if they were partners.

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

Allen G. Fisher and *Charles A. Fisher,* for appellant.

E. D. Crites and *F. A. Crites, contra.*

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

DAY, J.

This is an action brought by the American Gas Construction Company against Robert Y. Lisco, Jr., to recover

the sum of $4,000 as the balance due on a written contract for the sale of equipment for the manufacture of gas, purchased by the defendant from plaintiff. The defendant does not dispute that the balance due is unpaid, but seeks to establish an offset or counterclaim in the sum of $4,000 or more which he alleges C. I. Tenney owes him on a different contract. The trial court sustained the special appearance of C. I. Tenney, dismissed an attachment and garnishment, and upon motion struck from the answer and cross-petition the set-off and counterclaim. From this order the defendant appeals.

The petition of the plaintiff alleges that the plaintiff is a corporation organized and existing under the laws of the state of Iowa; that the defendant entered into a contract to purchase certain equipment for the installation of a gas-works at Laramie, Wyoming; that the equipment was delivered; that the contract price was $27,000, and that there is a balance of $4,000 unpaid. The defendant in his answer denies the corporate existence of the plaintiff. He further alleges that the real party plaintiff is C. I. Tenney. Defendant then proceeds with what is termed a counterclaim and cross-petition against C. I. Tenney, in which he sets out another contract under which C. I. Tenney is indebted to him in the sum of $5,000 and prays judgment against C. I. Tenney, doing business under the name of American Gas Construction Company, in the sum of $4,000. A writ of attachment is issued and money in the hands of the defendant due upon the contract sued upon by the plaintiff in this action is garnished as the money of C. I. Tenney. There was no personal service upon C. I. Tenney in Dawes county, Nebraska, and the only service upon Tenney is based upon the attachment and garnishment.

The claims set out in the pleadings arise by virtue of two different contracts. The contract set out in the set-off and counterclaim is signed by C. I. Tenney, while the one sued upon by plaintiff is signed by the plaintiff, by D. C. Tenney, Secretary. Our statutory provisions are as follows: Under section 20-813, Comp. St. 1929, defining

a counterclaim, it must be one existing in favor of a defendant, and against a plaintiff, between whom a several judgment might be had in the action, and arising out of the contract or transaction set forth in the petition as the foundation of the plaintiff's claim, or connected with the subject of the action." Under section 20-816, Comp. St. 1929, a set-off can only be pleaded in an action founded on contract, and must be a cause of action arising upon a contract or ascertained by the decision of the court. The set-off and counterclaim in this case does not arise out of the contract or transaction set forth in the petition as the foundation of the plaintiff's claim, or connected with the subject of the action. Mutuality of demands is necessary to entitle a defendant to a set-off or counterclaim. "A claim on the part of a defendant, which he will be entitled to set off against the claim of a plaintiff against him, must be one upon which he could, at the date of the commencement of the suit, have maintained an action on his part against the plaintiff." *Simpson v. Pennings*, 15 Neb. 671; *Bank of Crab Orchard v. Myers*, 120 Neb. 84.

The defendant in this case contends that the plaintiff was not in fact a corporation, for that its life had expired prior to the execution of the contract by operation of law, and that C. I. Tenney was then doing business under the corporate name as a trade-name. It is also seriously contended that C. I. Tenney is the real plaintiff in interest. The argument of the defendant upon the question is plausible and persuasive. However, we are confronted with certain well-established principles of law. When a party contracts with an imperfectly organized corporation, he is estopped to deny its corporate existence and is precluded from recovering from its members individually as if they were partners. *Nebraska Nat. Bank of York v. Ferguson*, 49 Neb. 109; *Livingston Loan & Building Ass'n v. Drummond*, 49 Neb. 200; *Estate of Davis v. Watkins*, 56 Neb. 288; *Exchange Nat. Bank v. Capps*, 32 Neb. 242. Since the defendant entered into this contract with the corporation and has dealt with the plaintiff as a corporation, he

is estopped to deny its corporate existence, after having received the benefits of the contract. The defendant has no just complaint because he now finds himself in the position which he thought he was in when he entered into the contract. Under this view of the case, the order sustaining the special appearance of C. I. Tenney disallowing the attachment and striking from the answer the set-off and cross-petition was proper.

Having reached this conclusion, other questions presented by the briefs become unimportant. The judgment of the district court is

AFFIRMED.

ERICKA C. JOHNSON ET AL., APPELLANTS, V. HASTINGS & HEYDEN ET AL., APPELLEES.

FILED FEBRUARY 19, 1932. No. 28149.

1. **Evidence** examined, and *held* to sustain the judgment.
2. **Contracts**: FRAUD: RESCISSION. In a suit for cancelation and rescission of a contract for exchange of property, based on fraud and misrepresentation, it is incumbent upon the plaintiff to establish facts constituting actionable fraud, and a failure to do so will not warrant the court in disturbing the contract.

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

A. H. Murdock and *Arthur C. Pancoast*, for appellants.

King & Haggart, Walter R. Johnson and *E. H. Westerfield, contra.*

Heard before ROSE, GOOD and EBERLY, JJ., and CARTER and CHASE, District Judges.

CHASE, District Judge.

This is a suit in equity in which the plaintiffs, as husband and wife, pray for the cancelation of a contract for the exchange of properties.

From the record it appears that the plaintiffs, Ericka C. Johnson and Eric Johnson, on and prior to the 20th day of May, 1930, were joint owners of 30 shares of stock in the Occidental Building & Loan Association, and 50 shares of stock in the Standard Savings & Loan Association; that one Henshaw, who claimed to be a salesman for a tract of land, known as West Dodge Addition, in Douglas county, Nebraska, approached the plaintiffs offering to make an exchange of several lots in this addition for their building and loan stock, to which they finally agreed, and the transaction was consummated for the Standard Savings & Loan stock on or about the 20th day of May, 1930, and for the Occidental Building & Loan stock on or about the 28th day of May, 1930, by delivering the certificates and accepting the deed for the lots. The plaintiffs contend that the said Henshaw, through whom the whole transaction was handled, was acting as agent of the defendants Hastings & Heyden and the Investors Syndicate, Inc., in the representations leading up to, and in the consummation of, the exchange of this property; that the plaintiffs were induced by fraud and misrepresentation to enter into the contract of exchange.

The principal specifications of fraud and misrepresentation which the plaintiffs allege induced them to make the exchange are that said Henshaw represented the value of the lots to be greatly in excess of their real value; that he represented that the building and loan associations in which plaintiffs held stock were in financial difficulties and that said stock was not worth more than 30 per cent. of its face value; that he further represented to them that one Walton had agreed to purchase one of the lots for which plaintiffs were dealing and had paid down the sum of $100 therefor, which contract would be turned over to plaintiffs in case they completed the transaction; that upon this basis, and believing these representations and relying thereon, plaintiffs entered into the transaction; that the said Henshaw was acting as agent of the defendants Hastings & Heyden and the Investors Syndicate, Inc., and that

any fraud or misrepresentation he may have indulged in, to induce a consummation of this transaction, was imputable to both these defendants.

The trial court, upon the evidence adduced by the parties, found against the plaintiffs, and ordered the suit dismissed. From that judgment plaintiffs appeal to this court.

We have carefully read the testimony for the purpose of determining whether or not plaintiffs were defrauded or overreached in any manner by any person in connection with this transaction. It fairly appears from the record and from the testimony of the plaintiffs themselves that they knew the Standard Savings & Loan Association was in the hands of a receiver before this transaction was made, and that the Occidental Building & Loan Association was not paying dividends at that time; that they were very anxious to get their money out of their building and loan stock; that the wife inspected the lots on two or three different occasions and the husband also made a minute inspection of the lots, and both realized that the quoted price of the real estate was somewhat above its real value, but were of the opinion that it was worth as much or more than the building and loan stock. The whole transaction appears to be, as numerous transactions have been found to be in the past few years, a bad bargain, which the plaintiffs entered into with their eyes open and dealing at arms length with the said Henshaw. Courts of equity cannot and will not make contracts for individuals. The function of a court of equity in such suits is merely to construe the contract the individuals themselves have made in the light of the evidence, for the purpose of determining whether one person has been overreached by another or unduly imposed upon by having been induced to enter into a transaction through misrepresentation of fact to such an extent that it would amount to actionable fraud. Ordinarily, a mere expression of an opinion as to the value of property, where persons have had an opportunity to inspect the character, quality and location there-

of, is not a misrepresentation of fact which would constitute actionable fraud. The parties had been negotiating the exchange for some time prior to the consummation thereof. If the plaintiffs did not feel themselves competent to form an opinion as to the value of the real estate, they could have inquired of disinterested third persons more familiar with its value and obtained their opinion. We find no evidence in the record where they were that vigilant. They appear to have been willing to accept their own judgment and that of Henshaw in the matter. The plaintiffs could not complain of Henshaw's alleged misrepresentations as to the value of their building and loan stock, for the reason that the law presumes the owner of property to be in position to know its value, and under that theory they could in no sense be misled by an opinion of a third party as to the value thereof. This court has held that the owner of property is a competent witness to testify as to the value of such property, without any further foundation than that of established ownership.

After a careful examination of the entire record, we reach the conclusion that the trial court was correct in his finding. Upon this theory the question of agency becomes immaterial. The judgment is, therefore,

AFFIRMED.

ZELLA KELLOGG ET AL., APPELLANTS, V. CARRIE E. MCDONALD ET AL., APPELLEES.

FILED FEBRUARY 25, 1932. No. 27879.

Mortgages: POSSESSION: NOTICE. Possession of land by a third person does not put a mortgagee upon inquiry with reference to anything which he would not have learned if he had made inquiry as to the ownership from such occupier.

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

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

Sidney W. Smith and *C. A. Kingsbury, contra.*

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

PER CURIAM.

This is an action which was brought in the district court for Dixon county to quiet the title in the plaintiffs to 90 acres of land, in the course of which suit a restraining order was entered, restraining the defendant, the Penn Mutual Life Insurance Company, from proceeding to sell at foreclosure sale a quarter-section of land, which included the 90 acres in question, which decree of foreclosure had been entered in the district court of the United States for the district of Nebraska. At the trial of the case, the district court for Dixon county entered a decree finding that the mortgage of the defendant is a first lien on the above described real estate, and is superior to the interests of the plaintiffs therein, and dissolved the temporary injunction, denied the permanent injunction, and dismissed the action to quiet title brought by the plaintiffs.

The evidence is voluminous, but the salient facts may be set out very briefly, as follows: J. J. Kellogg gave a $3,000 mortgage, dated July 5, 1904, upon 160 acres of Dixon county land near Allen, Nebraska, to the Connecticut Mutual Life Insurance Company, and later conveyed 40 acres of said land to his wife. He left nine living children by a first wife and five children by his second wife at the time of his death on January 6, 1918, and a posthumous son, Francis, one of the plaintiffs herein, was born shortly after his death. He died intestate, and the county court decreed that five-twentieths of the land passed to his widow and one-twentieth to each of his 15 children. Mr. Kellogg had at one time owned a section of land, and had deeded one-half of it to his nine older children and had deeded another 160 acres to the four oldest children of the second marriage, for which reason quitclaim deeds were given by the older children, leaving the wife and youngest children to be provided for out of this remaining

160 acres, out of which he had given his wife a deed to one 40 acres, the whole 160 acres being included in the mortgage given to the Connecticut Mutual Life Insurance Company, as above set out. The mortgage being in default, a foreclosure action was brought, and all parties were properly served. The property was bid in for $16,000 by V. W. McDonald. Upon June 7, 1922, said bidder, with his wife, gave a mortgage for $10,000 to W. S. Gilman, of Sioux City, Iowa, for the purpose of raising money to pay his bid on said land. This mortgage was recorded June 19, 1922, and upon July 6, 1922, the sheriff's deed was issued.

The surplus above the amount due the Connecticut Mutual Life Insurance Company was distributed to the proper heirs, and the mother receipted in full as guardian for the proper amounts due to her minor children.

For the purpose of paying off his mortgage to Gilman, the said McDonald gave a mortgage for $10,000 upon the same 160 acres to Frank H. Binder, dated March 23, 1923, and upon May 10, 1923, Gilman released his first mortgage. Upon May 25, 1923, Binder assigned his mortgage to the Penn Mutual Life Insurance Company, which mortgage being in default, a decree of foreclosure was entered upon March 12, 1927, in the district court of the United States at Omaha, all parties to said title and mortgage being duly served. It is alleged in the answer in this case that each and all of the mortgagees, to wit, W. S. Gilman, Frank H. Binder, and the Penn Mutual Life Insurance Company, were without knowledge of any alleged claim or interest of the plaintiffs in or to said property, nothing appearing of record in reference thereto.

The plaintiffs claim, on the other hand, that V. W. McDonald, who had died prior to the trial, did not purchase said land for $16,000 for and on his own behalf, but that he did so under an arrangement which was reduced by him to a written declaration of trust upon July 31, 1924, setting out that he now held "and will continue to hold the same in trust only for the use and benefit of said minor

heirs," being the plaintiffs in this action, Zella Kellogg and Francis Kellogg, such trust instrument covering 90 acres of the 160 acres in the mortgage given to the Penn Mutual Life Insurance Company. Counsel for appellants say in their brief: "We think it is sufficiently set forth from the very beginning what our contention is. We simply say that these minor children own this 90 acres of land; that the title was fraudulently taken away from them by McDonald; that they were in possession of the land when the Penn Mutual mortgage was taken."

Of course, these small children were not in possession, but the land was worked by several tenants in small tracts, who each rented it of V. W. McDonald, who gave the mortgage which the Penn Mutual Life Insurance Company owns and is foreclosing. These tenants all knew it as the old Kellogg farm or Kellogg estate, and no one of them knew anything in regard to the real and actual title or ownership of the land they farmed.

The broad rule is that possession of real estate is constructive notice to all the world of whatever claim the possessor asserts, whether legal or equitable. 13 L. R. A. n. s. 51. And it cannot be claimed that he is not chargeable with notice of what the actual right and title of the actual possessor was and is. *Essex County Nat. Bank v. Harrison*, 57 N. J. Eq. 91.

On this contention, the evidence of each of the tenants who were farming portions of this land was taken, and if the mortgagees had inquired of each of them who owned the land, not one of them would have given an answer that would have warned the mortgagees that the title and ownership was other than as shown by the abstracts. In *Smoke v. Pope*, 119 Neb. 432, the court say: "Possession of land may be notice to the world of possessory rights of which inquiry of the occupant would elicit knowledge." It is clear that none of the tenants knew, or could have communicated, any information as to the secret declaration of trust. *Engdahl v. Laverty*, 110 Neb. 672; *Dengler v. Fowler*, 94 Neb. 621.

The doctrine that possession is notice of whatever right or title the occupant has is really a rule of equity, and grows out of the equitable doctrine of notice, and whatever is sufficient to put a party upon inquiry is good notice of everything which it is afterwards found that such inquiry, if diligently prosecuted, would have disclosed.

A visible state of things inconsistent with a perfect right in the person who proposes to sell is the foundation of the duty to make inquiry. *Dix v. Wilkinson,* 149 Ga. 103.

It is a settled rule in this state that, if the possession by one of a piece of land is consistent with the record title, the purchaser is not bound to inquire concerning the title indicated by the possession, because no inquiry is suggested by it. *King v. Lane,* 186 S. W. (Tex. Civ. App.) 392; *Hunt v. Ellis,* 27 N. M. 397.

The English rule is that a purchaser of land, neglecting to inquire into the title of the occupier, is not affected by any other equities than those which such occupier may insist on. *Hunt v. Luck,* 1 Ch. Div. 45, 70 L. J. Ch. n. s. 30.

Possession of real estate is notice to an intending purchaser or mortgagee of whatever rights, title or interest the possessor then asserts. This is the holding in *Laughlin v. Gardiner,* 104 Neb. 237; but on rehearing, 104 Neb. 245, this was amplified in these words: "The evidence is undisputed that such an inquiry would have disclosed that they were then merely holding by sufferance, ready to yield possession at any time, and making no claim of any interest in the property. Their possession therefore was not notice of any infirmity in the title."

Nor does the possession of land by a third person put a purchaser "upon inquiry of anything which he would not have learned if he had duly and fully inquired of the person in possession, in regard to the rights he claimed in the premises." *Canfield v. Hard,* 58 Vt. 217. See *Dickey v. Lyon,* 19 Ia. 544; *Walker v. Neil,* 117 Ga. 733.

It is clear from the evidence that the possession of each of the tenants was not different from what it had been before there was any secret trust agreement, and no one of

these tenants had any knowledge thereof which he could have imparted to the mortgagee, which would have given any additional information to what the record title disclosed.

Plaintiffs allege that they were in possession of said premises, and that this was notice to the world of their ownership of said premises. Is not the burden of proof to establish this fact upon the plaintiffs? If the several tenants knew nothing of the ownership of these minor plaintiffs of the land they were farming, have the plaintiffs sustained the allegation?

The Penn Mutual Life Insurance Company is asking that its rights be protected by subrogation to the Gilman mortgage, which is clearly a good mortgage, given as part of the foreclosure proceedings. The plaintiffs seek to have the mortgage canceled as to their land. Can this equitable relief be granted them without their doing equity by paying off a mortgage given under these circumstances? We think not. *Henry v. Henry*, 73 Neb. 746; *Betts v. Sims*, 35 Neb. 840. The facts as proved bring this case clearly within our holdings that conventional subrogation arises where one pays the debt of another under an agreement, express or implied, that the person paying should be subrogated to the liens existing as security for the debt. *Hoagland & Co. v. Decker*, 118 Neb. 194; *Prudential Ins. Co. v. Qualset*, 116 Neb. 706.

The district court was right in refusing to grant a permanent injunction and further delay the sale directed by the federal court, because that is a court of coordinate jurisdiction, which first acquired jurisdiction of the subject-matter, and the judgment of the district court is hereby

AFFIRMED.

ARTHUR A. FOREMAN V. STATE OF NEBRASKA.

FILED FEBRUARY 25, 1932. No. 27857.

1. **Information:** VERIFICATION. An information verified on the information and belief of the county attorney before the clerk of the district court is, in this respect, a sufficient compliance with the law.
2. **Banks and Banking:** MISAPPLICATION OF FUNDS: BOOKS OF ACCOUNT: FALSE ENTRIES. "A bank officer who wilfully misapplies the funds of the bank, or who makes or causes to be made a false entry in its books, knowing it to be false, cannot be heard to say that he did the act innocently." *Morse v. United States*, 174 Fed. 539.
3. **Criminal Law:** INTENT: EVIDENCE OF LIKE OFFENSES. When certain evidence is offered and received in a criminal action to disclose the attitude or the tendency of a defendant in former like transactions, it is not error to admit such evidence with the end in view of establishing the then present intent of the defendant in the perpetration of the crime charged in the information.
4. ———: INSTRUCTIONS. When an objection is made in behalf of a defendant in a criminal action in respect of an instruction given by the trial court, the judgment will not be reversed when the instructions, considered in their entirety, are not prejudicial to the lawful rights of the defendant.

ERROR to the district court for Dawson county: ISAAC J. NISLEY, JUDGE. *Affirmed.*

Leonard A. Flansburg, O'Sullivan & Southard and *Cook & Cook*, for plaintiff in error.

C. A. Sorensen, Attorney General, and *F. S. Howell, contra.*

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

DEAN, J.

Arthur A. Foreman, the defendant, at all times material to the facts here involved, namely, from June 11, 1927, until October 7, 1929, was the president and a director of the Farmers State Bank of Overton. December 10, 1930, the defendant was informed against in the dis-

trict court for Dawson county and there charged with having made certain false entries and deceptive statements in respect of the record books of the Overton bank, with the unlawful intent then and there and thereby to deceive the secretary of the department of trade and commerce in respect of the true financial condition of the bank.

Upon submission, the jury returned a verdict finding the defendant guilty as charged in the information in respect of counts numbered 9, 13, and 14 thereof, and not guilty as to counts numbered 1, 2, 3, 4, and 5 thereof. And as to counts numbered 6, 7, 8, 10, 11, and 12 of the information, the jury reported they were unable to agree. Thereupon the court, pursuant to the verdict, sentenced the defendant to serve a term of from two to four years on each of the counts numbered 9, 13, and 14, the sentences to run consecutively. From the judgment so rendered, the defendant prosecutes error.

A plea in abatement was filed by the defendant wherein it is alleged that the trial judge was without jurisdiction in the premises on the ground that the original complaint was not verified upon oath of the county attorney. The court overruled the plea in abatement and also the defendant's demurrer. We do not find error in the court's ruling in the premises. The information was verified in the following language by the county attorney: "T. M. Hewitt, being duly sworn according to law, says the facts stated in his foregoing information are true as he verily believes." The information was sworn to before the clerk of the district court and, under the law, we think such information, verified as it was on the information and belief of the county attorney, was sufficient. We have held: "The sufficiency of an oath to a complaint or information is not fixed by our state Constitution, but is a matter of legislative and judicial determination." *Watson v. State,* 109 Neb. 43. This statement also appears in the *Watson* case: "In some jurisdictions, notably the federal districts represented by the courts cited, *supra,* it has been held that an oath upon information and belief is not an oath, and that a complaint

or information verified upon information and belief is void. This court is committed to a different rule." And in *Sharp v. State*, 61 Neb. 187, we held: "It is sufficient if an information is verified by the county attorney, on information and belief." See, also, *Washburn v. People*, 10 Mich. 372. We conclude that the requirement in the matter of the verification upon oath of the county attorney sufficiently complies with the law of this state.

In March, 1929, the affairs of the Overton bank were examined by J. Y. Castle, a bank examiner. He testified that the directors, pursuant to his advice, voted to assess the capital stock at 100 per cent. in order to avoid closing the bank. A copy of the minutes of the meeting was forwarded to the state banking department and it is therein stated that an assessment had been previously made of the 172 shares of stock jointly owned by the directors. A duplicate deposit slip was also forwarded to the department and, in a letter by Foreman, the report of the bank examiner stating that an assessment had been made on the capital stock was confirmed. It appears, however, that a later inventory of the books of the bank by Castle disclosed that a record of the assessment had never been entered therein. Under the law, state banks are required to have a legal reserve of 15 per cent. of their deposits on hand. It appears that the South Omaha State Bank, at the time, was a correspondent of the Overton bank and the defendant's brother-in-law was then the president of the Omaha bank.

Under count 9 of the information, the defendant is charged with having made a false report to the banking department at Lincoln wherein he stated that the Omaha bank owed the Overton bank $27,798.69, whereas only $17,798.69, and no more, was the amount owing to the Overton bank. The defendant testified that he sent a note to the Omaha bank for $10,000, but that the president of that bank returned the note unused for the reason, as stated in a letter to the defendant, that the liability ledger of the Omaha bank showed that the Overton bank already owed $26,000, and this was the loan limit. But it is un-

contradicted that the defendant, notwithstanding the refusal of credit, failed to charge off the amount of $10,000 from his books. The Omaha bank at the end of the month sent a copy of its ledger sheet to the Overton bank, but no mention is made therein of the $10,000 item.

From the evidence of several of the bank's former employees it appears that certain erasures and changes were made in the figures of the bank books from time to time under the direction of the defendant. But, in respect of such alterations, the defendant testified that they were merely "corrections" of certain mistakes in entries.

The defendant admits that the reserve of the bank would have been much lower had the $10,000 item been omitted from the report that was forwarded to the banking department. And he admitted that the bank's reserve was then lower than the 15 per cent. required under the law. The defendant also made it plainly appear that he was aware of the fact that the department officials would infer from his report that the Overton bank's reserve was higher than the fact would warrant. And yet, notwithstanding the fact that the defendant received the letter from the Omaha bank refusing any further credit, he made no effort to make a clear statement to the banking department in respect of the actual then present condition of the bank. The evidence shows that, when previous reports were due from the bank to the banking department, the defendant borrowed credit to build up the then current reserve of the bank. That the $10,000 was included by the defendant in his report with the wilful intent to deceive the banking department officials as to the true financial status of his bank clearly appears.

The defendant contends that it was through the instigation and under the direction of the bank examiner that the assessment and the subsequent report in respect thereof were made. We think this contention is without merit. From a review of the defendant's evidence it appears that he then knew that the bank would be closed unless its reserve was reported to be larger than was the fact. Nor

does it appear that the checks were made out, and the duplicate deposit tickets made out and a letter written merely because the examiner so directed. The defendant admitted that he did it to have his bank remain open for business. And, as stated in *Morse v. United States*, 174 Fed. 539: "A bank officer who wilfully misapplies the funds of the bank, or who makes or causes to be made a false entry in its books, knowing it to be false, cannot be heard to say that he did the act innocently."

Complaint is made in the admission of certain evidence relating to other reports by the defendant to the banking department. The evidence was received, however, only to show the disposition of the defendant in former transactions and, where such evidence was admitted for the purpose of proving intent, the court did not err in refusing to exclude it. *Clark v. State*, 79 Neb. 473; *State v. Sparks*, 79 Neb. 504; *Chamberlain v. State*, 80 Neb. 812.

Defendant also complains of the giving of instruction numbered 9 in that it is alleged that the court there placed unnecessary emphasis on evidence that was directed against the defendant. That part of the instruction above referred to follows:

"You are doubtless aware the state has not been able to produce a witness who testified as to what the defendant's intent was when he made or caused to be made book entries or statements as set forth in the counts of the information, except the testimony of William Nagel as to the ten thousand dollars credit on the books of the Farmers State Bank of Overton, Nebraska, as alleged in counts 9, 11, and 12 of the information."

It does not appear that the instruction complained of in any manner even tends to prejudice the jury against the defendant. The evidence of the defendant himself clearly concedes the fact that he knowingly, wilfully, and of his own volition made the report to the state banking department with the intent to thereby deceive the officials thereof. It is elementary that, when complaint is made of one instruction given by the court to the jury, the ver-

dict and judgment thereon will not be reversed when the instructions, considered in their entirety and as a whole, are not prejudicial to the lawful rights of the defendant.

The defendant has urged other assignments of alleged error which we have examined and considered. But we find none of them prejudicial to the defendant.

The judgment is right and it is therefore

AFFIRMED.

WENCEL H. KIRCHMAN V. STATE OF NEBRASKA.

FILED FEBRUARY 25, 1932. No. 27993.

1. **Indictment.** The defendant, in a felony case, should find in the indictment a plain and concise statement of the charge against him. Yet all such necessary details may be set out therein, if without prejudice to the substantial rights of the defendant, as will enable the court to pass upon the question of whether it is sufficient to charge a criminal offense, and, on the other hand, be sufficient to inform the defendant of all such facts as will clearly identify the entire transaction for which he is held to answer.
2. **Criminal Law: INSTRUCTIONS.** It is the better practice in a criminal case for the trial court to charge the jury, in concise and informal language, as to the material facts which must be proved beyond a reasonable doubt to authorize a conviction, rather than to copy the information or indictment into its instructions.
3. ———: ———. It is a well-settled rule that it is not necessary to give an instruction in the exact language offered by counsel, where the same subject is adequately covered by instructions given by the trial court.
4. ———: ———: ACCUSED AS WITNESS. It was not error to call attention, by an instruction, to the fact that the defendant had availed himself of his right under the law to testify as a witness in his own behalf, and his credibility may be impeached the same as any witness.
5. ———: CAUTIONARY INSTRUCTION. In the trial of important felony cases, when the jury may have been influenced to a greater or less extent by the feelings of the audience, or unduly swayed by appeals in the arguments, it is proper for the trial judge to give a cautionary instruction, such as set out herein, cautioning the jury not to allow sympathy or prejudice to affect their deliberations, and to be governed solely by the evidence and the instructions of the court.

ERROR to the district court for Seward county: HARRY D. LANDIS, JUDGE. *Affirmed.*

Norval Brothers, O'Sullivan & Southard and *H. A. Bryant*, for plaintiff in error.

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

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

PAINE, J.

Upon September 18, 1930, an indictment, properly indorsed "A True Bill," was returned by the grand jury in Saunders county, charging the plaintiff in error, hereinafter called the defendant, Wencel H. Kirchman, who was the cashier of the Nebraska State Savings Bank, of Wahoo, Nebraska, and another, with intent to deceive, injure and defraud said bank, its officers, and other persons, by executing a release of a mortgage in the sum of $7,500 and discharging the same of record. The defendant filed a demurrer to the indictment, and, upon its being overruled, made application for a change of venue, with a showing in support thereof, and thereafter the state confessed said motion and the district judge directed that the venue be changed to Seward county, Nebraska. Trial was begun upon April 13, and upon April 24, 1931, the jury returned a verdict of guilty, upon which verdict the defendant was sentenced to serve 10 years in the penitentiary and to pay a fine of $2,500.

Defendant prosecutes error to review the record in this court. The petition in error sets out some 24 allegations of error, each of which has been carefully considered by this court. It is especially urged in the brief that the court erred in overruling the defendant's demurrer to the indictment, and in the giving of each of the 22 instructions, and in refusing to give 6 instructions offered by the defendant. It is also urged that the indictment was not sufficiently specific, definite and certain to meet the re-

quirements of section 3, art. I of the Constitution of the state of Nebraska, which provides that no persons shall be deprived of their liberty without due process of law, and that the indictment also violated, for the same reason, section 1 of article XIV of the amendments to the Constitution of the United States. It is also contended that the sentence imposed upon the defendant is illegal and excessive, and is null and void because the same is made to run consecutive to a sentence previously pronounced.

The evidence, which is found set out in two large leather-bound volumes of the bill of exceptions, shows that the defendant, who is 47 years of age, was born at Wahoo, Nebraska, and has always resided there; that he is a married man, with a family, and has been connected with the Saunders County National Bank at Wahoo since he was 17 years of age, starting in as a messenger; that the father of the defendant was president of both the Saunders County National Bank and the Nebraska State Savings Bank up to the time of his death in July, 1924, and was succeeded in that position in both banks by Frank J. Kirchman, uncle of the defendant, who held that office until both banks closed on April 15, 1930; that the defendant was cashier of both banks; that in the Nebraska State Savings Bank, the uncle drew $125 a month as president, while the defendant drew $50 a month as cashier; the uncle drawing $200 as president of the Saunders County National Bank, the defendant drawing $175 as cashier of the latter institution, and both the president and the cashier had sons working in the banks. Each of the banks occupied the same banking rooms, there being no partition between the two banks, but the Nebraska State Savings Bank, which began business March 17, 1909, had its name in a sign over one of the wickets in the banking room of the Saunders County National Bank. The defendant and his uncle occupied adjoining desks, and the uncle had a little private room adjoining his desk, and only rarely sat at his desk out in the banking room, and usually transacted his business in his private office.

Nels and Amanda Peterson borrowed of the Nebraska State Savings Bank $7,500, and gave a mortgage, dated April 3, 1923, upon 120 acres of land to secure the same. The notes were drawn in the form of three first mortgage bonds, in the sum of $2,500 each, which were sold to Daniel Dailey, Frank Dolezal and Martin Thorson. Nels Peterson died July 1, 1924, leaving his estate and his widow both bankrupt. The land described in the mortgage was sold to the defendant by the executor, Charles Slama, on June 14, 1927, for $10, subject to the mortgages outstanding. The defendant, being the owner of this land, found a purchaser in one John Pokorny for $13,200, the deed to John and Antonia Pokorny being dated September 26, 1928. In payment of this sale, Pokorny paid $6,000 in cash on September 26, 1928, and gave a mortgage upon October 1, 1928, for $7,200 to the Nebraska State Savings Bank. The defendant, as cashier, and his uncle, Frank J. Kirchman, as president of the Nebraska State Savings Bank, in order to show a clear title for the Pokorny sale, executed on October 11, 1928, and filed on October 25, 1928, the said bank's release of the original Peterson mortgage in the sum of $7,500, but did not take up or pay off the three outstanding mortgage bonds of $2,500 each, secured thereby, and, for the crime of issuing this release, he was tried by a jury in Seward county. The original Peterson mortgage became due in 1928, and the defendant and his wife, Lila, issued an extension agreement on it for five years upon April 1, 1928, giving new coupon notes, with interest, to the holders of the three mortgage bonds, which was done a short time before he executed the release of the $7,500 mortgage back of these bonds. The holders of the three $2,500 renewal bonds continued to receive their interest for the years 1929 and 1930, notwithstanding the security had been released by the defendant.

1. The defendant's counsel first contends that the demurrer to the indictment should have been sustained, for the reason that the indictment is a mere recital of evi-

dence, rather than a charge of any offense, and, to illustrate this, says that the indictment recites, among many other things, that on April 3, 1923, Nels Peterson executed three notes of $2,500 each, and a mortgage securing them, to the Nebraska State Savings Bank; that on April 16, 1923, one of the bonds was sold to Dailey, on April 27, 1923, another bond was sold to Dolezal, and on May 19, 1923, the third was sold to Thorson; that on June 14, 1927, Slama, executor, conveyed the Peterson land to the defendant; that April 1, 1928, the defendant extended the Peterson mortgage and gave new coupons to the original purchasers; that on September 26, 1928, the defendant conveyed the land to Pokorny; that on October 1, 1928, Pokorny gave four notes and mortgage to the Nebraska State Savings Bank for a total of $7,200; and the defendant then says that this indictment concludes with the following allegation:

"On or about the 11th day of October, 1928, said defendants, Wencel H. Kirchman, in the name of W. H. Kirchman, and Frank J. Kirchman, in the name of F. J. Kirchman, acting as officers of said banking corporation, *with the intent aforesaid,* and in the manner aforesaid, unlawfully, wilfully, fraudulently, feloniously, and falsely, did then and there, then and there being, execute a release of said mortgage for the sum of Seventy-Five Hundred Dollars ($7,500) discharging the same of record."

Defendant insists that this indictment charges an intent to defraud, on October 11, 1928, by the doing of certain acts performed in 1923, 1924, 1927, and 1928, the date of the commission of some of such acts being more than seven years prior to the return of the indictment, and more than five years prior to the date when it is charged that the crime was committed, and that these acts cannot be disregarded as surplusage, because "An allegation in an indictment descriptive of that which is essential to the charge therein made is a material allegation and cannot be rejected as surplusage." 14 R. C. L. 191, sec. 37. See *Goodlove v. State,* 82 Ohio St. 365, 19 Ann. Cas. 893, 30 L. R. A.

n. s. 134; *State v. Herrera*, 28 N. M. 155, 24 A. L. R. 1134.

"The accused may demur when the facts stated in the indictment do not constitute an offense punishable by the laws of this state, or when the intent is not alleged, when proof of it is necessary to make out the offense charged." Comp. St. 1929, sec. 29-1809.

The accused was entitled to a plain, concise statement of the charge against him. To allege every material fact leading up to the offense charged required in this case certain allegations, to which objections are laid. This indictment consists of about four typewritten pages, and sets out, in the greatest detail, each particular step, terminating with the signing of the release of the mortgage, which act it is charged he did, unlawfully, wilfully, fraudulently, feloniously, and falsely, with intent to defraud. We may grant that the recitations about the giving and recording of the mortgage years before, and the sale of the three $2,500 notes secured thereby, while not a part of the criminal act itself, yet laid the foundation therefor, and together formed the opportunity which he used, to the injury of others. But, is it not to the advantage of the defendant to have all of the facts leading up to the offense charged in minute detail? It is required that such necessary details be set out as will enable the court to pass on the question whether a criminal offense has been committed, and, on the other hand, the law requires that the defendant be informed of such facts as will clearly identify the entire transaction for which he is held to answer.

It may be admitted that perhaps some facts in this long indictment need not have been recited in such great detail; yet is this sufficient ground upon which to found a demand that this court reverse the conviction? "The law books are replete with cases in which defendants have gone free on the basis of some minor defect in the indictment." 9 Neb. Law Bulletin, 161. And our legislature has passed an act which will tend to avoid this happening in Nebraska: "No indictment shall be deemed invalid * * * for any other defect or imperfection which does not tend to the preju-

dice of the substantial rights of the defendant upon the merits." Comp. St. 1929, sec. 29-1501.

A patient study of this indictment and the briefs, together with each of the authorities cited, leads to no other conclusion but that the substantial rights of the defendant have not been prejudiced in this case by setting out in the indictment each and all of the preliminary details leading up to the criminal act charged therein.

2. The greater portion of the defendant's brief is devoted to an attack upon each of the 22 instructions given, and the error in refusing to give the 6 instructions offered by the defendant and refused by the court.

Instruction No. 2 sets out in four numbered paragraphs a concise statement of the material and essential elements of the crime charged, which the state must prove to warrant a conviction. Defendant then argues that there is no evidence showing that the defendant intended to or did defraud the Nebraska State Savings Bank, and says:

"The giving of an instruction which submits to the jury the existence or nonexistence of a fact material to the issues in the case on trial, when no evidence has been introduced which would support a finding of its existence, is error for which the judgment may be reversed." *Morearty v. State,* 46 Neb. 652.

The citation gives us an approved holding on the point there involved, yet let us examine the portion of the instruction as given which charges that the defendant "made such use of the said banking corporation with the intent * * * to injure and defraud said banking corporation, or with the intent * * * to injure and defraud Daniel Dailey, Frank Dolezal and Martin Thorson, or either of them." A careful reading of the instruction does not bear out the objection laid against it.

This court holds that it is considered better practice in a felony case to charge the jury, in concise and informal language, exactly what evidence is essential to authorize a conviction, rather than to copy the entire indictment into the instructions. *Dixon v. State,* 46 Neb. 298; *State*

v. Bater, 232 S. W. (Mo.) 1012. The court, in the case at bar, followed this approved practice, and we find no merit in the objections made thereto.

3. The defendant had submitted to the trial judge his requested instruction, No. 6, that where the defendant has introduced testimony tending to show his previous good reputation for being an honest, truthful and law-abiding citizen in the community in which he has lived, and continuing for about half a page, and terminating with: "It may be considered as tending to show that a person of good reputation would not be likely to commit the crime charged; to show that a person of good character and reputation is far less apt to commit crime than a person of bad character or reputation." In the place of this, the court gave instruction No. 12, which was about half as long. The defendant objects to the court's substituting its No. 12 for the offered instruction, No. 6, on the ground that instruction No. 6, offered, presented the good reputation of the defendant prior to the time the offense was committed, while the court's instruction presented an entirely different issue, the good character of the defendant *at the time of trial.* This court has carefully examined both of these instructions and does not find the error indicated in the one given by the trial judge.

Several approved instructions on good character, embracing practically the language used by the trial court, may be found in 1 Corcoran, Nebraska Instructions to Juries (2d ed.) 359-361. See *Strong v. State*, 106 Neb. 339; *Wakeley v. State*, 118 Neb. 346; *Linn v. United States*, 251 Fed. 476; 16 C. J. 981; *Latimer v. State*, 55 Neb. 609. It is a well-settled rule that it is not necessary to give an instruction in the exact language offered by counsel, where the same subject is adequately covered by instructions given by the trial court.

4. Instruction No. 13 is attacked for stating that evidence was introduced by both the state and the defendant in regard to his general reputation for truth and veracity, and the defendant insists that no one testified that the de-

fendant's reputation was good at the time of the trial, and that was not an issue in the case, and that the only evidence introduced by the defendant was as to his good reputation for being an honest and law-abiding citizen prior to the time the alleged offense was committed. It may be admitted that the instruction No. 13 could have been couched in more apt language, yet nothing therein given would mislead the jury. It was not error to call attention to the fact that "the defendant, Wencel H. Kirchman, in this case has availed himself of the right under the law to testify as a witness in his own behalf, and his credibility may be impeached the same as any witness." *Johnson v. State*, 34 Neb. 257; *Palmer v. State*, 70 Neb. 136; *Davis v. State*, 31 Neb. 247; *Philamalee v. State*, 58 Neb. 320.

5. Cautionary instructions. Instruction No. 20 was, in brief, that, although the members of the jury might sympathize with those who suffer, yet they were bound by their oaths to administer justice; that no question of misery, sentiment, or sympathy, or anything else, should reside with them; that they must be just to the state and equally just to the defendant. This instruction is attacked by the defendant as an unnecessary lecture to the jury. It is charged that it is an entirely uncalled for and unwarranted caution; that it scolds them about having any sympathy for the defendant; that, by referring to their oaths, and asking them to assist the court, it becomes "a patent intimation that the court's idea of justice in this case was a verdict of guilty."

In *Dinsmore v. State*, 61 Neb. 418, a cautionary instruction is set out in full, in which the members of the jury are told that they are "ministers of justice," and that "it is absolutely necessary and essential to the preservation of society that law should be enforced," and similar objections were made to it as are made in the present case; yet this court said it was merely a cautionary instruction, which the trial court may, in its discretion, give or not. See *Smith v. State*, 4 Neb. 277.

In the trial of felony cases, it may occur that unfairness

may arise in the final arguments of counsel; in other cases, in a crowded courtroom the feelings or desires of the audience may become manifest to the jury, and affect the jury to a greater or less extent in reaching a verdict. In such cases the trial judge may, and where there is a seeming necessity should, caution the jury to be governed by the evidence, and not to allow sympathy or prejudice to influence their verdict. *People v. Turner,* 265 Ill. 594, Ann. Cas. 1916A, 1062; *Preston v. Walker,* 26 Ia. 205, 96 Am. Dec. 140; *People v. Nunn,* 120 Mich. 530. It has been held proper to instruct each juror to bear in mind the obligation of his oath and that he should follow the guidance of his conscience. *Wimberly v. State,* 12 Ga. App. 540. And, on the other hand, it has been held that it is a mistake to give instructions which have a tendency to lessen the sense of the jury's responsibility. *Adams v. State,* 135 Ind. 571. "There is no merit in the assignment of error relating to the instruction impressing upon the jury the importance of the case to the state. The court was equally emphatic in stating its importance to defendant." *State v. Mueller,* 122 Minn. 91. To meet the necessities of such a situation in important felony trials, we find one instruction which has been given for years in many states, and was given in the case of *Ridings v. State,* 108 Neb. 804, and in many other cases, and, while not identical in every clause with instruction No. 20 in this case, it is very similar, and reads as follows:

"The duty of counsel and the court has now been performed. The counsel engaged in this case have been untiring in their efforts to bring before you all possible evidence that may aid you in arriving at the truth. They have ably assisted you in applying the evidence to the facts in dispute. The court has endeavored to rightly advise you in the law, and now there confronts you the final and important duty of pronouncing upon the guilt or innocence of the defendant. I submit this case to you with the confidence that you will faithfully discharge the grave duty resting upon you without, upon the one hand, being

moved by any undue demand for conviction on the part of counsel for the state, or being swayed from its right performance by any undue appeal to your sympathies. You will bear in mind that the liberty of the accused may neither be trifled away, nor taken by careless or inconsiderate judgment. But if, after a careful consideration of the law and the evidence in the case, you are satisfied beyond a reasonable doubt that the defendant is guilty, you should return your verdict accordingly. You must be just to the defendant and equally just to the state. As manly, upright men, charged with the responsible duty of assisting the court in the administration of justice, you will put aside all sympathy and sentiment, all consideration of public approval or disapproval, and look steadfastly and alone to the law and evidence in the case, and return into court such a verdict as is warranted thereby." (Transcript, p. 37.) See *Hinshaw v. State*, 147 Ind. 334.

This court has carefully examined each of the other alleged errors presented for a reversal of this case, and does not find error therein, including the errors alleged in sustaining a motion to strike out certain evidence several days after it was admitted. The defendant insists that this establishes a bad precedent, and in effect makes a new rule, which would read about as follows: Allow an attorney to "get all you can on the examination of your own witness and before you rest your case have the court strike out that which does not serve your purposes."

His proposition of law No. 11 reads as follows: "Several days after a state's witness had left the stand the court sustained a motion of the prosecutor, made at the time he rested his case, to strike as not responsive an answer of the witness given on his direct examination and which was material to the inquiry. This was prejudicial error."

I Wigmore, Evidence (2d ed.) sec. 19, says: "An objecting opponent is not entitled to treat a ruling as final, and therefore he cannot complain of a subsequent revocation of a ruling, merely in so far as the temporary ad-

mission of inadmissible evidence against his objection may obtain consideration for it in the minds of the jurors; for the instruction which will accompany the subsequent striking out of the evidence must be supposed to be obeyed by the jurors; except in extreme cases which obviously call for a stricter treatment."

In a recent civil case, this court condemned the acts of the defendants, who thrust aside both the letter and the spirit of our banking laws, and, with a reckless disregard of the rights of others, engaged in a course of conduct relative to the affairs of the Burton State Bank, the inevitable result of which was the ruination of the bank and disaster to others. *Kienke v. Kirsch*, 121 Neb. 688.

In a well-written article, telling why Nebraska should adopt the model code of criminal procedure prepared by the American Law Institute, found in 9 Neb. Law Bulletin, 146, is quoted the statement from President Hoover's inaugural address, as follows: "Every student of our law enforcement knows full well that it is in need of vigorous reorganization; that its procedure unduly favors the criminal. * * * In our desire to be merciful the pendulum has swung in favor of the prisoner and far away from the protection of society." Nebraska lawmakers have given to this court a provision which clearly provides: "No judgment shall be set aside, or new trial granted, or judgment rendered, in any criminal case on the grounds of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, if the supreme court, after an examination of the entire cause, shall consider that no substantial miscarriage of justice has actually occurred." Comp. St. 1929, sec. 29-2308.

In the case on trial, the defendant admits that he signed the release of this mortgage, but argues that, as he did not read it, and simply signed his name to the release on the line indicated by a relative, he should not be responsible for this act. If pulling the trigger of a supposedly unloaded gun kills, can the actor avoid punishment? No.

The jury patiently listened to the evidence introduced for days, and heard the defense offered by the defendant, and held him to be guilty as charged. This court, finding no error in the record of the trial court, hereby affirms the same.

AFFIRMED.

GOOD, J., not participating.

MARGARET HALL, APPELLEE, V. CITIZENS STATE BANK OF SUPERIOR, APPELLANT.

FILED FEBRUARY 25, 1932. No. 27977.

1. **Banks and Banking: INSOLVENCY: TRUST FUNDS: INTEREST.** An order of court establishing a trust fund in a sum certain, entitled to priority of payment from the assets of a failed bank before the claims of depositors and creditors are paid, bears interest at 7 per cent. from the date of the decree until paid. Comp. St. 1929, sec. 45-103.
2. ———: ———: ———: ———. The interest thus accrued is payable in full from the assets of the bank in preference over the claims of depositors and creditors.

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

F. C. Radke, Barlow Nye, W. A. Crossland and *I. D. Beynon,* for appellant.

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

Heard before ROSE, GOOD and DAY, JJ., and CHAPPELL and LANDIS, District Judges.

CHAPPELL, District Judge.

The Citizens State Bank of Superior, Nebraska, was closed by the department of trade and commerce of Nebraska on December 28, 1928, and placed in receivership on June 28, 1929. The appellee, Margaret Hall, filed her claim for a trust fund payable in full out of the assets of this bank. On November 7, 1929, the district court for Nuckolls county, Nebraska, decreed her a trust fund in

the sum of $5,630.47, entitled to priority of payment out of the assets of said bank ahead of the claims of depositors and creditors. The decree was silent as to interest. Upon appeal to the supreme court of Nebraska the decree of the district court was affirmed and mandate handed down on January 10, 1931. The receiver thereupon paid to the clerk of the district court for Nuckolls county the said sum of $5,630.47 in compliance with decree and mandate. Thereafter the appellee filed a motion in the district court for Nuckolls county for an order allowing interest on said decree from November 7, 1929, the date of the rendition, to January 17, 1931, the date of payment, in the sum of $470.73. Motion of appellee was sustained and the district court decreed that she have and recover the sum of $470.73 as interest on said judgment and that the same be paid by the receiver as a trust fund out of any assets of the Citizens State Bank of Superior, Nebraska, and prior to the claims of depositors. The receiver excepted to this decree and leave was granted to appeal to this court.

The errors relied upon for reversal are: (1) The decree is contrary to law; and (2) the decree is inequitable.

Appellant contends that the allowance of a claim for a trust fund is not a decree and judgment for the payment of money, but that it is a judgment for the recovery of property, and as such not within the statute imposing interest upon decrees and judgments, for the payment of money; and that if such interest is allowable it is not payable in full from the assets of the bank in preference over the claims of depositors and creditors. Appellant relies upon the case of *Gering v. Buerstetta,* 118 Neb. 54, and many well-reasoned cases from other jurisdictions. After a careful study of the cases cited, this court believes that they are distinguishable from the present case and not controlling because of our statute and the former holdings of this court. In the case of *Gering v. Buerstetta, supra,* the court passed only upon the question of whether interest was recoverable in that particular case up to the

date of the judgment, and not thereafter. In paragraph 2 of the syllabus the court said: "Under the facts in this case, claimants are not entitled to interest on and after December 14, 1926." In the opinion the court said: "The judgment that was entered in the district court allowed claimants the recovery of interest at 7 per cent. per annum from December 13, 1926. This was error. Claimants are not entitled to interest under the facts in this case in this proceeding."

In other Nebraska cases, *Capital Nat. Bank v. Coldwater Nat. Bank*, 49 Neb. 786, *Capital Nat. Bank v. Genesee Fruit Co.*, 49 Neb. 793, *Capital Nat. Bank v. Cupples Woodenware Co.*, 49 Neb. 794, *Capital Nat. Bank v. Magoon*, 49 Neb. 795, *Capital Nat. Bank v. First Nat. Bank of Cadiz*, 49 Neb. 795, and *Higgins v. Hayden*, 53 Neb. 61, this court permitted the recovery of interest upon a trust fund with respect to which the bank had but a single duty to perform, that is, to deliver it to the party thereto entitled, up to the date of the judgment. In *Capital Nat. Bank v. Coldwater Nat. Bank, supra*, this court said: "The judgment of the district court required the payment of interest on the sum which the receiver was thereby adjudged to pay to the defendant in error. It is argued that as its claim is for specific moneys deposited, the relief must be limited to that sum, and that therefore no interest was allowable. It is probably true that this result would follow in the absence of a controlling statute, but this we need not consider, for it is provided in chapter 44 of the Compiled Statutes (Comp. St. 1929, sec. 45-104) that interest shall be at the rate of seven dollars for each one hundred dollars, annually, 'on money received to the use of another and retained without the owner's consent, express or implied.' The rate of interest fixed by the district court was conformable to this legislative enactment and was, therefore, proper."

In *Higgins v. Hayden, supra*, this court said: "Finally it is contended that the district court erred in allowing interest under the circumstances. In the absence of

statute this contention would have much force, but the point has heretofore been determined adversely to the defendant upon a construction of our statute. Comp. St. ch. 44, sec. 4; *Capital Nat. Bank v. Coldwater Nat. Bank*, 49 Neb. 786."

This court has never directly passed upon the question whether a trust fund established by the district court is a decree and judgment for the payment of money coming within the provisions of section 45-103, Comp. St. 1929, which reads: "Interest on all decrees and judgments for the payment of money shall be from the date of the rendition thereof at the rate of seven dollars upon each one hundred dollars annually until the same shall be paid." However, there are Nebraska cases indicating that the establishment of a trust fund was in the nature of a judgment coming within the provisions of the last above section. Appellee cites and relies upon the cases of *State v. Farmers State Bank*, 113 Neb. 679, and *State v. Nebraska State Bank*, 118 Neb. 660. These actions were to establish claims against the guaranty fund. In *State v. Nebraska State Bank, supra*, this court said:

"One further question remains to be considered, viz.: Is the depositors' guaranty fund chargeable with interest on the claim at 7 per cent. from the date of its allowance by the district court? In several cases we have held that the allowance of the claim amounted to a judgment and came under the general provision of the statute that judgments shall draw interest at 7 per cent. It is contended by counsel for receiver that these decisions were rendered at a time when the guaranty fund was solvent and able to pay all claims certified to it under the law, but that at the time of the trial there were approximately $7,000,000 in claims certified for payment and unpaid because there were no funds in the depositors' guaranty fund to pay the same; and, further, that the maximum assessment authorized by law at that time in any one year was $1,650,000. Evidence of these facts appears of record. Attention is also called to the fact that by section 8028,

Comp. St. 1922, as amended by section 26, ch. 191, Laws 1923, the maximum assessment for replenishing the fund is one-half of 1 per cent. of the average daily deposits of banks, whereas prior thereto the assessment permitted was 1 per cent. of the average daily deposits. It is therefrom argued that, inasmuch as the delay in payment of the deposits is attributable to the law itself, no interest should be allowed.

"The argument *ab inconvenienti* is of considerable force and its rejection results in leaving the guaranty fund charged with a burden of staggering weight, but we would not be justified in relieving it unless in accordance with legal principles applicable to the facts of the case. As above noted, we have held in a number of cases that upon the allowance of the claim it draws interest at 7 per cent. per annum until paid. Among these cases may be cited: *State v. Farmers State Bank*, 113 Neb. 679, *State v. Octavia State Bank*, 116 Neb. 825, and three cases of *State v. Security State Bank*, 116 Neb. 521, 526, and 530, in which claims were allowed 'with interest as provided by law.' The question now presented was not discussed in any of those cases, but the principle upon which the holdings are based is that the allowance of the claim is in the nature of a judgment and is therefore within the operation of section 2836, Comp. St. 1922, providing that judgments shall bear interest at 7 per cent. unless a greater rate is provided for in the contract upon which it is based."

In the case of *Trompen v. Hammond*, 61 Neb. 446, citing this statute, this court said: "This section, it seems to us, admits of but one construction. It provides, in terms too plain to be misunderstood, that all judgments and decrees for the payment of money shall bear interest from the date of rendition to the date of payment." Likewise, in *Stuart v. Burcham*, 62 Neb. 84, this court said: "A defendant in a suit to which all the claimants of a fund in his hands are parties, who, being ordered by the decree to pay the fund into court, excepts to such decree and participates in an appeal therefrom by one of the

claimants, cannot be heard to claim, after affirmance of the decree, that he was a mere stakeholder and therefore is not chargeable with interest."

In *Johnson v. Farmers Bank*, 223 Mo. App. 513, a recent Missouri case similar to the case at bar and involving the same questions, the court said: "Under Revised Statutes 1919, section 6493, providing for interest on all money due on a judgment or order, judgment for amount of preferred claim against bank in liquidation under sections 11673-11726, properly provided for interest from date of its rendition." In the opinion the court said: "Contention is made that the court erred in allowing interest on the judgment from the date of its rendition. It is argued that the scheme for administration of insolvent banks is provided by article 1, chapter 108, of the Revised Statutes of Missouri 1919, and contemplates an equitable distribution of the assets of insolvent banks among all of the creditors, and as no provision is made for the allowance of interest, the court erred in allowing it. No authority is cited in support of this contention. Section 6493 of the General Statutes of Missouri 1919, provides that interest shall be allowed on all money due upon any judgment or order of any court, from the day of rendering the same until satisfaction be made by payment, accord or sale of property. This statute is general in its application to all judgments or orders of any court. We see no reason why it would not apply to the judgment rendered in this case, especially so, in the absence of any prohibition in the statutes which govern the liquidation of insolvent banks."

It has been said in other jurisdictions: "Interest is recoverable on judgments rendered against persons in their fiduciary capacities, and affecting the funds in their hands, as upon other judgments; and any proper order or decree of court requiring a fiduciary to make payment of funds in his hands is generally considered a judgment under statutes providing for interest to be recovered thereon." 33 C. J. 215, and cases cited.

This court has indicated and by the great weight of authorities it seems impossible to separate the judgment and interest accruing thereon. Such interest is a part of the judgment itself for which execution may issue upon request. In *State v. Nebraska State Bank, supra,* it is well said: "Interest accruing upon a bank deposit is a mere incident to the principal sum and a part of it, within the meaning of the bank guaranty act." In *Stuart v. Burcham, supra,* in the opinion, at page 87, this court said: "The three orders are in entire harmony; one directing the money to be held till further order, the next, furnishing such further order by directing it to be paid in; the next, granting an execution for the interest from the date at which he should have paid in, pursuant to the statute fixing interest on judgments." In *Calloway v. Doty,* 108 Neb. 319, 325, this court said: "When, therefore, the plaintiff applied to the clerk of the court for an execution for the unpaid balance due upon the judgment, it was not only proper for the clerk, but it was his duty, to ascertain from the record what rate of interest the amount of judgment bore and issue an execution accordingly." In *Evans v. Fisher,* 26 Mo. App. 541, under a statute substantially the same as ours, it was said: "The rate of interest which a judgment shall bear is a quality which the statute ascribes to the judgment, and it is not a necessary part of the judgment entry; and where it is not shown by the judgment entry, it is the duty of the clerk to ascertain from the record the interest which the judgment shall bear, and to issue execution accordingly; and where he refuses to perform his duty, the circuit court can direct him to do so on motion, or the defendant can compel him to do so by mandamus." See *State v. Vogel,* 14 Mo. App. 187. It has been said in other jurisdictions: "Where a statute states that judgments are to carry interest, such will be implied though the particular judgment was silent on the point. Even where, by agreement, execution is to be delayed, the judgment will bear interest, and it has always been held that the interest as an incident to a judgment

may be collected as long as the execution remains unsatisfied notwithstanding the payment of the amount of judgment." 15 R. C. L. 15, sec. 12, and cases cited. "At the present time, by force of statute in most jurisdictions, interest on judgments as a matter of right is allowed, and may be collected on execution. It has been said that interest is as distinctly a substantive part of the debt as if the obligation to pay was founded upon a contract for interest." 33 C. J. 213, and cases cited.

In the absence of any prohibition in the statutes governing the liquidation of insolvent banks, the allowance of a trust fund is a decree in the nature of a judgment for the payment of money and, therefore, within the provisions of section 45-103, Comp. St. 1929, and bears interest at the rate of 7 per cent. from the date of judgment until paid, and such accrued interest is a part of the judgment and payable in full from the assets of the bank in preference over the claims of depositors and creditors.

The judgment of the district court is

AFFIRMED.

HAARMANN VINEGAR & PICKLE COMPANY ET AL., APPELLEES, V. DOUGLAS COUNTY ET AL., APPELLANTS.

FILED FEBRUARY 25, 1932. No. 28066.

1. **Appeal: PLEADING: AMENDMENT.** Permission to amend a pleading is of no avail unless complied with; neither does it raise a presumption that the case proceeded to trial and judgment on the theory of a permissive amendment. *Ingram v. Bank of Commerce*, 114 Neb. 64.
2. **Taxation: ASSESSMENT.** K., the owner of a tract of land known as Iler Grand distillery tract, made a contract for sale of a part thereof described by metes and bounds to G. W. C. B. Co.; the contract was recorded in the miscellaneous record in the office of the register of deeds; a trust deed in the nature of a mortgage was executed by G. W. C. B. Co., and also recorded in the office of the register of deeds; no actual notice being given or facts brought to the attention of clerk or assessor indicating change of ownership. *Held*, that the continuing to list the tract described in the contract for assessment in the

name of K., and assessing it along with other land in the Iler Grand distillery tract, as one entire tract and at one aggregate amount, did not, under the circumstances of this action, render the entire tax based thereon void.

3. **Taxation**: VOLUNTARY PAYMENTS. Where, after sale had been held under a decree in a foreclosure case, and before confirmation, there was an agreement whereby a lienholder was permitted to take over the property involved, which he had acquired by assignments from others interested therein, and in consummation of such agreement the bid of the purchaser at said sale was handled by reimbursing him for the amount he had paid out up to that time on the property, which included certain taxes involved in the instant case, said payment or reimbursement of the bidder for taxes paid not being by virtue of any order or decree of court, the payment of such taxes was a voluntary payment.
4. ———: ———. The owner, on sale of real estate, which had been sold for nonpayment of taxes, agreed with the purchaser to pay the taxes for certain of the years included in the tax sale, and in consummation of the contract of sale permitted the purchaser to retain from the purchase price an amount sufficient to satisfy the tax lien for said years, the purchaser paying to the holder of the sale certificate the amount of the tax lien, and the certificate was thereupon surrendered to the county treasurer and canceled, the payment of such taxes by the owner in consummating the sale was a voluntary payment.
5. ———: ———: RECOVERY. Taxes not entirely void, though the assessment on which based was irregularly made, may not be recovered when voluntarily paid.
6. ———: VALIDITY. Where taxes are levied and computed on an amount in excess of actual assessed valuation of real property, such taxes are absolutely void so far as based on valuation in excess of actual assessed valuation.
7. ———: VOID TAXES: RECOVERY. If a tax has been levied that is absolutely void, and has been paid, though voluntarily, the amount thereof may be recovered in an action for that purpose.

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

Henry J. Beal, John W. Yeager, John F. Moriarty and *T. J. O'Brien*, for appellants.

Hotz & Hotz and *Merrow & Murphy, contra.*

Heard before GOSS, C. J., EBERLY and PAINE, JJ., and BEGLEY and ELDRED, District Judges.

ELDRED, District Judge.

This is an action brought to recover a refund for certain taxes claimed to have been void and to have been involuntarily paid. The petition contains three causes of action. Haarmann Vinegar & Pickle Company was interested in the first cause of action only, and from the judgment entered on that cause of action, no appeal has been taken, and that company is no longer interested in the case. Cynthia M. Daniel, plaintiff and appellee, was alone interested in causes of action two and three, and from a judgment in her favor the county of Douglas, city of Omaha, and Otto J. Bauman as county treasurer and *ex officio* treasurer of the city of Omaha, defendants and appellants, have appealed.

By the second cause of action Cynthia M. Daniel, appellee, is seeking an accounting and refund of taxes she claims to have involuntarily paid on February 16, 1924, on the real estate involved in this action, in the sum of $3,344.43, being taxes of the city of Omaha for the years 1920, 1921, 1922, and 1923, with interest; and the further sum of $1,009.14, county taxes of Douglas county for the years 1919, 1920, 1921, and 1922, with interest.

Prior to December 16, 1918, the property in question was a part of a much larger tract, referred to as the Iler Grand distillery tract, located near Fourth and Pierce streets in Omaha, and owned by one Adolph L. Meyers. On that date Meyers entered into a contract with the Great Western Commercial Body Company for the sale of the specific part of said Iler Grand distillery tract in question, described by metes and bounds, and containing approximately 39,840 square feet, or 0.9146 acres. The contract was filed for record in the office of the register of deeds on the same date, and recorded in miscellaneous record. Meyers had a first lien upon the property for a balance due him on the purchase price. Appellee became the owner of a lien under a trust deed given by the Great

Western Commercial Body Company to the Omaha Safe Deposit Company. This trust deed likewise described the property by metes and bounds and was recorded in the office of the register of deeds August 10, 1920. During all the years covered by the second cause of action the irregular tract involved herein was assessed along with and as a part of the larger tract of said Meyers as one single entire tract, and taxes computed thereon in an aggregate amount. Foreclosure proceedings were instituted by Meyers, and appellee, with others, was made a party defendant. In the adjusting of the matters involved in that suit, plaintiff acquired the title and paid the taxes in controversy.

Appellee contends that all of the taxes were illegal and void, for the reason that the tract in controversy was assessed and taxed with property other than the property of the plaintiff as an entire tract, at one aggregate valuation, so that it was impossible to determine the amount of taxes for which her property was liable; and, further, that the payment was involuntary.

The district court found against the appellee and in favor of appellants as to county taxes for the years 1919 and 1920, and city taxes for the years 1920 and 1921; and as no cross-appeal has been taken, that part of the decree will not be farther considered.

As to the county taxes for the years 1921 and 1922, and city taxes for the years 1922 and 1923, the trial court sustained the contention of appellee, and entered judgment for a refund of all taxes paid for those years.

By the second cause of action of the petition, the appellee, one of the plaintiffs, claims to have been the owner of the property at the time of paying taxes, but makes no claim of having been a secondary lienholder, nor to having paid taxes to protect any lien held by her against the property. From the bill of exceptions it appears that, during the trial and after the evidence had all been introduced, plaintiff orally asked permission to amend causes of action two and three to conform to the proof, by plead-

ing in the second cause of action the facts as to a secondary lien; the manner in which title to the property was claimed to have been acquired through a foreclosure proceeding; the payment of the taxes by the purchaser at the sale, and redemption by her to protect her secondary lien. The bill of exceptions further discloses that the court, over the objection of the appellants, granted permission to make the amendment. No record of these proceedings nor any amendment appears in the transcript, and there is nothing in the record to indicate that any amendment was in fact made.

By the requested amendment the appellee's second cause of action would be founded upon a different set of facts and theory than originally relied upon. But no amendments having been made the case must be disposed of upon the issues made by the pleadings as embodied in the transcript. The court will not examine the bill of exceptions to determine issues upon which the case was tried. "Permission to amend a pleading is of no avail unless complied with; neither does it raise a presumption that the case proceeded to trial on the theory of the permissive amendment." *Ingram v. Bank of Commerce*, 114 Neb. 64.

According to the petition of the appellee she became the owner of the property February 11, 1924; the evidence supports that allegation. Appellee alleges that she paid the taxes in controversy February 16, 1924, the specific amounts being set out; and that she believed when said taxes were paid that they were due and legal taxes upon said property. It is further alleged in the petition that the property involved had been sold and conveyed by metes and bounds on numerous occasions, and that deeds were of record showing ownership of the tract in controversy to be separate and distinct from other surrounding properties; that the taxes paid covered other and additional property, and that said facts have recently come to light.

The taxes appear to have been paid by the plaintiff un-

der the following circumstances: Decree having been entered by the court in the foreclosure proceeding, the tract involved herein was sold by the sheriff under said decree on July 17, 1923, to one Cook, for the sum of $24,310, which bid included the amount of the first lien under the Meyers contract, and the county taxes for 1919, 1920, 1921, and 1922, and the city taxes for 1920, 1921, 1922, and 1923. It was stipulated on the trial, in substance, that J. Edgar Daniel filed a petition to set aside the sale, and on December 1, 1923, by agreement of parties, he was permitted to take over said property that he had acquired by the assignment of the interest of Adolph L. Meyers and others, and be substituted as party plaintiff; the bid of Cook being handled by Daniel reimbursing Cook for the amount paid out by him up to that time, Daniel directing the property transferred to his wife, the appellee, who furnished the funds therefor. The total amount of taxes thus paid for all years above mentioned aggregated the sum of $4,353.57. This is the substance of all the evidence bearing upon the disposal of the foreclosure proceeding and the acquiring of the title and payment of the taxes by plaintiff. It will be noted that the case was disposed of and taxes paid pursuant to some agreement between the parties, and not on any order or decree of the court. Appellee does not contend in her petition that the taxes were void, but prays for an accounting and recovery of excess amounts paid by her. The trial court sustained the contention of the appellee and found that taxes for 1921 and 1922, county, and 1922 and 1923, city, were entirely void.

The only evidence to support the allegation that the property had been sold and conveyed by descriptions set out, and that deeds were of record showing separate ownership, was the recording of the contract between Meyers and the Great Western Commercial Body Company, which was recorded in the miscellaneous record of the office of the register of deeds, and not in the deed record; and the trust deed from the latter company to the Omaha

Safe Deposit Company, being in effect a mortgage. The contract was not offered in evidence, and the stipulation does not cover its terms and conditions, nor disclose what particular interest or right was conveyed or acquired thereby. There is some claim that the attention of the assessor and county treasurer were directed to the sale of the tract in controversy through certain letters written by the attorney for appellee; but all those letters were written long after the assessments in question were made. So, the question is: Did the failure to have the property involved separately listed and assessed for taxation, under the issues and the evidence in this case, render the entire tax void? The statute appears to contemplate that real estate should be separately listed and assessed for taxation in the name of the owner, as far as the clerk shall be able to ascertain the same. Comp. St. 1929, sec. 77-1602.

There being no deed of record describing the specific tract involved, and no evidence of any notice of sale or request made to have the tract separately listed and assessed, we conclude that the failure of the clerk to separately list the tract, or the assessor to value it as a separate tract, did not render the entire tax void. At most, it was an irregularity only. *Carman v. Harris*, 61 Neb. 635, 645. It did not devolve upon the clerk in making up the list of owners of real estate for assessment purposes to examine miscellaneous records or records of mortgages or trust deeds and determine the legal effect of such instruments, or in whom ownership of property was vested. The interests of the parties under such circumstances are protected by the provisions of section 77-1903, Comp. St. 1929, providing that "the treasurer shall receive taxes on part of any lot, piece or parcel of land charged with taxes, when a particular specification of the tract is furnished." It is evident from the testimony of the witnesses that the tract could be divided and the taxes assessed proportioned thereon, and that it was in fact so handled later, and before taxes for 1924, county, and 1925, city, involved in the third cause of action, were assessed and levied.

The taxes not being void, but at most irregularly assessed, appellee having paid the same without protest, in consummation of an agreement for the purchase of the property, such payment constitutes a voluntary payment, and she is not entitled to a refund therefor. The decree of this court is therefore in favor of the defendants, appellants, as to the second cause of action.

The appellee alleges in her third cause of action that on or about the 1st day of January, 1927, she transferred the property in controversy to the Haarmann Vinegar & Pickle Company under an agreement whereby she was to pay the 1923 and 1924 county taxes, and the 1924 and 1925 city taxes; that in pursuance of such agreement the company withheld the sum of $3,033.37 to cover the taxes upon the property for said years, and interest, on the basis of a statement rendered by defendant treasurer; that she believed at that time that the statement as to said taxes was right, but now discovers it was erroneous. She alleges further that under the date of February 23, 1924, she furnished a plat and description of the property in controversy to the county treasurer, and under date of February 22, 1924, a like description to the county assessor, and that on a number of other dates set out, all subsequent to the dates above mentioned, she directed the attention of the taxing authorities to the specific description of the property involved, then owned by her, but that nevertheless no information was given appellee which would enable her to pay taxes upon her property.

It is further alleged that the assessed valuation of the property involved herein in the year 1924 was $22,300, but that the taxes were based upon an erroneous assessed valuation of $46,750, which it is alleged was the basis of the taxes which were withheld by the Haarmann Vinegar & Pickle Company for taxes for the years mentioned; and therefore the sum withheld from her, to wit, $3,033.37, is in error; that she is entitled to a refund from other parties to the action, and offered by said petition to pay county taxes for the years 1923 and 1924, and city taxes

for 1924 and 1925, based upon the valuation of $22,300, instead of a valuation of $46,750; that the defendant, Omaha Trust Company, is the owner and holder of a tax sale certificate upon said property based upon a valuation of $46,750. Appellee prays for an accounting.

The court found that as to the 1923, county, and 1924, city, the taxes were based upon an erroneous assessment, in that the property was intermingled with other property as one tract, and that there was no basis from which the court could determine what the assessment should have been for the 1923, county, and 1924, city, and found that the county tax for said year 1923, and 1924 city tax were entirely void, and that the appellee was entitled to recover the amount thereof with interest.

All that has been previously said in considering the second cause of action, regarding any conveyance of the property, the recording of instruments and the manner of assessing property, is equally applicable to the taxes, 1923, county, and 1924, city, involved in this cause of action. No additional notice to taxing authorities of any change of ownership appears. The notice of change of interest or of ownership given by the letters referred to were all after the assessment on which the 1923, county, and 1924, city, taxes were computed, must have been made. The tract appears to have been divided and property separately listed and assessed for the tax year following. The only difference as to the situation relative to taxes involved in the second cause of action, and taxes, 1923, county, and 1924, city, in the third cause of action, is as to the manner in which payment was brought about. In the second cause of action the payment of the taxes was made, as heretofore shown, in consummation of an agreement for the purchase of the property; while, in the last mentioned cause, appellee was selling property to the Haarmann Vinegar & Pickle Company; she agreed to pay the taxes for the years involved, and permitted the purchaser to retain the amount necessary for that purpose; that company paid the amount retained to the Omaha Trust Company, the

holder of the tax sale certificate, and the certificate was surrendered to the county treasurer for cancelation. This was a voluntary payment. The tax for 1923, county, and 1924, city, not being void, but at most based on an irregular assessment, and being voluntarily paid, the appellee is not entitled to a refund therefor. The decree of this court on the third cause of action as to the 1923 county and 1924 city tax is in favor of the defendants, appellants.

As to the remaining taxes involved in the third cause of action, that is 1924, county, and 1925, city, it appears that the actual assessed valuation upon which these taxes should have been computed was $22,250, according to the records of the board of equalization; but the taxes for 1924, county, and 1925, city, were in fact computed on the basis of an assessed valuation of $46,750, and entered upon the treasurer's book for collection, and later the real estate was sold at tax sale for said taxes so erroneously computed on a valuation of $46,750 to the Omaha Trust Company. Computed upon such erroneous valuation of $46,750, instead of $22,250, the county taxes for 1924 amounted to $275.49, and should have amounted to only $128.47, the difference on the county tax being $147.02; the city tax for 1925 amounted to $1,163.53, and should have amounted to only $550.05, the difference on the city tax being $613.48. This was the finding of the trial court, and it is likewise the finding of this court.

How the error was made in computing taxes on the wrong amount as assessed valuation does not satisfactorily appear, and it is not material. There was no foundation for the assessment and levy of taxes on any valuation in excess of $22,250, and all such excess taxes are wholly void. *Farmers Co-operative Creamery & Supply Co. v. McDonald,* 100 Neb. 33. If a tax has been levied that is absolutely void, and has been paid, though voluntarily, the amount thereof may be recovered with interest in an action for that purpose. *Wilson v. Butler County,* 26 Neb. 676.

The property of appellee was sold for the void tax, and

the appellants county and city received it from the tax sale purchaser; the appellee furnished the funds used to reimburse the tax sale purchaser, and secure the possession of the certificate and cancelation of said tax, and is entitled to recover the amount thereof from the appellants county and city. The decree of the district court as to this item was that the appellee, Cynthia M. Daniel, recover from the county of Douglas the sum of $147.02, with 6 per cent. interest from November 3, 1926, and from the city of Omaha the sum of $613.48, with 6 per cent. interest from November 3, 1926. The decree of the district court as to the second cause of action and as to the claim for county tax, 1923, and city tax, 1924, involved in the third cause of action reversed and case dismissed as to all of such items. Decree of the district court as to county tax, 1924, and city tax, 1925, affirmed. Each party to pay own costs on this appeal.

AFFIRMED IN PART, AND REVERSED IN PART.

GERTRUDE EBERS, APPELLANT, V. ROGER C. WHITMORE ET AL., APPELLEES.

FILED FEBRUARY 25, 1932. No. 27981.

1. **Automobiles**: USE BY EMPLOYEE: PRESUMPTION: REBUTTAL. In absence of evidence to the contrary, it will be presumed that an automobile in charge of its owner's employee is in the service of such owner, but such presumption vanishes when rebutted by evidence that is clear and undisputed.
2. ———: ———: COLLISION: LIABILITY. Defendant, owner of a garage, loaned his truck to an employee to go to his home, seven blocks south of the garage, for the purpose of getting his lunch; after lunch the employee drove three blocks west from his home and twenty blocks north to get his watch which had been left at a jewelry store for repairs; while returning, and when ten blocks north of the garage, a collision occurred between the truck and another automobile at a street intersection. *Held*, that the truck was not being used in the service of the owner at the time of the accident, but by an employee for his own personal convenience, and that the evidence does not bring the case within the rule announced in *Keebler v. Harris*, 120 Neb. 739.

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

Baylor & Tou Velle and *George A. Healey,* for appellant.

Hall, Cline & Williams and *H. W. Baird, contra.*

Heard before ROSE, GOOD, DAY and PAINE, JJ., and LESLIE, District Judge.

LESLIE, District Judge.

This action is brought by the plaintiff against the defendants for the recovery of damages for personal injuries resulting from a collision between the automobile in which plaintiff was riding and a truck driven by defendant Geiger, but owned by defendant Whitmore, on the 4th day of June, 1930, at or near the intersection of B and Fourteenth streets, Lincoln. An extensive statement of the allegations of the amended petition and the answers of the defendants is not necessary. It is sufficient to state that defendant Whitmore, owner of the truck driven by Geiger, admitted the ownership of it and that a collision occurred on the date in question, but expressly denied in his answer that at the time of the collision the defendant Geiger was using the truck in his, Whitmore's, service. At the conclusion of the evidence the jury were instructed to return a verdict for the defendant Whitmore; the case was submitted to the jury as to the liability of Geiger, and they returned a verdict against such defendant.

The plaintiff appealed from the judgment of the trial court in sustaining the motion of defendant Whitmore for a directed verdict. This being the only question for our consideration, it is necessary to consider the evidence only in so far as it relates to whether the truck was in the service of Whitmore at the time of the accident.

Whitmore was operating a garage in Lincoln on Fourteenth street a little south of South street, and defendant Geiger was employed by him as a helper. On the day in question the family car that usually called to take Geiger to his lunch did not arrive and he used Whitmore's truck

for the purpose of going to his home at Thirteenth and Otoe streets for his noon meal. In relation to this Whitmore testified: "He (Geiger) was waiting for his mother to come * * * and take him to lunch, so I told him to take the truck and get his dinner and get back as quick as he could." This evidence is undisputed as to the circumstances under which the truck was taken from the garage. Geiger's home at Thirteenth and Otoe streets is approximately seven blocks south and one block west of defendant Whitmore's garage. The scene of the accident is approximately ten blocks north of the garage. After having his lunch, Geiger drove from his home, seven blocks south of the garage, to Parke-Brown's jewelry store on Tenth street north of O, twenty-two blocks north of the garage, to get a watch he had left for repair. Geiger's testimony is that he drove from there north on Tenth to P street, east on P street to Fourteenth, south on Fourteenth to B street, where the collision occurred.

It is plaintiff's contention that, when Whitmore gave Geiger permission to take the truck to his home with instructions to return it after lunch, the truck was in the service of Whitmore, and, conceding that Geiger was using it for his own personal convenience while going from his home to the jewelry store on Tenth street, when he turned to go from there to the garage he was operating the truck in the service of the owner within the rule announced in *Keebler v. Harris,* 120 Neb. 739. We cannot assent to this. In *Keebler v. Harris,* defendant Harris was an employee of codefendant American Credit Corporation, and had been directed by his employer to repossess a certain Ford car and take it to a garage at 610 South Fifteenth street, Omaha. From his home, Fifty-second and Izard streets, he drove his father's car to 915 South Forty-eighth street, where he took possession of the car. He then returned his father's car to Fifty-second and Izard streets; the repossessed car, driven by another boy, following him. After leaving his father's house, Harris took the repossessed car and drove to several places in Omaha to make

collections that he was authorized to make for the defendant credit corporation, eventually returning to Forty-ninth and Dodge streets, from which point he started to take the repossessed car to the garage to which he had been directed to take it, on Fifteenth street. The accident occurred at Forty-sixth and Farnam streets, two blocks south and three blocks east of Forty-ninth and Dodge, and on one of two routes that would usually be taken in going from Forty-ninth and Dodge streets to Fifteenth street. This court held that Harris was in the zone of his general duties, and that if he had, earlier in the evening, temporarily abandoned his employment for his own convenience, he resumed his duties when he started to go to the garage from Forty-ninth and Dodge streets. In the instant case the defendant Whitmore loaned his truck to Geiger for his own personal use, with no directions other than to return as soon as he could. The exact language used by Whitmore is not material so long as it definitely appears that Geiger was to perform no service for Whitmore during the time he was out with the truck. There is no conflict in the evidence that Geiger was driving the truck on an errand personal to himself. By no stretch of imagination can it be said from the record that he intended to perform, was directed to, or, in fact, did perform any service for his employer while he was out with the truck.

The plaintiff urges, however, that, since it is conceded that Whitmore was the owner of the truck and Geiger was employed by him and frequently used the truck on the streets in the vicinity of where the accident occurred, he is presumed to have been using it on this occasion in the service of his employer, and that this presumption is evidence that would sustain a verdict for plaintiff. Our attention is called to cases that support this contention: *Williams v. Ludwig Floral Co.*, 252 Pa. St. 140; *Holzheimer v. Lit Bros.*, 262 Pa. St. 150; *Randolph v. Hunt*, 41 Cal. App. 739; *Ward v. Teller Reservoir & Irrigation Co.*, 60 Colo. 47. The great weight of authority, however, is to the contrary, and the decisions of this court are in accord

with those cases which hold that a presumption is not evidence and will not prevent a directed verdict when the evidence rebutting it is convincing and undisputed. In the instant case the presumption arose from the facts alone that Whitmore was the owner of the truck and Geiger was employed by him. This established *prima facie* that the truck was in the service of the owner. The presumption is unsupported by circumstancial evidence. It was rebutted by the testimony of witnesses who knew the facts. This extinguished the presumption. *Eckman Chemical Co. v. Chicago & N. W. R. Co.*, 107 Neb. 268; *Sorensen v. Selden-Breck Construction Co.*, 98 Neb. 689. Plaintiff's contention in a sense would extend the family automobile doctrine to employees. In *Mogle v. A. W. Scott Co.*, 144 Minn. 173, the court said:

"We are now asked to extend the (family automobile) doctrine to cases where an employer permits a favored employee to use, for his own pleasure, an automobile kept and ordinarily used in carrying on the employer's business. * * * If we were to hold as requested, it would tend to put an end to the praiseworthy custom of many employers who permit faithful employees to use occasionally, for their personal enjoyment, automobiles kept and ordinarily used in carrying on the employer's business. * * * But, aside from this particular consideration, we think both reason and authority are opposed to plaintiff's contention. The extension of the family automobile doctrine to other relationship cannot well be justified upon any principle of the law of master and servant or principal and agent. The owner of an automobile, who loans it to another to use for purposes personal to the borrower, is neither master nor principal, but merely a bailor, and in law is not chargeable with the consequences of the borrower's negligence while pursuing his own ends in his own way."

There being no controverted questions of fact to go to the jury, the court properly directed a verdict for the defendant Whitmore.

The judgment of the trial court should be, and is,

AFFIRMED.

CITIZENS NATIONAL BANK V. ROSE POLSKI, APPELLEE: CLARENCE G. BLISS, RECEIVER, APPELLANT.

FILED MARCH 2, 1932. No. 28126.

1. **Contracts**: PUBLIC POLICY. When a contract has been executed in consideration of an agreement not to prosecute criminally, the general rule is that no action lies to recover property delivered under its terms. The court will leave the parties in the same position in which it finds them.
2. ———: DURESS. When such an agreement has been obtained by duress, it may be avoided by the party against whom the duress is exercised.
3. **Equity**: PUBLIC POLICY. "The equitable principle expressed in the maxim, 'He who comes into equity must come with clean hands,' being founded on public policy, public policy may require its relaxation or limitation. Even when the parties have been found to be *in pari delicto*, relief has at times been awarded on the ground that in the particular case public policy has been deemed to be best conserved by that course." *Weaverling v. McLennan*, 116 Neb. 466.
4. ———. "Where equity has assumed to act, it must do complete justice, regardless of whether litigants originally came into court with unclean hands." *Weaverling v. McLennan*, 116 Neb. 466.

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

Lamont L. Stephens and *F. C. Radke*, for appellant.

George I. Craven, contra.

Heard before GOSS, C. J., DEAN and PAINE, JJ., and BROADY and RHOADES, District Judges.

GOSS, C. J.

The Citizens National Bank filed its petition in equity in August, 1930, interpleading Rose Polski as one claiming the proceeds of a four months' time certificate of deposit in plaintiff bank, dated April 1, 1930, for $3,750, bearing 4 per cent. interest, and Clarence G. Bliss, Receiver of Bank of Ashton, as another party claiming such proceeds. Plaintiff asked to be permitted to deposit the principal and interest thereon for four months with the

clerk of the court, that said claimants be required to litigate their respective claims, and that plaintiff be discharged upon paying such principal and interest. Issues were joined and trial was had. On August 5, 1931, the court entered a decree finding generally in favor of Mrs. Polski and awarding her the proceeds of the certificate. The receiver appealed.

Bank of Ashton had long been a state bank owned and operated by the Polski family. For some years Stephen S. Polski had been president and managing officer. On November 24, 1929, he died. The bank was closed the next day with heavy liabilities. The evidence suggests misapplication of funds of the bank and of bonds left with the bank for safe-keeping. Polski left considerable insurance, part of which was payable to the bank and part to his wife, Rose Polski. She deposited $3,750 in the plaintiff bank and received the certificate of deposit therefor. On June 7, 1930, she indorsed the certificate at her home and it was turned in to the receiver through his assistant, who was present when it was indorsed by Mrs. Polski. At the time she indorsed the certificate it was agreed between the assistant receiver and her that the department of trade and commerce and the receiver would stay prosecution of the officers of the bank or would return the certificate. The assistant to the receiver gave her a written memorandum to that effect. It is in evidence. Mrs. Polski naturally wanted to lighten the obloquy on the family name of her husband and to protect her brothers-in-law, George L. Polski, a director and vice-president of the bank, and Ignac M. Polski, cashier of the bank, who had not only civil liability to the bank but who had reason to fear criminal prosecution. George L. Polski and C. E. Brown, assistant to the receiver, went to the home of Rose Polski on June 7, 1930, on a joint venture. They knew Mrs. Polski had funds. Polski wished to borrow from her and Brown desired him to do so in order that George might pay the bank. They had virtually an all-day session. Mrs. Polski called in her brother-

in-law, Garrett H. Lorenz, as her adviser. Ultimately, on that day, she turned over to George L. Polski, among other securities totaling $9,950, the certificate of deposit, indorsing her name on the back of it. It was understood he would turn it over to the receiver, which he did soon thereafter by delivering it to Brown, assistant to the receiver. Brown duly indorsed it to Bliss, receiver, who is here claiming the proceeds. Brown signed in ink and delivered to Rose Polski a statement in these words: "If in any case the dept. of trade and commerce or the receiver of the Bank of Ashton should not see fit to accept moneys tendered by Rose Polski to stay prosecution of the officers of the Bank of Ashton, that such certificate of deposit or moneys shall be returned to her. (Signed) C. E. Brown, Asst to Receiver of Bank of Ashton." It is evident the threat of prosecution was the potent influence in obtaining from Mrs. Polski this certificate as the fruit of the day's work.

Mrs. Polski received from George on June 7, 1930, his two notes—one for $4,666 (signed also by L. B. Polski) due June 7, 1935, and one for $5,000, due June 7, 1940. George gave her a memorandum listing the securities, totaling $9,950, and the notes, and showing the balance due Rose Polski to be $284. During the trial Mrs. Polski tendered in court the notes and offered to surrender them to the receiver or to the makers. The receiver declined the tender.

Among other things, Rose Polski had pleaded duress on the part of Brown in procuring her to indorse and deliver the certificate. By its decree the court found generally in favor of Rose Polski on all the issues, "save and except that the court fails to find that any duress was exercised or used in obtaining the transfer of the certificate," etc.; found that the consideration was the agreement not to prosecute, and that such an agreement is illegal and void, but that she "was an ignorant woman and not acquainted with the provisions of law relative to compounding a felony," was constrained by over-persuasion of Brown and

George L. Polski, and was not equally guilty with Brown. Therefore, the court declared her indorsement and delivery of the certificate void and decreed payment of the proceeds to her.

In *Johnson v. Owen,* 72 Neb. 477, it appears that Charles Owen was complained of on the charge of rape. He left the state, but his father, Frank Owen, indorsed and delivered a $300 certificate of deposit to the county attorney on condition that the prosecution would be dismissed. The county attorney indorsed and delivered the certificate to the county judge. Charles Owen replevied it. The judgment in favor of Charles Owen was reversed, the court holding: "Where a plaintiff claims that a certificate of deposit in the sum of $300 was indorsed and delivered for him to a county attorney under an agreement that, in consideration thereof, he would dismiss a criminal prosecution against plaintiff and release him from jail, a court will not aid him to regain possession of the property. Such a contract or agreement is illegal, against good morals and public policy, and the court will leave the parties in the same position in which it finds them." Trending the same way but on facts not so similar are *Brower v. Fass,* 60 Neb. 590; *Davis v. Hinman,* 73 Neb. 850; *Perry v. Berger,* 85 Neb. 753; *Clarke v. Omaha & S. W. R. Co.,* 5 Neb. 314. This may be said to be the general rule. We note that *Johnson v. Owen, supra,* was an action at law and not in equity, that the opinion rejected Owen's argument that the certificate of deposit was obtained by duress; and we do not know what happened to the certificate after the mandate went down to the district court.

The finding of the district court that Rose Polski was not equally guilty with Brown and the order granting her relief, notwithstanding she was *in pari delicto,* finds support in the continuation of jurisdiction by equity until the matter is entirely disposed of. *Weaverling v. McLennan,* 116 Neb. 466. In that case we held:

"The equitable principle expressed in the maxim, 'He

who comes into equity must come with clean hands,' being founded on public policy, public policy may require its relaxation or limitation. Even when the parties have been found to be *in pari delicto*, relief has at times been awarded on the ground that in the particular case public policy has been deemed to be best conserved by that course.

"Where equity has assumed to act, it must do complete justice, regardless of whether litigants originally came into court with unclean hands."

The case just cited did not reverse or abate the general legal principle stated in *Johnson v. Owen, supra.*

In the case at bar, which is here for trial *de novo*, the district court failed to find that duress was exercised in obtaining the transfer of the certificate from Mrs. Polski and grounded the judgment upon a finding that she was consciously ignorant of the legal effect of her act and that the assistant to the receiver overpersuaded her and induced her to enter into the illegal agreement; that, therefore, though *in pari delicto* (in a like offense), she was not of equal guilt with him and could recover. However, we think the evidence justifies a finding that her consent to indorse the certificate was the result of duress. She might well be called, without using the term in any offensive sense, an ignorant woman. Her intellectual disparity with Brown was very evident. Her state of health, her pride in the family name, her public shame and mortification that would result if her husband's brothers were prosecuted, the circumstances in which Brown and George L. Polski dealt with her for several hours to consummate the results, even though Lorenz was there to aid her, indicate that her will was overborne and she loaned George nearly $10,000 without security where previously she had resisted alone his importunities to borrow $4,000. As the triers of the facts, we conclude that, in all the circumstances, the action of Brown, the agent and representative of a branch of a coordinate department of the state, under the modern doctrine amounted to duress in procuring her

consent to an illegal agreement. 9 R. C. L. 715, sec. 7.

It follows that the judgment of the district court was right in canceling her indorsement of the certificate and in awarding her the proceeds thereof, for which judgment against plaintiff was directed. The judgment and decree is therefore

AFFIRMED.

POLA LUSTGARTEN, APPELLEE, V. FRANK HARRIS ET AL., APPELLANTS.

FILED MARCH 2, 1932. No. 28146.

1. **Negligence**: COMPARATIVE NEGLIGENCE: QUESTION FOR JURY. In an action by a pedestrian against the owner of an automobile for personal injuries sustained when she was struck by such automobile as she attempted to cross the street in the middle of the block, where it appears that the automobile was more than half a block away when she first started across the street, and that she looked a second time, and no other automobiles were in sight, and where the driver of such automobile saw such pedestrian and, by the exercise of due care in the control thereof, could have stopped in time to avoid striking her, *held*, that the question of the comparative negligence of the parties is one for the jury.
2. **Trial**: CONTRIBUTORY NEGLIGENCE: QUESTION FOR JURY. "Where different minds may reasonably draw diverse conclusions from the same facts as to whether or not they establish negligence or contributory negligence, those issues must be submitted to the jury." *Perrine v. Union Stock Yards Co.*, 81 Neb. 790.
3. **Evidence** examined, discussed in the opinion, and *held* that the verdict is supported thereby.

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

Kennedy, Holland & De Lacy, for appellants.

Brome, Thomas & McGuire and *John T. Marcell, contra.*

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

DEAN, J.

Mrs. Pola Lustgarten began this action in the district court for Douglas county to recover damages for personal injuries sustained by her when she was struck by an automobile owned by the O'Brien Drug Company and at the time driven by Frank Harris, an employee of the company. Both the drug company and Harris are named as defendants herein. The jury returned a verdict for $5,000 for plaintiff and the defendants have appealed.

The plaintiff, who has driven an automobile for 18 years, parked her car on the south side of Farnam street between Thirty-eighth street and Thirty-eighth avenue. The accident in question here occurred in Omaha, April 4, 1930, at about 11:30 in the forenoon. The plaintiff testified that she left her car, intending to go directly across the street to a grocery store in the middle of the block on the north side of the street. She testified that she saw the defendant's car approaching when more than half a block away, and when she first started across the street, and no other cars were then approaching from the opposite direction. She looked a second time and the car was then only about a half block away. From her evidence it appears that the plaintiff concluded she had ample time in which to cross the street, but when she was only four or five steps from the sidewalk, and while she was crossing the second street car tracks, she was struck by the defendant's car.

Defendant Harris testified that he was going west on Farnam street at the time, and that he slowed down to permit an approaching truck to pass in front of him on Thirty-eighth street, and that he was driving in second gear and at not more than 15 or 16 miles an hour at the time. He also testified that when he first saw the plaintiff she was standing in the middle of the street and he thought she was waiting for him to proceed. From his testimony it appears that he slowed down several times, and that the plaintiff stopped, but that, finally, she started running directly in front of his car just as he stepped

on the accelerator. The plaintiff was struck by the bumper of the car and thrown not more than two feet before the car was stopped. On the cross-examination, it was developed that at no time was the car brought to a complete stop before the accident. The defendant testified that he was still 40 feet from the plaintiff when he sounded the horn the second time and, at that time, he was driving at the rate of only 8 miles an hour. And he testified that he was only 12 feet from the plaintiff when she stopped the second time.

One witness testified that a skid mark, 68 or 70 feet in length, was perceptible on the pavement after the accident, and that the mark was evidently made by the left rear wheel of the car. And another testified that he observed the plaintiff as she left her car and started across the street, but he did not see the car strike her as his vision was obstructed at the time by the wall of the store in which he was employed. He testified that his attention was called to the car as it moved swiftly by and that shortly thereafter he heard the squeaking of the car brakes. He also testified that a long skid mark was made on the pavement and that the car appeared to him to have been driven at about 35 miles an hour when he first noticed it and that at no time did he hear a horn sounded. Another witness testified that his attention was attracted to the defendant's car from the fact that it was being driven a "little bit faster" than the average car. To substantially the same effect is the evidence of another witness who heard the squeak of the tires on the pavement as the brakes were applied, but he heard no horn sounded. On this feature, however, evidence was introduced in behalf of the defendants tending to prove that the horn was sounded immediately before the accident, and that the car was being slowly driven at the time, but that the plaintiff apparently became confused.

In respect of the plaintiff's injuries, the physician who attended her immediately after the accident testified that she sustained a fractured rib, and that she was bleeding

from a wound in the back of her chest which was occasioned by a puncture of a lung, and that she was very weak and complained of pain in breathing. The plaintiff was confined in a hospital for two weeks and thereafter she was removed to her home where she remained in bed for some time. The physician testified that her lung expansion will be permanently limited and her breathing restricted, especially in case of undue excitement or exertion on her part. The fact appears to have been established that, owing to her injuries, the plaintiff has been in an unusual nervous condition and that she has lost considerable in weight. Another physician testified that the plaintiff had the symptoms of traumatic neurasthenia, or nervousness, induced by the accident. And on the part of the defendants the evidence of a physician was introduced. He examined the plaintiff at the request of the defendants and, in his opinion, the plaintiff's rib had healed, and she did not show signs of the lung injury, nor did he discover signs of nervousness in her.

We have examined several of the cases cited by the defendants in support of their theory of the accident, but we do not think the cases so cited are fairly applicable to the facts before us. In the cited cases the plaintiffs crossed the street in the middle of the block, but they did not look for approaching cars after leaving the sidewalk. In the present case, however, the evidence discloses that the plaintiff looked the second time when the defendant's car was then about a half block away. And, according to his evidence, the defendant observed the plaintiff when he was about 100 feet distant from her. So that the question of the negligence of the plaintiff, if any, as compared to that of the defendant was one for the jury. It has been held: "In an action for death of pedestrian struck by defendant's automobile while he was crossing street in middle of block, the evidence is held sufficient to present questions for jury as to whether defendant exercised ordinary care with respect to lookout and speed and control of his car." *Ford v. Werth*, 197 Wis. 211.

And it has also been held: "Testimony in action for personal injuries resulting to pedestrian when defendant's automobile struck her, *held* sufficient to present an issue of fact for jury on question of plaintiff's negligence by attempting to cross street after observing defendant's automobile approaching." *Halamka v. Schneider,* 222 N. W. 821 (197 Wis. 538).

It is to be noted that the evidence herein conflicts in respect of some of the material facts. But the jury evidently believed that the plaintiff was justified in concluding that she had ample time in which to cross the street when no other automobiles were in sight and the defendant's car was then more than a half block away. And it doubtless appeared to the jury that, if the defendant had exercised due and reasonable care in the control of his car, it could then have been stopped in time to avoid striking the plaintiff. We have held: "Where different minds may reasonably draw diverse conclusions from the same facts as to whether or not they establish negligence or contributory negligence, those issues must be submitted to the jury." *Perrine v. Union Stock Yards Co.,* 81 Neb. 790. See *Leon v. Chicago, B. & Q. R. Co.,* 102 Neb. 537; *Casey v. Ford Motor Co.,* 108 Neb. 352; *Luther v. Farmers Union Cooperative Ass'n,* 119 Neb. 676.

Error is assigned in the giving of certain instructions and in the court's refusal to give certain other instructions requested by the defendants. Upon an examination of the instructions given and those refused, however, we conclude that reversible error does not appear in the ruling of the court thereon. The instructions given by the court substantially and fairly cover the issues that are involved herein.

Complaint is also made that the verdict is excessive, but, in view of the evidence before us, we do not agree with counsel on this feature of the record.

We conclude that the judgment must be and it hereby is

AFFIRMED.

CLARENCE G. BLISS, RECEIVER, APPELLANT, V. LIVE STOCK NATIONAL BANK OF OMAHA, APPELLEE.

FILED MARCH 2, 1932. No. 28104.

1. **Banks and Banking:** MISAPPROPRIATION OF FUNDS BY OFFICERS. Where the president and vice-president of a bank make an unauthorized payment of their individual debts out of funds of the bank, the bank may recover from the creditor who received the payment with knowledge that it was so paid.
2. ———: ———: NOTICE. The fact that the president and vice-president are personally interested in a transaction is sufficient to put the creditor on inquiry as to their authority to pay their individual debts with funds of the bank.

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

George I. Craven, for appellant.

W. C. Dorsey and *Howard M. Baldrige, contra.*

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

DAY, J.

This action was brought by the receiver of the First State Bank of Bethany against its president and vice-president and the Live Stock National Bank of Omaha, Nebraska, for the conversion of funds of the bank. The trial court entered judgment against the officers of the bank and in favor of the Live Stock National Bank against the receiver. The receiver appeals from the latter part of the judgment.

The transaction involved in this controversy had its inception in June, 1929, at which time the First State Bank of Bethany, on account of an apparent loss occasioned in part by their moving from the suburbs into the heart of the city, had an impairment of their capital amounting approximately to $4,000, which impairment of capital the banking department of the department of trade and commerce of Nebraska insisted should be replaced by the stockholders. To this end the vice-president of the bank

negotiated with the Live Stock National Bank of Omaha, Nebraska, for a loan of $4,000 on a note to be signed by one stockholder of the state bank and payment to be guaranteed by the other stockholders. This negotiation was carried on by correspondence, and the application of the vice-president to the Live Stock National Bank contains the following statement: "This is for the bank to cover deficit which was made when we started here and bought considerable supplies, but we are going good now and should soon be on a paying basis. We will also send in property statements. You will remember I told you about this when I was there, in your bank, and we do not want our public statement go out showing a deficit." This loan was finally made upon a note signed by the president and vice-president of the bank in their individual capacities and payment guaranteed by the other directors. The proceeds of the note were by the Live Stock National Bank placed on deposit to its credit in said First State Bank of Bethany. This amount was placed either in the undivided profits or surplus of the First State Bank. This replaced the impairment of the capital of the bank to the satisfaction of the state banking department, and accrued to the benefit of the stockholders of the bank and was for their benefit rather than for the benefit of the bank. This note was for 90 days and was dated June 26, 1929, and thereafter on September 27, 1929, the First State Bank sent to the Live Stock National Bank a draft for $500 as partial payment upon the note. This draft was not drawn upon the appellee but upon the Continental State Bank of Lincoln. The individuals liable on this note who were officers of the bank paid nothing to the bank for this draft. It was credited upon the note and renewal note and the balance of $3,500 due October 10 was accepted by the Live Stock National Bank. Subsequently, on October 17, 1929, this renewal note, at the direction of the vice-president of the First State Bank, who, in his individual capacity, had signed the note as maker, was charged to the account of the bank and thereupon the Live Stock

National Bank returned the note and the guaranty to the First State Bank.

The learned trial judge in the decision of this case relied upon the case of *State v. American State Bank*, 114 Neb. 722. In the syllabus in that case this court said: "Where an officer of a bank gives his individual note to another bank and places the proceeds to the credit of the bank of which he is an officer, and which it accepts and uses, such bank may not complain that such officer subsequently pays and discharges his note out of the bank funds. The transaction is equivalent to the bank borrowing the money and subsequently paying its own debts." The trial court was of the opinion that the above quoted law applied to the facts of this case. In the decree the trial court stated: "The argument that the impaired capital of the Lincoln bank cast a legal obligation on each stockholder is such an issue as to make the note in question in this case an individual obligation, while persuasive, does not appeal to this court as conclusive. All the stockholders or practically all of them authorized, if not directed, the Heiligers to negotiate this loan, and they all guaranteed its payment. All of which was done primarily for the use and benefit of the bank as such." While according the finding of the trial judge great respect and consideration, we are unable to reach the conclusion that the evidence in this case is sufficient to support such a finding. This loan was secured by the directors upon the individual note of two of the officers and guaranteed by others for the purpose of restoring an impairment to the capital stock. Such a loan was for the benefit of the stockholders and not for the benefit of the bank. The Live Stock National Bank, when they made this loan, made it, not as a loan to the bank, but upon the individual obligation of the stockholders. They were cognizant of its purpose, for in the very first letter, portions of which are heretofore quoted, they were told that it was for the express purpose of covering a deficit in the bank, and that they as stockholders were putting this

money in the bank in order that their public statement might not be issued showing a deficit. A perusal of the correspondence passing between the makers of the note and the bank is not capable of any construction except that such loan by the Live Stock National Bank was the individual and personal obligation of the stockholders of this bank. In passing, it is noted that a loan of this character to the bank was not of benefit to it. If the bank borrowed this money on its faith and credit, it was in no better shape after the loan than it was before. Regarded as a loan for the benefit of the bank, it merely enabled the bank to fool the department of trade and commerce by misrepresentation into permitting the bank to continue to accumulate and increase its losses so that at the time of closing it was in a worse condition than at the time of the loan. That a loan does not increase net worth is too simple to require demonstration.

The first payment upon the indebtedness evidenced by the original note of $500 was paid by a draft of the First State Bank for which the makers did not pay. There is no presumption that such a draft was paid for when issued and the burden is on the party claiming it was thus paid to prove it. *Mendel v. Boyd*, 71 Neb. 657. None of the directors or stockholders who had individually guaranteed this note knew at the time the bank closed that the note had been paid except the makers. Where the president and vice-president of a bank make an unauthorized payment of their individual debts out of funds of the bank, the bank may recover from the creditor who received the payment with knowledge that it was so paid. The fact that the president and vice-president are personally interested in a transaction is sufficient to put the creditor on inquiry as to their authority to pay their individual debts with funds of the bank. *State v. Thedford Bank*, 114 Neb. 534. Again, we stated this rule in *State v. Farmers State Bank*, 111 Neb. 585, as follows: "The cashier of a bank cannot legally pay his individual note with other notes belonging to the bank, and the payee in

such an individual note may be held liable for conversion if, with knowledge of the facts, he accepts payment in that manner."

The Live Stock National Bank, having received payment of the individual note of the president and vice-president of the First State Bank, unauthorized, from funds of the bank with knowledge, is liable for conversion of the amount so paid. The judgment of the district court is reversed and the cause is remanded for further proceedings in accord with this opinion.

REVERSED.

WOODS BROTHERS CORPORATION, APPELLANT, V. MARTHA FRANCKE, APPELLEE.

FILED MARCH 2, 1932. NO. 28170.

1. **Banks and Banking**: CHECKS: DUTY OF ACCEPTOR. One who accepts the check of a third party as a conditional payment of a debt is charged with the duty of collecting it without negligence.
2. ———: ———: ———: NEGLIGENCE. In such a case, the circuitous routing of the check through a distant bank situated outside the state, requiring six days for making a presentment for payment, which might have been made in one day, is negligence.
3. ———: ———: ———. Such negligence, if it causes the check to be unpaid, will render the conditional payment of the debt absolute.

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

Woods, Woods & Aitken and *I. E. O. Pace*, for appellant.

Mockett & Finkelstein, contra.

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

DAY, J.

This action was brought to recover the amount due for the purchase price of a mortgage bond. The price of the bond was $1,018.68, of which $18.68 was paid, and plaintiff now sues for $1,000. At the time of the sale, October 2, 1929, the defendant tendered in payment of the $1,000 a check dated September 24, 1929, of a third person, payable to defendant and indorsed by her in the said amount, drawn on the Bank of Eagle, Nebraska. The plaintiff deposited this check in its account in the Central Trust Company of Chicago, Illinois, and it was forwarded to the Federal Reserve Bank at Omaha, Nebraska, and by it sent to the Bank of Eagle, Nebraska, for payment, October 8, 1929. The check remained in the Bank of Eagle without remittance on the 8th, 9th, and 10th of October, and on October 11 the Bank of Eagle closed. During the period the check was in the Bank of Eagle, the only bank in Eagle, the bank was open for business, accepting deposits and paying checks, and had cash in its vaults and credits in correspondent banks sufficient to pay the check. The maker of the check had sufficient funds in his account in the Bank of Eagle to pay the check. From a judgment in favor of the defendant in the district court, the plaintiff appeals.

There is no substantial dispute in the facts relative to this transaction, but there is a dispute between the parties as to the legal effect to be deduced from these facts. The defendant contends that Woods Brothers Corporation took the check in payment for the real estate bond delivered to her, while the plaintiff insists that it took the check for collection only. On October 2, the date the check was indorsed in blank and delivered to Woods Brothers Corporation, the plaintiff delivered to the defendant a real estate bond of $1,000. Thereupon the defendant became the owner of said bond and Woods Brothers Corporation became the owner of said check. *Henefin v. Live Stock Nat. Bank*, 116 Neb. 331. The defendant was in no position to maintain an action on the check

and was unable to present it for payment and was not the owner thereof. True, on October 2 the defendant was liable as indorser, but this suit is not brought against the defendant as such indorser. As such indorser she would not have been liable because of the delay caused by the circuitous routing by the deposit of the check in the Chicago bank as before outlined, as such delay was sufficient to discharge the indorser. *First Nat. Bank of Wymore v. Miller,* 37 Neb. 500; *Bedell v. Harbine Bank,* 62 Neb. 339.

On the other hand, the plaintiff contends that the check was not accepted from the defendant in payment but merely as conditional payment, and in view of the nonpayment of the check, the defendant owes the original debt. To support this contention the plaintiff cites numerous cases, among which is *Chicago, B. & Q. R. Co. v. Burns,* 61 Neb. 793. In that case the check in question was an order of the paymaster to the treasurer of the railroad company to pay an employee. The check was stolen and it was paid upon a forged indorsement. It was held that the giving of this check was not the payment of the debt. Clearly, the rules announced in that case are not applicable here. However, conceding that the check was given to Woods Brothers Corporation as a conditional payment, it was charged with the duty of collecting it. A bill of exchange has been held to be payment if the holder through his own negligence fails to take proper steps to obtain payment. *Phoenix Ins. Co. v. Allen,* 11 Mich. 501; *Smith v. Miller,* 43 N. Y. 171. This court said in *Bedell v. Harbine Bank,* 62 Neb. 339: "If the payee of a check drawn upon a bank in this state indorses it to a bank in a neighboring town for collection and the latter, without the knowledge or consent of the payee, sends it for collection through a distant bank situate outside the state, thereby consuming three days for making a presentment for payment which might have been made in one day, the indorsee will be liable for the consequences of such delay and for any default or negli-

gence of the bank chosen to make the collection." The deposit of this check in the Chicago bank was a proper and convenient method so far as plaintiff was concerned, but it was not a discharge of its duty to the defendant. The delay in presentment caused by the circuitous routing of the check for collection was the cause of the nonpayment of the check. On October 2, 1929, this check was transferred by indorsement of the defendant to the plaintiff. The plaintiff sent the check for deposit in its account in a Chicago bank, which in turn sent it to the federal reserve bank at Omaha, who sent it direct to the only bank in Eagle, the Bank of Eagle, to which the check was directed. The check reached the Bank of Eagle on October 8. Notwithstanding the fact that the bank was open for business and did receive deposits and pay checks on the 8th, 9th, and 10th of October, the check remained in the bank and no remittance was made thereon. The Bank of Eagle, Nebraska, is shown by the record to be 18 miles from Lincoln, connected by telephone lines and two trains each way each day. If the check had been deposited in a Lincoln bank, it would have reached Eagle on October 3 or 4 and the check would have been paid or nonpayment would have been known to the parties several days before the bank closed. As it was, the defendant did not receive notice until the check had been returned by the agent of the banking department in charge of the closed bank who returned it by the circuitous route by which it had come, that is, by way of Chicago; thereupon it was returned to Woods Brothers Corporation, who notified her on October 17, or 15 days after they had received the check. Regardless of the view taken of this case, as to the situation created by the facts, plaintiff is precluded from recovering in this case on account of their negligence in the collection of the check.

AFFIRMED.

LOUISE LEMERE, APPELLEE, V. ALTON D. WHITE ET AL., APPELLANTS.

FILED MARCH 2, 1932. No. 28176.

Mortgages: FORECLOSURE: SALE: CONFIRMATION. Mere inadequacy of price in a sale under foreclosure will not justify a court in refusing a confirmation, unless such inadequacy is so great as to shock the conscience of the court or to amount to evidence of fraud.

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

Morsman & Maxwell and *William Baird & Sons*, for appellants.

Rose, Wells, Martin & Lane, contra.

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

PAINE, J.

The plaintiff owned a mortgage of $5,800 upon a rooming-house in Omaha. The plaintiff bid in the property at foreclosure sale for $6,800, and waived a small deficiency judgment which might have been taken. Objections to confirmation were overruled and the sale confirmed. The defendants, Alton D. White and the United States National Bank, Trustee, have appealed on the ground of inadequacy of price.

The record discloses that H. Cooper gave the original mortgage to Arthur J. Miller, who assigned the mortgage to the plaintiff. Upon April 19, 1919, Alton D. White, who had purchased the place, executed the extension agreement, extending the maturity date to July 10, 1924, but he continued to pay interest thereon after maturity and up to January 10, 1929. A decree of foreclosure was entered July 30, 1930, and a stay of nine months taken. On May 5, 1931, the order of sale was issued, and the property sold by the sheriff June 16, 1931. Defendant White had the hearing on confirmation set over until

August 15, 1931. Upon June 25, 1931, the United States National Bank, trustee under a trustee's deed issued to it by defendant White, filed objections to confirmation on the ground of inadequacy of price realized, and alleging that a greater price would be realized upon a resale, and in support thereof filed five affidavits of five men engaged in the real estate business in Omaha, Nebraska, each affidavit being in exactly the same form, setting forth that the affiant had been actively engaged in the real estate business in Omaha for a certain number of years, was well acquainted with the property, and that in his opinion the fair market value of said property was $26,000. Objections to the confirmation were also filed by Alton D. White, defendant, on the same ground; and a counter affidavit was filed by Charles D. Armstrong, another real estate agent of Omaha, in which he set out that the fair and reasonable market value of the property did not exceed $15,000, and that rooms in the building had been rented to tenants furnished, but that Alton D. White was also the owner of the furniture, and that all of the furniture had been attached, and that when the furniture was taken out of the building the building would become vacant and be of much less value than the above amount. An affidavit was also filed by G. F. Kroeger, of the Omaha National Bank trust department, setting forth that the delinquent taxes against said property amount to over $5,000, and that in his opinion "a purchaser for said property cannot be found at this time or in the near future for an amount in excess of the sum due on the decree plus the unpaid taxes which are liens on said property."

The same question has been before courts in other states, and they have held against the contention of the appellants.

Mere inadequacy of price will not justify a court in refusing to approve a sale, unless the inadequacy is so great as to shock the conscience of the court or to amount to evidence of fraud, and such inadequacy is not shown

by sale for $150 of land claimed to be worth $300. *Doyle v. Maxwell,* 155 Ark. 477.

The only question to be decided on objections to confirmation of sale of land under mortgage foreclosure is whether the price was the best that the property would then bring for cash. *Dunlop v. Chenoweth,* 90 N. J. Eq. 85.

"A foreclosure sale will not be set aside on the ground of inadequacy of the price bid, in the absence of a showing that a larger or even as large a price could be obtained on a resale." *Farmers Bank v. Quick,* 39 N. W. 752 (71 Mich. 534).

"It is the general rule that, in the absence of fraud and unfairness, mere inadequacy of price does not furnish sufficient ground to invalidate a foreclosure sale, unless the price is so grossly inadequate and unconscionable as to shock the moral sense, or unless there be additional circumstances against its fairness." 19 R. C. L. 584, sec. 397. See *Wells v. Lenox,* 108 Ark. 366, Ann. Cas. 1914D, 11.

This court having the entire record before it in the form of affidavits, we are in no manner bound by the finding of the trial court.

This court has held: "A judicial sale of real estate will not be set aside on account of mere inadequacy of price, unless such inadequacy is so gross as to make it appear that it was the result of fraud or mistake." *First Nat. Bank v. Hunt,* 101 Neb. 743; *Lindberg v. Tolle,* 121 Neb. 25.

This property sold for substantially its full value, considering that the delinquent and unpaid taxes against it amount to over $5,000, and no affidavit is submitted of any bidder willing to raise the price bid in the event of resale. *Fink v. Murdock,* 98 Neb. 1.

"There are no restrictions upon the means by which the trial court may satisfy itself that a fair price was obtained at a foreclosure sale or that a subsequent sale would not realize a greater amount. The burden is upon

the appellants to show affirmatively that the judgment of the trial court is erroneous." *Occidental Building & Loan Ass'n v. Beal, ante,* p. 40.

We have examined the record and believe the land sold for its fair and reasonable value under the conditions existing at the time. The judgment of the district court is therefore affirmed, with leave to redeem before mandate is issued.

AFFIRMED.

HOPE MCKINNEY, APPELLEE, V. IVAN WINTERSTEEN, APPELLANT.

FILED MARCH 2, 1932. No. 28081.

1. **Automobiles: SPEED: OPINION OF EXPERT.** A qualified expert, upon laying a proper foundation, may give his opinion as to the speed of an automobile, based on the length of skid marks made by it when brakes were applied.
2. **Infants: NEGLIGENCE.** A child six years of age is not possessed of sufficient discretion to make her guilty of negligence, or contributory negligence, for her failure to exercise due care for her safety.
3. **Evidence** examined, and *held* to support the verdict of the jury.

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

Frederick J. Patz and *George Boland,* for appellant.

Donald Gallagher, contra.

Heard before GOSS, C. J., EBERLY and PAINE, JJ., and BEGLEY and ELDRED, District Judges.

BEGLEY, District Judge.

Action brought by Hope McKinney, a minor, by her father and next friend, against Ivan Wintersteen, for damages alleged to have been sustained because of the negligent operation of an automobile owned by the defendant, appellant, and driven by his agent, Allen Wintersteen. At the close of the evidence the defendant moved for a directed verdict, which was overruled, and the jury

returned a verdict for the plaintiff for the sum of $2,000. From a judgment entered thereon, the defendant has appealed.

The negligence charged against defendant's agent and alleged to be the proximate cause of the injuries are: (1) In exceeding the speed limit of ten miles an hour at the time he struck plaintiff, and that his car was going at the unreasonable and improper speed of about thirty miles an hour; (2) defendant's agent failed to keep his car under proper control; (3) defendant's agent failed to keep a proper lookout for pedestrians in said alley; (4) defendant's agent failed to sound any horn or give any signal of his approach; (5) defendant's agent failed to stop or turn his automobile so as to avoid striking plaintiff.

The defendant's answer alleged in substance that defendant's automobile was being driven westerly in said alley in a careful, prudent and lawful manner, approximately eight to ten miles an hour, and that plaintiff ran into the alley from the south and ran into the defendant's car, which had been swerved to the north and stopped, and that there were buildings and other obstructions bordering the alley which prevented the defendant from seeing the plaintiff.

The evidence shows that on September 19, 1930, at about noon, the plaintiff, a minor child of six years, was crossing from south to north a paved public alley that runs east and west between Twenty-first and Twenty-third streets in the city of Lincoln, Nebraska, when an automobile, owned by defendant and driven for defendant's benefit by his agent, Allen Wintersteen, over and upon said alley in a westerly direction, ran into and struck the plaintiff and injured her.

It is admitted by the record that the maximum speed limit in any alley in the city of Lincoln is ten miles an hour, as fixed by city ordinance. Allen Wintersteen, the only eyewitness to the accident besides the plaintiff, testified that he had just taken his car from a nearby garage

where he had the brakes adjusted and that same were in a good state of repair; that he drove into the alley and did not sound his horn; that he was traveling about ten miles an hour; that he did not see the plaintiff until she was three feet in the alley; that she was running north and a little east, and when she was about nine feet in front of his car, he slammed on his brakes and the left front headlight of defendant's car struck the plaintiff; that he had driven through the alley on other occasions; that the day was clear and the street was dry; that after the accident he saw skid marks behind the car between six and eight feet in length. Two witnesses for the plaintiff testified that the skid marks were eighteen feet in length on the pavement and two police officers testified said marks were twelve feet in length. An expert witness testified that he had made experiments in the alley with a car of similar weight and good brakes, and that the car driven at the rate of speed of ten miles an hour would not make skid marks in that alley over two feet in length when the brakes were applied; that when the car was driven at twenty miles an hour the skid marks were not over six feet, and when driven at thirty miles an hour the skid marks were not over ten feet; and that in his opinion, at the time of the accident, defendant's car was being driven over thirty miles an hour.

The evidence of skid marks on the roadway made by an automobile makes the question of speed and control of said automobile one for the jury, and a qualified expert may give his opinion as to the speed of the automobile, based on the length of the skid marks made by it. *Carson v. Turrish*, 140 Minn. 445; *Heidner v. Germschied*, 41 S. Dak. 430; *Luethe v. Schmidt-Gaertner Co.*, 170 Wis. 590.

Appellant contends that this case should be ruled by the decision in the case of *De Griselles v. Gans*, 116 Neb. 835. The facts in the two cases are very readily distinguished. In that case, the court found that defendant was not guilty of negligence; that he was driving twelve

or fifteen miles an hour and his car was stopped in from three to five feet; that he was not driving in violation of any ordinance, and that the plaintiff's acts were the proximate cause of the accident. In this case, the plaintiff's evidence is to the effect that defendant was driving in excess of thirty miles an hour, when the ordinance provided for ten miles; that he saw the plaintiff when nine feet from the car and could have stopped his car within two feet if driving at the rate of ten miles an hour. We think the question of defendant's negligence as to the rate of speed he was driving was for the jury.

Appellant complains that the court erred in the instruction submitting the question of contributory negligence and comparative negligence to the jury. On account of her tender years, plaintiff cannot be deemed in law, to be possessed of sufficient discretion to make her guilty of negligence for her failure to exercise due care for her safety. *Sacca v. Omaha & C. B. Street R. Co.*, 98 Neb. 73. The instruction was therefore not prejudicial to appellant. However, while the plaintiff is not chargeable with negligence, if her act, whether negligent or not, was the proximate cause of her injury, there can be no recovery. *De Griselles v. Gans, supra.*

From a careful reading of the evidence we conclude that the jury were justified in finding that the proximate cause of the injuries was the negligence of defendant's agent in driving his automobile through said alley at an unlawful rate of speed and without having the same under proper control.

Appellant complains that the verdict is excessive. The evidence shows that appellee received a fractured skull; her left collar bone was fractured; her forehead cut above the right eye; her finger was cut, and she sustained a pressure on the brain; that before the accident she was a bright girl, and that since the accident she has been dull and complains of headaches, which may continue; her eyesight may be decreased and there may be dizzi-

ness. This evidence is sufficient to sustain a verdict as to the amount.

The judgment is

AFFIRMED.

CHRIS STABEN, JR., APPELLEE, V. MAURICE MEHRENS, SHERIFF, ET AL., APPELLANTS.

FILED MARCH 2, 1932. No. 28093.

1. Judgment: VALIDITY: INJUNCTION. A judgment debtor who files a dilatory pleading in a suit filed against him in county court and thereafter consents with the plaintiff to permit the cause to be continued for more than three terms of court in order that he may procure evidence of a partial payment, claimed to be made by him, and thereafter abandons his defense and permits the plaintiff to take default judgment against him, cannot in a collateral proceeding, by injunction, enjoin the enforcement of such judgment as void under section 27-524, Comp. St. 1929, as having been continued for more than three terms of court without his consent.
2. ———: RELIEF IN EQUITY. "In a suit by a judgment debtor to enjoin the enforcement of a judgment, on the ground that it is void because the court wherein it was rendered had not acquired jurisdiction over his person, a court of equity will not grant affirmative relief unless it is made to appear that he had a meritorious defense to the cause of action on which the judgment was based." *Braun v. Quinn*, 112 Neb. 485.

APPEAL from the district court for Washington county: CHARLES E. FOSTER, JUDGE. *Reversed and dismissed.*

W. A. Ehlers, for appellants.

Howell, Tunison & Joyner, contra.

Heard before GOSS, C. J., EBERLY and PAINE, JJ., and BEGLEY and ELDRED, District Judges.

BEGLEY, District Judge.

This is an action in equity wherein the plaintiff, Chris Staben, Jr., filed a petition against the defendants, seeking to enjoin and restrain the enforcement and collection of a judgment entered on the 20th day of March, 1930,

in the county court of Washington county, Nebraska, for the sum of $427 and costs. The transcript of such judgment had been filed in the office of the clerk of the district court for Washington county, on which an execution had been issued and a levy made on certain lands belonging to the plaintiff herein and about to be sold thereunder.

The plaintiff alleged in his petition that the judgment was and is a nullity and void, in that said county court of Washington county, Nebraska, was without jurisdiction to enter any judgment, and had lost jurisdiction of said cause at the time said judgment was attempted to be rendered, and prayed that the judgment be decreed a nullity and void and the defendants enjoined from proceeding to execute such judgment. The district court found for the plaintiff and enjoined the enforcement of the judgment. A motion for a new trial was overruled, and defendants have appealed.

There is little dispute as to the evidence. On June 14, 1929, Robert Ross, as plaintiff, filed a petition in the county court of Washington county, praying judgment against Chris Staben, Jr., defendant, in the sum of $409.70. The summons was served upon Chris Staben, Jr., personally, and on July 30, 1929, defendant Staben, by his attorneys, O'Hanlon and O'Hanlon, of Blair, Nebraska, filed a motion to require the plaintiff to make the petition more definite and certain. No further action of any kind was taken or entered by the court until on the 20th day of March, 1930, when the county judge procured a confirmation from O'Hanlon and O'Hanlon over the telephone that they had withdrawn from the case, and thereupon, at the request of the plaintiff's attorney, overruled the motion of the defendant as being a dilatory motion and entered a default judgment against the defendant in the sum of $427.60, together with costs taxed at $9.65.

Two questions are presented for determination: (1) Did the county court lose jurisdiction of the case by permitting same to be continued for more than three terms be-

fore entering judgment therein? (2) Is the appellee herein entitled to an injunction to prevent the enforcement of the county court judgment, without first alleging and proving a meritorious defense to said cause of action?

Section 27-524, Comp. St. 1929, reads as follows: "The provisions of the Code of Civil Procedure relative to adjournment of causes before justices of the peace, shall apply to civil actions in the county court not cognizable before such justices, so far only as the causes for adjournment and the conditions to be imposed thereon are concerned, but the time for which the cause may be adjourned shall be regulated by the county judge in the exercise of a reasonable discretion: Provided, such action cannot be adjourned over more than three regular terms of said court, upon the application of either party, without the consent of the other."

Judge I. C. Eller, the county judge who entered the judgment in the case, testified that he held regular terms of his said court; that no order was entered continuing this case to the next regular term after July, 1929; that it was his understanding of the law and of the attorneys in the case that the filing of the motion by the defendant made a general appearance and waived any irregularities and held the case in abeyance until it was heard.

Mr. W. A. Ehlers, attorney for the defendants herein testified that he was the attorney of record for the plaintiff in the case; that the hearing on the motion of the defendant was continued from time to time by agreement of the attorneys until in February of 1930, when the then attorneys for the defendant dictated a letter in his presence, notifying the defendant that they were withdrawing as counsel and directed him to procure other counsel; that three or four days after that, Mr. Joyner, of the firm of Howell, Tunison & Joyner, called him and stated that they had been employed by defendant and, after various conversations about a compromise settlement, whereby the defendant claimed to have made a payment on the note in the sum of $100, asked and were given time to pro-

cure the receipt, and that the matter drifted along until the 19th of March, 1930, when Mr. Joyner stated that they would not defend further, and that the plaintiff was entitled to take judgment if he so wished, and he thereupon arranged for the county judge to have judgment entered in accordance therewith and to have the motion of O'Hanlon and O'Hanlon overruled; that, before entering the default judgment, the county judge called the firm of O'Hanlon and O'Hanlon and they notified him that they had withdrawn from the suit.

Mr. Joyner, one of the attorneys for the defendant, testified that he came to Blair and examined the record in the case, and that he afterward had a talk with Mr. Ehlers, wherein he told him that more than three terms of court had passed; and that the court had lost jurisdiction of the case; that any judgment he took would not be worth anything because the court no longer had jurisdiction of it.

It will be noted that by said section of the statute the time for which a cause may be adjourned shall be regulated by the county judge, in the exercise of a reasonable discretion, but it cannot be adjourned over more than three regular terms upon the application of either party without the consent of the other. Neither party to the suit made application for a continuance nor was any objection filed to same. On the contrary, the evidence shows that the parties did agree to the various continuances, and that same were had for the benefit of appellee herein, in order that he might search for a receipt which he claimed to have in his possession. Appellee knew of the contemplated judgment and failed to file objections with the court that the continuances were had without his consent. The lack of consent does not appear affirmatively upon the judgment. His present plight is attributable to his own neglect. *Shufeldt v. Gandy*, 34 Neb. 32. The fact that the county judge or his clerk neglected or omitted to make a record of such continuances, where the plaintiff is without fault, cannot, as between the parties,

deprive the plaintiff of his rights therein through such official neglect. *Crete Mills v. Stevens*, 120 Neb. 794.

As to the second proposition, it is admitted that appellee has neither pleaded nor proved that he has a meritorious defense to the county court judgment. The rule of the majority of the courts, including Nebraska, is that in a suit by a judgment debtor to enjoin the enforcement of a judgment, on the ground that it is void because the court wherein it was rendered had not acquired jurisdiction, a court of equity will not grant affirmative relief unless it is made to appear that he had a meritorious defense to the cause of action on which the judgment was based. 39 A. L. R. 414, note.

In the case of *Bankers Life Ins. Co. v. Robbins*, 53 Neb. 44, the court held: "A party against whom a judgment has been rendered by default, which judgment is void for want of jurisdiction over the person of the defendant, is not entitled to an injunction to restrain the enforcement of such judgment unless he makes it appear, both from his pleadings and proof, (1) that he has a meritorious defense to the cause of action on which the judgment is based; (2) that he has no adequate remedy at law; and (3) that his plight is in nowise attributable to his own neglect."

The case of *Braun v. Quinn*, 112 Neb. 485, appears to be directly in point. The court said: "The reason usually given for the rule against relieving from a void judgment unless a meritorious defense to the cause of action is averred is that equity will not do a useless thing, and it would subserve no useful purpose to set aside a judgment for want of jurisdiction, if the party seeking the injunction had no defense to the cause of action upon which it was based. Another reason is that it is not enough that the judgment assailed be unlawful. It must be against conscience as well."

The trial court therefore erred in granting an injunction against the enforcement of the county court judg-

ment. The judgment is reversed and the cause is dismissed.

REVERSED AND DISMISSED.

JUANITA HAMAKER, APPELLANT, V. ABRAHAM L. PATRICK, APPELLEE.

FILED MARCH 11, 1932. No. 27986.

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

Herman Aye and *L. J. Te Poel,* for appellant.

William Baird & Sons and *L. C. Hupp, contra.*

Heard before GOSS, C. J., DEAN and EBERLY, JJ., and CHASE and HASTINGS, District Judges.

PER CURIAM.

This is an action at law. Plaintiff's petition set forth two causes of action. There was a trial to a jury with verdict and judgment for plaintiff.

At the close of the evidence, the bill of exceptions discloses that the defendant moved the court to direct a verdict in favor of the defendant "for each and all of the following reasons," which included the insufficiency of the evidence to sustain a verdict in favor of the plaintiff and against the defendant. However, the cause was duly argued to the jury, a verdict returned for the plaintiff, and a judgment entered thereon. Within the time provided by statute, the defendant filed a motion for a new trial. At the time of hearing on this motion the following order was entered:

"This cause having duly come on for hearing on January 30, 1931, on the motion of the defendant, Abraham L. Patrick, to vacate and set aside the verdict of the jury and the judgment rendered thereon on January 8, 1931, and for a new trial, and the same having been duly submitted and heard and argued by counsel for the parties

and having been taken under advisement, and the court now being fully advised in the premises finds:

"That the motion of the defendant should be sustained, and also finds that the motion of the said defendant for a directed verdict or for a dismissal of the action, duly made by the said defendant at the close of the evidence, in the trial in the above action, should be sustained and the action dismissed.

"Wherefore, it is ordered and adjudged by the court that the motion of the defendant to vacate and set aside the verdict and judgment and for a new trial, heretofore referred to, be and the same is hereby sustained, and the verdict of the jury and the judgment thereon rendered and entered on January 8, 1931, be and are hereby vacated, set aside and annulled.

"It is further ordered and adjudged that the order of the court overruling the motion of the defendant for a directed verdict or a dismissal of the action, made at the time of the closing of the evidence in the trial of this case, be and is hereby vacated and set aside, and said motion be and is hereby sustained, and the above entitled action be and is hereby dismissed," etc.

"Dated February 28, 1931."

It is obvious that the effect of the court's judgment above set forth was to annul and set aside all proceedings subsequent to the motion made by the defendant, at the close of the evidence of all the parties, to dismiss or for an instructed verdict in his behalf. The trial court's judgment of dismissal thereupon entered was the same in force and effect as if originally made and entered "at the close of the evidence." The plaintiff thereupon became the "aggrieved party," vested with the right to file and present a motion for a new trial. Comp. St. 1929, secs. 20-1142, 20-1143. This, the record before us discloses, he failed to do. No motion for a new trial in behalf of the plaintiff appearing in this record, the only question for this court presented thereby is the determination of whether the answer of the defendant supports

the judgment entered. We are not permitted to go back of this judgment of the trial court to review anything done or any proceedings had prior to the judgment. *Johnson v. Songster,* 73 Neb. 724; *Farmers & Merchants Nat. Bank v. Mosher,* 63 Neb. 130; *Hansen v. Kinney,* 46 Neb. 207.

So, too, an objection that the findings and judgment of the court are not supported by sufficient evidence is, in the face of this record, unavailing, it failing to show that a motion for a new trial was filed and ruled on. *Gretna State Bank v. Grabow,* 52 Neb. 354; *Losure v. Thompson,* 45 Neb. 466.

The allegations in the defendant's answer presenting a defense to plaintiff's claim set forth in his petition, we are required to affirm the action of the trial court.

AFFIRMED.

REX BALL V. STATE OF NEBRASKA.

FILED MARCH 11, 1932. No. 28048.

1. **Criminal Law:** REVIEW. An instruction not challenged as erroneous in the motion for a new trial is not reviewable in a proceeding in error.
2. **Intoxicating Liquors:** BOOTLEGGING: SUFFICIENCY OF EVIDENCE. Evidence that accused was arrested while backing an automobile containing bottles of intoxicating liquor away from a curb in a street and afterward told an officer he had driven the car and left it while delivering therefrom bottles of intoxicating liquor may be sufficient to sustain a conviction for bootlegging.

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

L. R. Doyle, for plaintiff in error.

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

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

ROSE, J.

In a prosecution by the state in the district court for Lancaster county Rex Ball, defendant, was convicted of bootlegging, and for that offense was sentenced to serve a term of 60 days in the county jail and to pay a fine of $100. As plaintiff in error defendant presents for review the record of his conviction.

Complaint is made of an instruction to the jury, but it was not challenged as erroneous in the motion for a new trial and is therefore not reviewable in the proceeding in error.

Insufficiency of the evidence to sustain the conviction is urged as a ground of reversal. Defendant argues there is no evidence that he kept or carried around in a vehicle intoxicating liquor with intent to sell or dispose of it in violation of the statute defining "bootlegging." Comp. St. 1929 sec. 53-103.

The evidence shows that defendant backed an automobile containing bottles of intoxicating liquor away from a curb on a street in the city of Lincoln and was arrested before he got away. There is also evidence he afterward told an officer he had driven the car and left it while delivering bottles of liquor therefrom. This is sufficient evidence of intent to sell or dispose of intoxicating liquor actually found and kept in his car.

AFFIRMED.

GEORGE L. MCCARTER, APPELLEE, V. J. D. COVER, APPELLANT.

FILED MARCH 11, 1932. No. 28166.

1. Appeal: TRIAL TO COURT: EVIDENCE: COMPETENCY: PRESUMPTION. In an action at law tried to the court without a jury, the presumption on appeal is that competent evidence only was considered in the determination of the issues.
2. ———: ———: FINDINGS. On appeal in an action at law tried to the court without a jury, the findings below have the same effect as the verdict of a jury.

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

Nye & Nye, for appellant.

John J. Cameron, Jr., contra.

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

ROSE, J.

This is an action to recover the amount due on the claim that plaintiff sold to defendant a town lot in Lexington and was to receive in part payment the stock and fixtures of a bakery in Grand Island, including a truck valued at $275 and rent of $45.75—two items of consideration never received. The prayer was for judgment in the sum of $320.75, with interest from May 18, 1930.

In an answer to the petition defendant put in issue the facts entitling plaintiff to relief and pleaded a counterclaim of $650 for breach of warranty in the deed to the Lexington lot for which the bakery in Grand Island had been accepted in part payment. The alleged breach of warranty consisted of encroachments of buildings extending beyond the boundary of an abutting lot. This claim was contested by plaintiff.

Before the district court without a jury, there were spirited trials which resulted in a judgment for $355.85 in favor of plaintiff for the price of the truck and the unpaid rent, and in a judgment for $445.08 in favor of defendant on his counterclaim for breach of warranty. Defendant appealed from the judgment for $355.85.

The judgment from which the appeal was taken is challenged for assigned errors in rulings on evidence and for insufficiency of the evidence to justify the conclusion reached by the district court. All material evidence offered on either side was admitted during the trial. In an action at law tried to the court without a jury, the presumption on appeal is that competent evidence only was considered in the determination of the issues. The

entire record has been examined with care and it shows an abundance of competent evidence to support the judgment. In such a case the findings have the same effect on appeal as the verdict of a jury. Prejudicial error has not been pointed out.

AFFIRMED.

SYD LENTZ V. STATE OF NEBRASKA.

FILED MARCH 11, 1932. No. 28212.

Intoxicating Liquors: BOOTLEGGING: INTENT. Under an information for "bootlegging," charging that accused kept, or carried around on his person, or left in a place for another to secure, intoxicating liquor with intent to sell or dispose of it, evidence of such intent, or evidence of circumstances from which it may be inferred, is essential to a conviction. Comp. St. 1929, sec. 53-103.

ERROR to the district court for Gosper county: CHARLES E. ELDRED, JUDGE. *Affirmed in part, and reversed in part.*

Ted R. Frogge and *McNeny, Gilham & Sprague,* for plaintiff in error.

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

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

ROSE, J.

In a prosecution by the state in the district court for Gosper county, Syd Lentz, defendant, was convicted on the charge that he had possession of intoxicating liquor May 13, 1931, for the purpose of unlawful use and disposition, and was fined $100 therefor; on the charge that he had possession of intoxicating liquor January 21, 1931, for the purpose of unlawful use and disposition, and was fined $100 therefor; on the charge that he was guilty of bootlegging January 21, 1931, and was fined $100 therefor and also sentenced to serve a term of 90 days in the county jail. As plaintiff in error he presents for review the record of his convictions.

Defendant insists that the evidence is insufficient to sustain a conviction on any charge. The record shows that this contention is without merit, except as to the charge of bootlegging. An examination of the evidence results in the conclusion that it is insufficient to prove beyond a reasonable doubt that defendant, January 21, 1931, kept or carried around on his person, or left in a place for another to secure, intoxicating liquor with intent to sell or dispose of it, as charged in the information and as "bootlegging" is defined by statute. Comp. St. 1929, sec. 53-103. The particular in which the evidence is lacking is the failure to prove the intent to sell or dispose of the intoxicating liquor. Evidence of this element of the statutory offense, or evidence of circumstances from which the criminal intent may be inferred, is necessary to a conviction.

The sentence for bootlegging is reversed for want of evidence and the charge therefor dismissed. The sentences for unlawful possession are affirmed.

JUDGMENT ACCORDINGLY.

IN RE ESTATE OF SUSAN F. KIERSTEAD. MADISON COUNTY, APPELLANT, V. METHODIST EPISCOPAL CHURCH OF TILDEN ET AL., APPELLEES.

FILED MARCH 11, 1932. No. 27971.

1. **Inheritance Tax: COMPUTATION.** When a will contest has been amicably settled between the beneficiaries named in the will and the heirs at law and they have in good faith stipulated for a decree of distribution in accordance with the settlement, and there is no intent thereby to evade or reduce the inheritance tax, the tax should be computed upon the portion received by each beneficiary under the decree.
2. ———: **EVASION: EVIDENCE.** Evidence of the effect on the property of the estate by the litigation growing out of the contest of the will is admissible to show whether the stipulation was entered into in good faith, without collusion of the parties to evade the inheritance tax.

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

Carl Peterson and *Moyer & Moyer*, for appellant.

Mapes, McDuffee & Mapes, G. M. Spurlock, W. V. Hoagland and *C. W. De Lamatre, contra.*

Heard before ROSE, GOOD and DAY, JJ., and CHAPPELL and LANDIS, District Judges.

CHAPPELL, District Judge.

Susan F. Kierstead died on June 13, 1927, then a resident of Madison county, Nebraska. She left a last will and testament which was filed for probate in the county court of Madison county, Nebraska. At the time of her death she was a widow about seventy years of age, and no issue survived her. In this will a portion of her estate was given to the following institutions: The Methodist Episcopal Hospital of Omaha, the Odd Fellows Home at York, the Mother's Jewels Home, a Methodist orphanage at York, and the Womans Home Missionary Society of the Methodist Episcopal Church.

A sister and twelve nieces and nephews, heirs at law, contested the admission to probate of this will, but it was admitted to probate by the probate court. An appeal was taken by the contestants to the Madison county district court where trial to a jury was had. This trial lasted more than three weeks; the jury were unable to agree and were discharged. The case was again tried in the district court for Madison county, and the second trial lasted more than five weeks; again the jury disagreed and were discharged without rendering a verdict. Thereupon the contestants filed a motion for a change of venue, asking to have the case removed from Madison county and from the ninth judicial district. This motion, supported by numerous affidavits, was sustained and the appealed action was transferred from Madison county to Platte county. After the case had been transferred from Madison county to Platte county the proponents and contest-

ants entered into a stipulation for the purpose of compromising and settling the litigation growing out of the petition for probate and the contest thereof. Pursuant to this stipulation the district court for Platte county entered its decree. Under this stipulation and decree L. P. Pasewalk, the special administrator appointed by the county court of Madison county, paid into the Platte county district court the sum of $25,010 for the heirs at law, contestants. The decree contains the following clauses: "Sixteenth. The contestants, Samuel J. Whitehead and Bertha Huston or their personal representatives, shall each be paid the sum of $250 as one-half of their legacies out of said fund of $25,010. Seventeenth. The contestants as heirs at law and the personal representatives of Bertha E. Huston, deceased, shall share in the balance of the fund paid into this court in the proportion as follows, to wit: (here follows their names and respective proportions)."

One George H. Moyer was appointed by the county court of Madison county to appraise the estate and make his recommendations as to the levying of an inheritance tax. He made his appraisement and assessment and reported the same to the county court. There is no dispute over the valuation established by the appraisement, and there is no dispute over the procedure which he adopted in making the appraisement, but the appraiser, Moyer, held and reported that the $25,010 paid by the special administrator to the heirs at law, contestants, was taxable, not to the heirs at law, who received it, but to the legatees named in the will, who received no part of it. The legatees under the will appealed from the appraiser's assessment to the county court where the assessment, as made by the appraiser, was approved. The legatees then appealed to the district court where a trial was had and the case submitted to the court. The district court reversed the county court and held that the $25,010 paid to the heirs at law, contestants, was not taxable as property received by the legatees; that the legatees are only

liable to taxation upon such property as they actually receive. From this decree of the district court for Madison county, the county of Madison has appealed to this court.

The assignments of error by appellant on appeal are: (1) The district court erred in exempting the sum of $25,010 received by the legatees under the last will and testament of Susan F. Kierstead, and paid out by them to the contestants under the stipulation of settlement of the will contest; (2) the district court erred in admitting evidence of the effect on the property of the estate of the litigation growing out of the contest of the last will and testament of Susan F. Kierstead.

Appellees in their brief present one other issue to this court to which appellant has filed a reply brief. Appellees contend that chapter 132, Laws 1931, amends the inheritance tax statute, section 77-2201, Comp. St. 1929, to read as follows: "Provided further, that all bequests, legacies, devises, or gifts, to or for the use of any corporation, organization, association or foundation organized and operated exclusively for religious, charitable or educational purposes, no part of which is owned or used for financial gain or profit to either the owner or user or inures to the benefit of any private stockholder or individual, or to the trustee or trustees exclusively for such religious, charitable or educational purposes, shall not be subject to any duty or tax, and no such duty or tax shall be assessed or collected after the taking effect of this act irrespective of the time of the death of decedent or the fact of pendency of his or her estate."

Appellees contend that they are all charitable institutions and that as legatees under the will they are not subject to any inheritance tax whatsoever by reason of this statute, as it contains a retroactive provision.

A careful examination of the transcript and bill of exceptions discloses that it contains no evidence or stipulation on the question as to whether these appellees were charitable institutions and might thereby come within the provisions of this statute, and appellees have filed no

cross-appeal in this court. For this reason, as we view the record, we are not required to determine this question.

Appellant contends, citing many well-reasoned authorities, that all the property composing the estate of Susan F. Kierstead passed by will and that the inheritance tax should be assessed against the right of succession of the legatees named in the last will and testament, under section 77-2201, Comp. St. 1929:

"All property, real, personal and mixed which shall pass by will or by the intestate laws of this state from any person who may die seised or possessed of the same while a resident of this state, or, if decedent was not a resident of this state at the time of his death, which property or any part thereof shall be within this state, or any interest therein or income therefrom, which shall be transferred by deed, grant, sale or gift made in contemplation of the death of the grantor, or bargainer or intended to take effect, in possession or enjoyment after such death, to any person or persons or to any body politic or corporate in trust or otherwise, or by reason thereof any person or body corporate shall become beneficially entitled in possession or expectation to any property or income thereof, shall be and is subject to a tax, at the rate hereinafter specified, to be paid to the treasurer of the proper county for the use of the state, and all heirs, legatees and devisees, administrators, executors and trustees shall be liable for any and all such taxes until the same shall have been paid as hereinafter directed."

Appellant takes the position that the inheritance tax law, section 77-2201, Comp. St. 1929, providing that all property, real, personal and mixed which shall pass by will or by the intestate laws of this state shall be subject to a certain tax, imposes a tax upon the right of succession, not upon the estate, debts and the expenses of administration being the only charges upon the estate, and the tax accrues when the estate vests upon decedent's death and is not affected by any transfer or agreements

by those who take the estate, so that a sum which legatees paid out of the estate to contestants of the last will and testament of the deceased, in consideration of their agreement not to further contest the will, is taxable to the legatees. Supporting this contention is cited, among other cases, *In re Estate of Sanford*, 90 Neb. 410. The court held in that case:

"The widow of a testator who takes real estate devised to her by his will in lieu of dower is not in a position to require the taxing authorities to exempt so much of such real estate as equals the value of her dower interest from the payment of an inheritance tax. * * * Real estate devised by will passes to the devisee at the death of the testator, and its status under the law taxing inheritances is fixed at that time. An agreement between devisees to satisfy a claim against the estate in favor of one of them by a conveyance of a portion of such real estate to the claimant will not exempt it from liability for an inheritance tax."

A vigorous and logical dissenting opinion was written in this case by Judge Fawcett as to both propositions above quoted. A rehearing was granted and the decision was modified, the opinion appearing in 91 Neb. 752, in which opinion as to the dower interest, the court said: "The dower interest of the widow in the estate of her deceased husband, whether taken under his will or by operation of law, is not subject to an inheritance tax." In the body of the opinion, as to the other question, the court said: "It is next contended that we should further modify our former judgment by holding that the claim of Charles W. Sanford for $35,524.95 against his father's estate should also be deducted from the appraisement before the inheritance tax is computed. We see no reason to change our former opinion on this question. While the demurrer of the county admits the facts which are well pleaded by the petition, it must be observed that the petition is insufficient in that it fails to set forth any enforceable contract or agreement between Charles W. San-

ford and his father which would sustain a judgment against the estate, and it appears that, after the succession of the estate, the beneficiaries under the will, who were also the sole executors thereof, agreed between themselves upon the so-called satisfaction of this claim. Such an agreement should not have the effect of avoiding the payment of a substantial part of the inheritance tax."

Judge Fawcett dissents from so much of the opinion as refers to Charles W. Sanford, for the reasons assigned in his opinion on the former hearing, reported in 90 Neb. 410. The inference or conclusion which this court derives from the modified opinion is that the petition was insufficient in that it fails to set forth any enforceable contract or agreement between Charles W. Sanford and his father which would sustain a judgment against the estate, and that it is not in point or a precedent for this case. It must be observed that the will of the decedent was admitted to probate without contest and that the question of liability for inheritance tax did not arise until two years after the death of the decedent and the probate of the will.

Section 30-221, Comp. St. 1929, now provides: "No will shall be effectual to pass either real or personal estate, unless it shall have been duly proved and allowed in the court of probate as provided in this chapter, or on appeal in the district court." Thus, the title to both the real and personal property would have actually passed to and vested in the legatees upon probate of the will more than two years before any controversy whatsoever arose.

The question has never been directly passed upon by this court. A careful study of the authorities discloses that the courts of the different states have adopted three different theories, most of them under statutes similar to ours.

One line of decisions treats the property in compromise of a will contest as expenses of administration for tax purposes, and thereby not taxable at all for any purpose. This proposition the court believes is a subterfuge and

inequitable in that it gives ready opportunity for collusion and fraud and would deprive the state of its legitimate revenue, thereby defeating the purpose of the inheritance tax law. *Kerr's Estate,* 159 Pa. St. 512; *Hawley's Estate,* 214 Pa. St. 525; *English v. Crenshaw,* 120 Tenn. 531. Pennsylvania has since abandoned this theory. 29 Columbia Law Review, 1164.

The second line of cases holds that such a transfer is an assignment by the legatee of a portion of his legacy and consequently the taxability of the property is determined by strict adherence to the terms of the will and without reference to the ultimate disposition of the property. This proposition is supported by well-reasoned cases and is the law in many states. *MacKenzie v. Wright,* 31 Ariz. 272; *In re Estate of Graves,* 242 Ill. 212; *Baxter v. Treasurer and Receiver General,* 209 Mass. 459; *In re Murray's Estate,* 155 N. Y. Supp. 185; *Hastings v. Nesmith,* 188 Mass. 190; *Brandeis v. Atkins,* 204 Mass. 471; *Estate of Rossi,* 169 Cal. 148; 26 R. C. L. 232, sec. 204; 29 Columbia Law Review, 1164.

The third viewpoint is that the compromise payment is to be taxed as a devolution of property by death to the contestant if an heir at law. The portion transferred is considered as having been renounced by the legatee, as passing directly from the estate to the one who receives it, and that the will is inoperative to that extent. This position seems preferable to either of the other two, since the tax is intended to reach property acquired by virtue of some relation to a decedent.

By virtue of this theory the $25,010 involved in this action would pass by the intestate laws of this state because of some relation to the decedent as heirs at law, and would not deprive the state of revenue by agreement among the contestants, but could not be taxed against appellees herein, who never actually received any part of it. This was the position which the eminent trial judge must have taken, and which is ably supported by the following authorities: 29 Columbia Law Review,

1164; *Taylor v. State*, 40 Ga. App. 295; *People v. Rice*, 40 Colo. 508; *State v. Probate Court*, 143 Minn. 77; *In re Estate of Harold Thorson*, 150 Minn. 464; *In re Estate of Stone*, 132 Ia. 136; *Matter of Wolfe*, 179 N. Y. 599; *Matter of Cook*, 187 N. Y. 253; *Pepper's Estate*, 159 Pa. St. 508; *Kerr's Estate, supra; Benz v. Rogers*, 141 Minn. 93; *Hawley's Estate, supra; Taber's Estate*, 257 Pa. St. 81; *McCoy v. Gill*, 156 Fed. 985.

In *State v. Probate Court*, 143 Minn. 77, under a statute similar to ours, the court said: "The question presented is whether, where there is a purported will, the several beneficiaries therein shall pay the inheritance tax upon the amount actually received out of the estate according to a decree of distribution entered upon a good faith compromise between them, or should they each pay upon the portion designated as the share in the will? The fundamental principle in the whole inheritance tax law is to exact a tax upon the clear amount in money value received by each beneficiary, legatee or heir from a decedent's estate, by virtue of the provisions of a will, or the intestate law, or otherwise, for the tax reaches transfers made by a decedent in contemplation of death. The tax is upon the transfers by which a beneficiary, legatee or heir obtains a portion. It is not a tax upon the estate, but upon the privilege of receiving a portion thereof, and is to be computed on the clear value of the portion received. True, theoretically the transfer occurs upon the death of decedent, when it is accomplished either by will or the intestate law. And the act provides that the basis of computing the tax shall be upon the money value of the portion received as of the time of decedent's death, or as soon thereafter as it is practicable to ascertain its then true value. The intention of the act is to compute the tax upon the value of the property which is received by an heir, or legatee, out of a decedent's estate, and upon nothing else. While the law provides against evasions it also carefully guards the rights of the one from whom the tax is exacted by providing for a refund under certain

conditions. It tolerates neither evasions nor injustice nor inequalities. The law does not in terms provide that the tax shall be computed upon the will as written. The intent no doubt is to compute upon the portion received by each legatee or beneficiary.

"Where a decedent has attempted to transfer his estate by a purported will, there is frequently an uncertainty as to the persons who eventually will participate in the estate, and the amount or value of the portion to be received, and there is also a possibility that the transfer may after all be in virtue of the intestate law and not through the will. The will may turn out not properly executed, or invalid because of lack of testamentary capacity or the exertion of undue influence. Therefore, in case of a contest between the beneficiaries named in the will, or where the instrument is attacked by one claiming under the intestate law, the practical proposition is that there is no actual transfer of any portion of the estate until the final decree of distribution is made, or until a court of competent jurisdiction construes or determines the issue between the claimants. The decree so finally entered relates back, and, of course, makes the transfer effectual as of the date of death. But so far as concerns the state's right to charge inheritance tax against a transferee for an amount received, the decree must be deemed conclusive, unless entered collusively for the purpose of evading or diminishing the tax. The final determination of the courts speaks with authority concerning the transfer, the transferee, and the portion transferred. And the inheritance tax law no doubt intended that, where there was uncertainty or a contest, the tax should be computed according to the final adjudication between the parties. A contest may be tried out, but it may also be compromised. A final judgment or decree after a trial is no more effective or binding upon the parties than one entered pursuant to a compromise. In this case there was a valid compromise and a decree of distribution agreed upon."

State v. Probate Court, supra, and other cases suggest that another principle may be applied to the facts in the instant case. A beneficiary in this will might refuse to accept the portion given. Certainly if he refused to accept the gift, no tax could be collected with respect to him, because there has been no transfer to him. The right to renounce the privilege of accepting the legacy is neither denied nor forbidden by the statutes or any authorities which we have been able to find. Upon his effective renunciation the title to or ownership of the property making up the legacy remains in the estate to be disposed of under the terms of the will or under the intestate law of the state and is taxable in accordance with the nature of the ultimate devolution. Logically, it would seem to follow that, if a beneficiary may renounce the whole legacy, he may renounce a part, and the part so renounced is not subject to the tax as property transferred to him by the will. When a will contest has been amicably settled between the beneficiaries named in the will and the heirs at law and they have in good faith stipulated for a decree of distribution in accordance with the settlement and there is no intent thereby to evade or reduce the inheritance tax, the tax should be computed upon the portion received by each beneficiary under the decree.

This court adopts this theory which justly places the burden imposed by statute upon those who actually receive the money or property, encourages the settlement of litigation, is for the best interests of society, and preserves property otherwise dissipated in payment of fees and court costs for another generation, thus ultimately providing more revenue for the state of Nebraska.

Having taken this position, the court did not commit error in admitting evidence of the effect upon the property of the estate of the litigation growing out of the contest of the will, as it was admissible to show that the stipulation and settlement were entered into in good faith

without collusion of the parties to evade or reduce the inheritance tax.

The decree of the district court is

AFFIRMED.

VIVIAN FORBURGER, APPELLANT, V. CLARENCE FORBURGER, APPELLEE.

FILED MARCH 11, 1932. No. 28128.

1. **Divorce**: DENIAL OF DECREE. In a divorce proceeding, where each party seeks a divorce against the other on the ground of extreme cruelty, and it appears that each is guilty of acts which amount to extreme cruelty, a court of equity is justified in refusing a divorce to either.
2. ———: DIVORCE A MENSA ET THORO: MAINTENANCE. In a proceeding for divorce upon the ground of extreme cruelty, where the facts fairly establish recrimination and absolute divorce is denied, the evidence showing the disposition of the parties to be such as to make conjugal happiness impossible, the trial court has jurisdiction to grant a divorce to the wife *a mensa et thoro* and award her pecuniary relief by way of separate maintenance.
3. ———: MAINTENANCE: AMOUNT OF AWARD. A monetary award of separate maintenance to the wife should bear an equitable proportion to the husband's income.

APPEAL from the district court for Lancaster county: JEFFERSON H. BROADY, JUDGE. *Affirmed as modified.*

Beghtol & Foe and *J. Lee Rankin*, for appellant.

Perrin & Kier and *Perry, Van Pelt & Marti, contra.*

Heard before ROSE, GOOD and EBERLY, JJ., and CARTER and CHASE, District Judges.

CHASE, District Judge.

This is a suit for divorce brought by Vivian Forburger against her husband, Clarence Forburger. The wife was plaintiff below and the husband defendant, and for convenience we will refer to them as such herein.

The ground relied upon by the plaintiff for her divorce is extreme cruelty. The defendant answered denying the allegations of plaintiff's petition, and by way of cross-

petition alleged extreme cruelty, praying for a divorce from the plaintiff.

After a long and detailed trial lasting several days, the court refused a divorce to either party and ordered both the petition and cross-petition dismissed; but did find that the plaintiff was entitled to a divorce from the defendant from bed and board and entered a decree accordingly, awarding her the sum of $75 a month for separate maintenance.

The plaintiff appeals only from the monetary award allowed by the court for her separate maintenance. The defendant prosecutes a cross-appeal, not only from the order denying his divorce, but also from the decree granting the plaintiff a divorce from bed and board, and separate maintenance.

The record is quite voluminous, consisting of nearly 600 pages of typewritten matter, exclusive of a vast number of exhibits. The plaintiff, at the time she met the defendant, was married and had a husband living. The defendant was then living with his second wife, he having been previously divorced from his first. The parties seem to have been infatuated with each other from their first meeting, but, as will appear later, this infatuation was of short duration. As a result of this quite imaginary fancy, the plaintiff obtained a divorce from her husband and the defendant employed the same procedure to free himself from his wife.

These parties were married on December 23, 1929. The plaintiff is 37 years of age and has one child by her former marriage, and the defendant is 46 years of age and has three children by his first marriage. There are no children of this marriage.

A considerable portion of the record is taken up in detailing a long series of illicit relations existing between the parties prior to their marriage. The trial judge listened with commendable patience to the defendant's testimony of these premarital relations, which could not have been offered for any other purpose except to cast slander

and disgrace upon the plaintiff. Certainly the conduct of the parties prior to their marriage cannot be considered as bearing any material relation to the issues involved in a suit for dissolution of that relation. The defendant pleads his own dissolute conduct and introduces evidence in support thereof as a reason for obtaining a divorce from the plaintiff. We are aware of no principle of law or logic that will allow a party to reap any reward from his own wrongful conduct, and more especially against the other party to the suit with whom he is *particeps criminis*. This whole story convinces us that there exists between these parties such an incompatibility of disposition as would destroy all conjugal felicity, if it could be truthfully said that any had previously existed. Without the testimony presented by this record, it would be difficult for one to believe that such marked variations of human feeling could find habitation in the receptacle of a single mind. At one time we find the defendant balancing upon the pinnacle of amorous ecstasy, and at the next plunged into the lowest depths of hatred and malevolence, and while under the influence of such spells committed unwarranted acts of violence against the plaintiff, such as striking and kicking her. The plaintiff, too, seems to be capable of exhibiting a similar flexibility of temperament. At times she displays quite an uncommon affection for her husband, while at others she hurls at him vile and insulting epithets, commits assaults upon him, and finally in a fit of anger cast a stone through the window of his automobile.

The trial judge had the opportunity to observe, not only the demeanor of the parties themselves, but their witnesses, in giving their testimony, and the candor and fairness with which they testified; and after full hearing was either of the opinion that the extreme cruelty charged by both parties had not been sufficiently proved to justify a dissolution of the bonds of matrimony or that recrimination was established to such a degree that neither party was entitled to the intervention of a court of equity for

the relief sought. Both parties had the previous experience of married life, and in each instance the legitimate objects of matrimony had aborted. In the interest of society courts are justified in refusing divorces to persons who present such a history, especially when there is question as to whether the statutory grounds have been sufficiently established. The powers of a court of equity should not be employed to satisfy the mere wants or desires of the parties in order that they might be freed from a burdensome status cast upon them by law, unless good reasons therefor have been fairly established. We believe the trial court was eminently correct in denying to each of the parties an absolute divorce.

The question now left for consideration is whether or not the court erred in granting a divorce *a mensa et thoro*, and awarding separate maintenance. It appears that there is an almost total absence of affinity existing between these parties and the hope of their ever living together in an atmosphere of marital bliss has departed. The trial court, having assumed jurisdiction of the case, could render any decree determining the rights of the parties in accordance with equity and good conscience. After a review of the entire record, we would not feel justified in asserting that the trial court was incorrect in granting a divorce from bed and board. Social welfare will best be conserved by compelling parties, with histories such as these, to remain bound by the marriage ties, but if their dispositions are such that they cannot happily live together they should be permitted to live apart.

We have searched the record in vain to satisfy ourselves as to even the approximate financial worth of the defendant. The evidence showed the defendant to be a man of some wealth, but the amount thereof is veiled in uncertainty. It appears that at the time of the trial he had an income of between $14,000 to $15,000 a year as a salary from his stone business in the city of Lincoln, and in addition thereto that he had some income property, the amount and value of which is not definitely shown. It

would not be an unwarranted conclusion to draw from the facts that the defendant was, at the time his case was heard, enjoying a total income of between $16,000 and $18,000 a year. The defendant should be brought to realize that there are oftentimes financial hazards connected with matrimonial excursions such as the last one in which he finds himself involved. It would seem that an award of separate maintenance made by the trial court hardly bears a sufficient proportion to the defendant's income to be equitable. However, we should not be unmindful of the fact that business generally has suffered a diminution of profits in the last twelve months. The plaintiff, before her marriage, was a clerk in a department store and perhaps not earning as much as she asks the defendant to pay her, yet, due to the effect upon her social standing, which must follow from the airing of such salacious incidents as the defendant has insisted on bringing into this case, and from the scandal and contumely heaped upon her by the defendant, she, doubtless, has suffered some diminution in earning power. The rule to be adopted by courts in determining these questions should be only in furtherance of equity and justice, but they must be ever vigilant in order that designing women may not successfully employ the institution of marriage as a means of future affluence. In view of all the circumstances, we conclude that an award for her separate maintenance in the amount of $125 a month is not excessive and it is hereby increased to that amount.

The plaintiff asks further that a reasonable sum be allowed her attorney for the prosecution of her appeal herein. It appears from the record that the district court has dealt with the plaintiff's attorney with reasonable liberality up to this time. The only service left to be compensated for is the preparation for the appeal in this court. The plaintiff's attorney is hereby allowed the sum of $150 to be paid by the defendant for such service.

With the modification above indicated, the judgment is affirmed.

AFFIRMED AS MODIFIED.

G. A. STEINHEIMER COMPANY, APPELLEE, V. JOHN PODKOVICH, APPELLANT.

FILED MARCH 11, 1932. No. 28171.

1. Master and Servant: WORKMEN'S COMPENSATION LAW: SPECIAL PROCEEDING: FINAL ORDER. The workmen's compensation law is a special proceeding within the meaning of section 20-1902, Comp. St. 1929, and the order made by the trial court is a final order within the meaning of such section.
2. ———: ———: JUDGMENT. Under the workmen's compensation law the parties are entitled to a final and complete disposition of their cause, and failure on the part of the trial court to make such disposition constitutes error.

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

Brome, Thomas & McGuire and *G. H. Seig,* for appellant.

Lee & Bremers, contra.

Heard before ROSE, GOOD and EBERLY, JJ., and BROADY and CHASE, District Judges.

CHASE, District Judge.

This is an appeal from a judgment of the district court in a case arising under the provisions of the workmen's compensation law. The trial court found that the total temporary disability which the employee had previously suffered had ceased, but ordered that the employee be placed for treatment under the care of Doctor Schrock for the purpose of determining whether permanent disability had resulted, and, if so, the extent thereof. The order required the doctor to report his findings within three months thereafter, and further ordered that, in the event such doctor decided an operation to be necessary, the payments for temporary disability be made at the rate of $15 a week during the time the operation may be complete. From this order the employee has appealed to this court.

A consideration of two propositions involved in this controversy will be sufficient for a complete determination

of the cause: First, will an appeal lie from an order of this character? Second, if so, did the trial court commit error in entering such an order? The appellee contends that the order made by the trial court is not appealable in that it is not a final order.

This court has held on numerous occasions that, generally speaking, only final orders are appealable, but a careful examination of section 20-1902, Comp. St. 1929, convinces us that the legislature intended to make an exception in cases of this character. This statute, among other things, provides as follows: "An order affecting a substantial right made in a special proceeding * * * is a 'final order' which may be vacated, modified, or reversed." Certainly the order under consideration here affects the substantial rights of the plaintiff.

The statute providing compensation for injured employees is a special one. The legislature therein undertakes to protect an injured employee and his family by awarding him compensation for injuries he sustains resulting from his employment. Unlike other actions for personal injuries, his rights are not based upon a tort or wrong, but grow out of the contractual relationship of master and servant. Only a limited class can resort to it for redress. In this sense the statute is *sui generis.* It is intended to be complete in itself and, ordinarily, resort need not be had to any other general statute to insure to the injured workman compensation for injuries he may have sustained during the course of and growing out of his employment. It provides special rules of pleading. It is calculated to afford an early hearing of the cause and secure to the injured employee speedy and accurate justice. This statute is a special one and comes within the provisions of the section above quoted. It follows, therefore, that the order made is final in cases of this character and hence is appealable. This same general doctrine has been announced by this court in *Schlesselman v. Travelers Ins. Co.*, 111 Neb. 65.

On the question of whether or not the court committed

an error in rendering judgment such as it did, it will be necessary to set forth a brief summary of the evidence. It appears that the appellant, John Podkovich, for a number of years had been employed as a painter and interior decorator by the A. G. Steinheimer Company, and for the past eight years, as such, had been earning about 90 cents an hour; that on January 12, 1930, while employed by the appellee, he was painting the interior of a building. While standing on a scaffold about ten feet in height, the scaffold broke, precipitating him to the cement floor below, fracturing the os calcis of the right foot, which, in ordinary parlance, is the heel bone. There is no question that the injury arose out of and in the course of the appellant's employment. Several physicians were called to give testimony as to the nature, extent and effect of such injuries.

Doctor Fouts and Doctor McQuiddy, members of the medical advisory board of the labor commissioner's office, testified that the appellant had received a fracture of the os calcis; that the bone formation on both sides of the ankle joint was increased in size; that the effect of this injury would be an impairment of the normal flexion of the foot; and that in their opinion appellant had suffered at least 25 per cent. permanent partial disability.

Doctor Rich, an instructor of surgery of the University of Nebraska, testified that from an examination he made of the appellant he noticed a considerable enlargement of his right foot; that this condition caused the patient pain in walking; that an operation for stabilization of the ankle would be advisable, but such an operation would destroy the flexion of the ankle joint and the ankle would remain stiff thereafter, but it would remove any pain that might result from walking; that in his present condition, taking into consideration that he was a painter and required to climb ladders and work upon scaffolding, he was of the opinion that the patient had suffered 100 per cent. disability of the ankle.

Doctor Robert Schrock, orthopedic surgeon, was called

as a witness for the appellant. He testified that he had examined the injured limb on two different occasions, the last being in May, 1931, at which time he took X-ray pictures; that he noticed the lateral motion of the appellant's ankle was about one-quarter normal, and also noticed a slight crepitation or grinding when this action is performed, and he was of opinion that the patient was suffering from at least 25 per cent. loss of the foot. Doctor Duncan also testified that he was of the opinion the appellant had suffered a 25 per cent. permanent partial loss of the use of his foot.

It will be noted that the trial court found the appellant was not suffering from any temporary total disability at the time, but ordered him committed to the care of a physician in order to determine whether the appellant was suffering a permanent disability, and its degree. The order further provided that, if the doctor should decide the appellant was suffering a permanent disability, he be required to report thereon within three months from the date of the order. The order further provided that, if the doctor should decide upon an operation, payments for temporary disability be given in the amount of $15 a week during the time the operation may be complete.

Under this order the compensation which had previously been paid to the appellant had ceased and determined during the period that he was placed under the observation of the doctor, or until the doctor made a report. The order appears to be somewhat inconsistent. In one paragraph it finds that the appellant was suffering from no temporary total disability, and yet he is committed to the charge of a physician in order that the physician may determine whether permanent disability exists, and its degree. It will be noted that the court finds no temporary total disability to exist. Under this order, in the event the physician should find any disability existing, the effect would be to leave the appellant without compensation until the physician makes this finding. Further, the duty

to determine the disability of the appellant, whether temporary total, temporary partial, permanent total, or permanent partial is transferred from the court to the physician, after the court has found that no temporary total disability existed.

We have a profound respect for the opinions of the learned trial judge, and have no hesitancy in stating that we believe his intention was to obtain results which he conceived to be for the best interests of the appellant. However, the question we are called upon to determine is whether or not appellant, as a matter of law, was entitled to a complete disposition of his case at the hands of the trial court. His rights, by the terms of the order, are certainly left in abeyance, as the compensation he was receiving has terminated, and no provision for other compensation was made or no finding that he is not entitled to any compensation, either temporary total, temporary partial, permanent total, or permanent partial. Such a finding as to one of these matters the appellant was entitled to receive at the hands of the trial court. An order should have been made, either finding the appellant was free from all disability, or finding the extent and nature of his disability and an award made therefor. A failure to do so constitutes error, for which the judgment is reversed and the cause remanded.

REVERSED.

IN RE ESTATE OF MICHAEL P. ABTS.
JOHN W. LANGLEY ET AL., APPELLEES, V. EMMA E. ABTS, APPELLANT.

FILED MARCH 11, 1932. No. 28043.

1. **Appeal: BILL OF EXCEPTIONS: AUTHENTICATION.** "The rule is settled that this court will, on its own motion, refuse to consider a document appearing in the record and purporting to be a bill of exceptions, when not authenticated as such by the certificate of the clerk of the trial court." *Union Stock Yards Nat. Bank v. Lamb*, 92 Neb. 608.

2. WILLS: CONTEST: UNDUE INFLUENCE: INSTRUCTIONS. In a will contest, where the will in question is not an unnatural one, ordinarily the conditions created by a marriage relation which has existed for a long time would have but very little value as a circumstance upon which to base a finding of undue influence, by a wife upon her husband, in securing the execution of a will in her favor; and the singling out of such fact and specifically directing the jurors' attention to it in an instruction would have a tendency to unduly stress its importance as evidence.
3. ———: ———: ———: ———. In a will contest, on the issues of mental capacity and undue influence, *held* error to instruct the jury as to the provisions made by law for a wife in her intestate husband's estate.

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

Garlow & Long, for appellant.

McElfresh & Walker, contra.

Heard before GOSS, C. J., EBERLY and PAINE, JJ., and BEGLEY and ELDRED, District Judges.

ELDRED, District Judge.

This is a will contest. Emma E. Abts, proponent and appellant, filed in the county court of Platte county a petition for probate of an instrument purporting to be the last will and testament of Michael P. Abts, deceased. John W. Langley, Susan Stupfel, Isabel Stupfel, and Alois Patsch, contestants and appellees, filed objections to the probate of the will. From the decree of the county court admitting the will to probate appeal was taken to the district court. On trial of the issues of mental capacity and undue influence before a jury in the district court, verdict was returned in favor of contestants on January 21, 1931, and on the same day judgment was entered on verdict denying probate of will. June 2, 1931, motion for judgment *non obstante veredicto* and motion for new trial on the part of the proponent were severally overruled. Proponent appeals.

It is urged by the contestants that the purported bill

of exceptions on file cannot be considered by this court for the reason that it has never been authenticated by the certificate of the clerk of the trial court, as provided by section 20-1922, Comp. St. 1929. The transcript and purported bill of exceptions are in separate volumes. No certificate of the clerk of the district court is attached to the bill of exceptions. The certificate to the transcript is dated June 17, 1931, and contains the clause, "I further certify that the bill of exceptions attached hereto is the original bill of exceptions filed in this office." The transcript was filed in the office of the clerk of this court June 30, 1931. The purported bill of exceptions now of record here appears to have been settled by the trial judge July 25, 1931, and filed in the office of the clerk of the district court September 5, 1931. It thus appears that the bill of exceptions now on file in this court was not on file in the office of the clerk of the district court at the time the clerk's certificate attached to the transcript was made. The certificate attached to the transcript could not, therefore, be made to apply to the purported bill of exceptions.

"The rule is settled that this court will, on its own motion, refuse to consider a document appearing in the record and purporting to be a bill of exceptions, when not authenticated as such by the certificate of the clerk of the trial court." *State Bank v. Bradstreet,* 89 Neb. 186; *Union Stock Yards Nat. Bank v. Lamb,* 92 Neb. 608. See *Dugger v. Smith,* 94 Neb. 552.

The bill of exceptions not being authenticated by the certificate of the clerk of the district court, the objection of appellees to its consideration is well taken, and it must be disregarded.

The first assignment of error challenges the sufficiency of the evidence to sustain the verdict.

"Assignments of error that require an examination of the evidence are unavailing on appeal in absence of a bill of exceptions." *Anthony Doll & Co. v. Strien,* 121 Neb. 43.

Complaint is made of the statement of the court in instruction No. 2, as to names of parties contesting. On

examination we conclude that the statement complained of is in harmony with the record.

The jury by instruction No. 9 were instructed as follows:

"You are instructed that in determining whether or not the will of August 3, 1930, was the result of undue influence, you should take into consideration all of the circumstances surrounding its execution, including the closeness of association between the deceased and his wife, Emma E. Abts, at and prior to the execution of the will, the opportunity of the wife to exercise influence upon the deceased in the disposition of his property, the previous attitude of the deceased in the disposition of his property, and the weakened condition of the deceased at and immediately prior to such execution, as bearing upon the matters of susceptibility to suggestions and whether or not he was more likely to respond to suggestions and influence in the disposition of his property than if he were not in such weakened condition."

The clause, "including the closeness of association between the deceased and his wife, Emma E. Abts, at and prior to the execution of the will, the opportunity of the wife to exercise influence upon the deceased in the disposition of his property," is criticized. Does not this language too emphatically direct the attention of the jury to the natural social relationship between husband and wife, and have a tendency to impress upon them the idea that they were to consider this natural relationship between such parties and their close association as a more important factor in determining the question of undue influence than should be given it? Where the marriage relationship is of long standing, and the will not an unnatural one, ordinarily the conditions created by such relationship would have but very little value as a circumstance upon which to base a finding of undue influence, by wife upon husband, in securing execution of a will in her favor, and the singling out of such fact and specifically directing the jurors' attention to it would have a tendency to unduly stress its importance as evidence.

In the statement of facts in appellant's brief it is stated: "In 1890, Michael P. Abts and Emma E. Abts were married and lived together until his death, which occurred on the 4th day of August, 1930. At date of their marriage neither had any property. Each of them was very industrious and frugal and by their joint efforts and frugality had, at the time of his death, accumulated considerable property (the items being set out, aggregating about $25,000). They never had any children." This statement as to the facts, not being controverted by appellees, will, for the purposes of this appeal, be taken as correct. The will, under such circumstances, would not be an unnatural one; and the presumption of undue influence to be drawn from the confidential relationship of husband and wife, if any, would be very slight. *Boggs v. Boggs,* 62 Neb. 274. The giving of instruction No. 9, with clause criticized, was prejudicial to appellant.

At the request of the contestants the jury were instructed:

"You are instructed that, in determining the issues herein, you may take into consideration the fact that the law of this state provides that in case of the death of a married man, leaving a widow and no children, in the absence of a will, the widow inherits one-half of the estate left by her husband in addition to certain allowances and specific property, and that in case such husband left a will, the widow is entitled to elect to take such statutory share if she is not satisfied with the share given her by the will."

We fail to see how this instruction could act as a guide or assist the jury in determining either the question of mental capacity or undue influence submitted to them; or any other issue properly considered by the jury in arriving at their verdict. It constituted something of an invitation for the jury to substitute their own judgment for the will of the testator as to what would be a proper disposition of testator's property, in view of what the law would give the widow if no will was made. Yet, it fell

short of furnishing the necessary information for that purpose, as it only advised them of a part of the provisions made by law in case the deceased died intestate; stating, "in the absence of a will, the widow inherits one-half of the estate left by her husband in addition to certain allowances and specific property," but failed to tell the jury what the "certain allowances and specific property" might be; leaving the jury to speculate as to that. If it were proper to advise the jury as to the law of descent in a case of this character then they should be fully advised and nothing be left for speculation.

The further clause in the instruction that, "in case such husband left a will, the widow is entitled to elect to take such statutory share if she is not satisfied with the share given her by the will," is also open to criticism. The jury, not being advised of what the statutory share might consist, were left not only to speculate or presume as to that, but to weigh the provisions made for her by the will in controversy and the prior will, referred to and set forth in the objections of the contestants in the transcript, with the provisions made by law, so far as set out in the instructions, and then determine whether she should have been satisfied. It would seem clear that this instruction suggested the consideration by the jury of matters that were not an issue in the case.

Errors are also urged in other instructions given by the court and in the refusal to give instructions requested by appellants. We have considered these other assignments, but as an examination of the evidence would be necessary to determine the applicability of the instructions and the rulings of the court as to the abstract proposition of law appearing correct, the assignments are unavailing.

REVERSED AND REMANDED.

GENERAL MOTORS ACCEPTANCE CORPORATION, APPELLEE, V. GEORGE SUTHERLAND: JOE CHANCELLOR, APPELLANT.

FILED MARCH 11, 1932. No. 27978.

1. **Sales on Condition:** AFFIDAVIT: SIGNATURE. Signature to affidavit attached to conditional sale contract as required by section 36-208, Comp. St. 1929, need not appear at the end, if it appears in any part, was placed there by party, and is applicable to the whole circumstances of the affidavit.
2. ———: ———: SEAL. Generally, omission of seal is not fatal; purpose of affixing seal being merely to attest the genuineness of signature of officer.
3. ———: CONTRACT: ADMISSIBILITY IN EVIDENCE. A conditional sale contract may be received in evidence, notwithstanding the facts that the affiant's signature appears only in the body of the affidavit thereto attached, and the seal of the notary public is lacking.
4. **Liens:** CREATION: ESTABLISHMENT. All liens are created by law or contract, and to establish a lien the contract must be made with owner of property on which the lien is sought to be imposed.
5. **Sales on Condition:** VENDOR'S LIEN: ARTISAN'S LIEN: PRIORITIES. Generally, lien of artisan making repairs to chattel at instance of conditional vendee in possession is subordinate to rights of conditional vendor under contract of which artisan has constructive or actual notice.
6. ———: CONTRACT: PROVISION AS TO LIENS: ARTISAN'S LIEN. Provision of conditional sale contract under which automobile was sold requiring vendee to keep property free of tax liens and incumbrances negatived existence of implied authority on part of conditional vendee to have repairs made on credit of automobile.
7. **Liens:** CREATION. A lien is proprietary interest, at most a qualified ownership, and actually can only be created by owner.
8. **Sales on Condition:** ARTISAN'S LIEN. Section 52-201, Comp. St. 1929, giving possessory lien for repairs on automobile, does not warrant presumption that conditional vendee has authority to incumber automobile for repairs thereon without consent of vendor.
9. ———: ———. Repairer of automobile sold under conditional sale contract had no possessory lien under section 52-201, Comp. St. 1929, as against unpaid conditional vendor, in absence of showing that repairs were made at request of or with consent of conditional vendor or assignee.

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

E. A. Wunder, for appellant.

Denney & Denney, Reed, Ramacciotti & Robinson and *Roman L. Hrushka, contra.*

Heard before ROSE, GOOD and DAY, JJ., and CHAPPELL and LANDIS, District Judges.

LANDIS, District Judge.

Replevin by General Motors Acceptance Corporation, as plaintiff, against George Sutherland, Chancellor Garage and Tire Company and Joe Chancellor, defendants, to recover possession of an automobile. Plaintiff obtained judgment against all the defendants in the county court, and again in the district court, where jury was waived and trial had to the court. Defendant Joe Chancellor appeals.

There is no dispute as to the facts. According to admissions in the pleadings, stipulated facts and evidence, on June 3, 1929, C. B. Clarke, doing business as Clarke Motor Company, sold to George Sutherland a new Pontiac automobile on a conditional sale contract, under the terms of which the title to the automobile remained in the seller, until all payments had been made.

The Clarke Motor Company assigned all of its interest in and to the conditional sale contract and the property covered thereby to the plaintiff. A certified copy thereof was filed in the office of the county clerk on June 8, 1929.

The defendant carries on the business of an automobile repairer. While the automobile was in the possession of the conditional vendee Sutherland it was damaged, and in November, 1929, he placed it in the hands of the defendant for necessary repairs. The defendant made the repairs, charging therefor, for one front fender, $11.25; one splash apron, $4.75; one running board, $8.75; one hub cap, 75 cents; express on parts, $2.10; recharging battery, $1; painting fender and door, $15; labor, straight-

ening angle frame and fender and replacing the new parts, $36.40, total, $80. Conditional vendee paid $10 on the charges, $70 thereof remaining unpaid, and defendant refused to deliver the automobile until the balance was paid.

The conditions and agreements of the sale were not fulfilled and performed by the conditional vendee, and the plaintiff seeks possession of the automobile under the terms of the conditional sale contract. Defendant held possession of the automobile on the ground that the lien for repairs is superior to the interest of the plaintiff.

When the plaintiff offered the conditional sale contract, defendant interposed the objection: "Defendant Joe Chancellor objects to the introduction of the exhibit for the reason that it is incompetent, irrelevant and immaterial under the issues in this case, the claim of the defendant being based on an artisan's lien and not on a purchase or general creditor's lien; for the further reason that said exhibit purports to be a conditional sale contract and is not certified as provided by section 2464 of the statutes."

The section referred to provides: "Said copy shall have attached thereto an affidavit of such vendor or lessor, or his agent or attorney, which shall set forth the names of the vendor and vendee, or lessor or lessee, or description of the property transferred and the full and true interest of the vendor or lessor therein." Comp. St. 1929, sec. 36-208.

Defendant contends that, because the signature of the affiant, C. B. Clarke, appears only in the fore part of the affidavit, and because the seal of the notary is missing, the court committed error in receiving the exhibit in evidence. In his brief, in discussing this question, he says: "Under the issues as formed in this case the defendant was not justifying his possession as either purchaser or judgment creditor, being the only two classifications of persons to whom a proper filing of the certified copy would impart notice under section 36-208."

Before the objection was made, defendant stipulated: "That the amount due on plaintiff's claim, based on exhibit A attached to plaintiff's petition, from George Sutherland who is in default in this action is the amount rendered in the county court of $378. It is further stipulated that exhibit A is the original signed conditional sale contract sued on in this action and that the signatures thereon are the signatures of the parties together with the assignment of said contract to the plaintiff and that the plaintiff is the owner of said contract."

The affidavit to the filed copy of the contract was as defined by the statutes. It was signed by C. B. Clarke, and the notary says it was subscribed and sworn to before her over her signature as notary public. True the signature of C. B. Clarke was in the beginning of the affidavit rather than at the end. But the signature need not be at the end, if it appears in any part, was placed there by the party, and is applicable to the whole circumstance of the affidavit. The purpose of affixing a seal is merely to attest the genuineness of the signature of the officer. Its omission is not generally held to be fatal. The trial court properly overruled the objection of the defendant to the exhibit. *McAbee v. Gerarden,* 187 Wis. 399; 1 R. C. L. 769, sec. 13; 2 C. J. 357.

The important question is the determination of priorities of the respective claims to possession. Defendant contends that as artisan he has a lien on the automobile paramount to plaintiff. Defendant's possessory lien is based on section 52-201, Comp. St. 1929:

"Any person who makes, alters, repairs or in any way enhances the value of any vehicle, automobile, machinery, farm implement or tool, or shoes a horse or horses, or mule or mules, at the request of or with the consent of the owner, or owners thereof, shall have a lien on such vehicle, automobile, machinery, farm implement or tool, or horse or horses, mule or mules, while in his possession, for his reasonable or agreed charges for the work done or material furnished, and shall have the right to retain said property until said charges are paid."

Defendant repaired the automobile at the request of the conditional vendee. His charges were reasonable, and he retained the possession thereof for the unpaid charges until taken under the writ of replevin. Plaintiff is assignee of a prior filed conditional sale contract, and had no knowledge of the repairing done by defendant until the same was completed. Conditional vendee defaulted in his payments and plaintiff replevied the automobile.

The precise question here involved has never been determined by this court. Defendant cites cases from California, Minnesota, New York, and Wisconsin. The California statute creates a prior artisan's lien for repairs made at the request of the owner or legal possessor of the property. Deering Civil Code 1931, sec. 3051. The Minnesota statute gives a lien for work or material used in the repair of personal property at the request of the owner or legal possessor. Mason's Minn. St. 1927, sec. 8507. The statute also defines the term "owner" to include a conditional vendee or mortgagor in possession. Mason's Minn. St. 1927, sec. 8528. The New York statute provides that a repair-man should have a lien for work done at the instance or request of a conditional vendee in possession. 6 McKinney's Consolidated Laws of N. Y. sec. 184. The Wisconsin statute allows an artisan's lien for work done at the request of an owner or legal possessor of chattel property. 3 Wis. St. 1913, sec. 3343.

In *Cache Auto Co. v. Central Garage*, 63 Utah, 10, it is pointed out that, in states where the lien of an artisan has been entitled to priority, it was because of a statute which specifically so provided. The leading cases from many jurisdictions are considered and the conclusion reached that no lien on chattel property sold by conditional sale can be obtained by one making repairs at the instance of the conditional vendee, where the statute provides for such a lien when the repairs are made at the request of the owner.

According to the decisions in the states of Idaho, Maine, Utah, and Washington, which have statutes like Nebras-

ka, before the artisan can have any possessory lien on the automobile at all, the repairs must have been furnished at the request or with the consent of the owner. *Neitzel v. Lawrence,* 40 Idaho, 26; *Hartford Accident & Indemnity Co. v. Spofford,* 126 Me. 392; *Wilcox v. Mobley,* 116 Wash. 118; *Cache Auto Co. v. Central Garage, supra.*

If A loans his automobile to B for a pleasure trip, and without A's knowledge or consent an artisan repairs same at the request of B, could the artisan assert his possessory lien for reasonable repairs under section 52-201, *supra,* as against A? All liens are created by law or by contract, and to establish a lien the contract must be made with the owner of the property upon which a lien is sought to be imposed. Our statute says the repairs must be made at the request of the owner. It seems obvious in the supposed case that A could successfully replevin his automobile from the artisan.

As a general rule, the lien of an artisan making repairs to a chattel at the instance of the conditional vendee in possession is subordinate to the rights of the conditional vendor under a contract of conditional sale of which the artisan making the repairs has constructive or actual notice. *Hollis & Ray v. Isbell,* 124 Miss. 799; *Shaw v. Webb,* 131 Tenn. 173; *Small v. Robinson,* 69 Me. 425; *Baughman Automobile Co. v. Emanuel,* 137 Ga. 354; *Arnold v. Chandler Motors of R. I., Inc.,* 45 R. I. 469; *Ellis Motor Co. v. Hibbler,* 219 Ala. 53; *Culberson v. Lakella Iron Works,* 170 Ark. 813.

In a conditional sale contract the title does not pass by the delivery of the property to the conditional vendee. Under such a contract the conditional vendee is bound to do something as a condition precedent to the passing of the title to the property. The title does not pass until the condition is fulfilled, although the property is delivered into the possession of the conditional vendee.

Possession of the property by the conditional vendee does not clothe him with the indicia of ownership sufficient to prevent the conditional vendor from reclaiming

same from a *bona fide* purchaser from the conditional vendee. It has been held that the conditional vendee is only a "bailee" of the property. *King v. Bates,* 57 N. H. 446. Also, that the vendee is the equitable owner. *Railway Co. v. Lumber Co.,* 130 Tenn. 354. Mere possession is not proof of property. *McComb v. Donald's Admr.,* 82 Va. 903. In *Drummond Carriage Co. v. Mills,* 54 Neb. 417, our court by Chief Justice Harrison rendered an opinion, Commissioner Ragan dissenting, wherein a common-law lien for repairs was held superior to a prior recorded chattel mortgage. This decision was made previous to the enactment of section 52-201, *supra,* and announces the rule: "By operation of the common law, in the absence of any specific agreement, every person who has bestowed labor and skill on a chattel bailed to him for the purpose, and has thereby increased its value, has a lien on such chattel and may retain it until paid his reasonable charges for his services." The opinion concludes with the following: "We are not holding that in all cases, or generally, the common-law lien will override and be superior to the prior chattel mortgage lien, but that in cases where the mortgagor can be said to have expressed or implied authority from the mortgagee to procure repairs to be made on the mortgaged property it will be so."

The Maryland Court of Appeals in *Meyers v. Neely & Ensor Auto Co.,* 143 Md. 107, holds that the rights of the conditional vendor are inferior to the common-law lien of a mechanic who has made repairs on the property, where the circumstances of the sale were such as to imply a consent by the conditional vendor that the conditional vendee may have it repaired when necessary.

On the other hand, there are cases which deny that there is any implied consent from entrusting an automobile with the conditional vendee, which will subject the conditional vendor's interest to the right of a mechanic employed by the conditional vendee. *Arnold v. Chandler Motors of R. I., Inc.,* 45 R. I. 469; *Bath Motor Mart v. Miller,* 122 Me. 29.

It is to be noted that there is a marked difference between the position of a mortgagor and a conditional sale vendee. The former must own the property which he mortgages. He is commonly known as the owner. This is not true as to the conditional sale vendee. He holds possession under an executory contract to purchase. He may have acquired equitable rights in the property, but he is not the owner.

In the instant case the conditional vendee got a new automobile and contracted to "keep said property free of all taxes, liens and incumbrances; shall not use same illegally, improperly, or for hire;" so that any presumption of implied authority upon the part of the conditional vendee to have repairs made upon the credit of the automobile itself would do violence to the real understanding of the conditional sale contract. This very definite provision negatives the existence of an implied agreement. A lien is a proprietary interest, at most a qualified ownership, and usually can only be created by the owner. Where the statute gives a lien, and does not provide for the priorities, then it must be interpreted as consistent with prior law, there being nothing in it inconsistent with the well-established rule that a prior lien, duly recorded, gives a prior claim.

In *Rankin & Schatzell v. Scott,* 12 Wheat. (U. S.) 177, Chief Justice Marshall said: "The principle is believed to be universal, that a prior lien gives a prior claim, which is entitled to prior satisfaction, out of the subject it binds, unless the lien be intrinsically defective, or be displaced by some act of the party holding it, which shall postpone him in a court of law or equity to a subsequent claimant."

Defendant claims a lien by force of a statute, section 52-201, *supra.* This statute has no technical terms, is unambiguous, plain, and easily understood. To give the conditional sale vendee implied authority to create a lien for repairs involves the necessity of changing the literal meaning of the statute. This would violate a fundamental rule of construction that, unless technical words or terms

are used, they should be given their usual and ordinary meaning.

This section does not warrant the presumption that a conditional sale vendee has authority to incumber the automobile, the legal title to which is reserved in the conditional vendor, unless the consent of the vendor is shown by some conduct or act on its part aside from merely putting the conditional vendee in possession, and permitting him to use the automobile pending payment of the purchase price. Under our system of government the office of a judge is *jus dicere,* not *jus dare*—to interpret the law, not to make the law. The legislature makes the law, has declared it plainly.

The artisan who is not bound to accept an automobile for repairs, but only does so at his election, must regard section 52-201, *supra,* as not providing for a possessory lien as against the unpaid conditional vendor under a duly filed conditional sale contract, which forbids liens being created on the chattel, unless the repairs are made at the request or with the consent of the conditional sale vendor.

The judgment of the trial court is right and is

AFFIRMED.

NUTRENA FEED MILLS, INC., APPELLANT, V. SUPERIOR WHOLESALE GROCERY COMPANY, APPELLEE.

FILED MARCH 11, 1932. No. 28011.

1. **Banks and Banking**: DRAFT: COLLECTION: AGENCY. When a bank receives a sight draft for collection and remittance, it becomes the agent of the sender for such purpose.
2. ———: ———: PAYMENT. When a draft with a bill of lading attached is sent to a bank for collection and the drawee of the draft tenders to the bank its check on the collecting bank for the amount of the draft, the drawee being a depositor in the said bank with sufficient funds on deposit to pay the check, and the bank has sufficient cash on hand to pay the same, and the bank accepts and retains such check in payment of the draft, marks the draft "Paid" and delivers it to the drawee, together with the bill of lading, the draft and the account it represents are paid. The delivery and acceptance of the check, under such circumstances, is equivalent to payment in cash.

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

Borders, Borders & Warrick, T. W. Cole and *Cornelius Roach, Jr.*, for appellant.

Stubbs & Stubbs, contra.

Heard before GOSS, C. J., DEAN, EBERLY and PAINE, JJ., and Wright, District Judge.

WRIGHT, District Judge.

The plaintiff, Nutrena Feed Mills, Inc., appellant in this court, brought this action against the defendant, Superior Wholesale Grocery Company, a corporation engaged in the wholesale grocery business at Superior, Nebraska, for goods, wares and merchandise sold and delivered. The defendant answered, admitting the purchase and receipt of the goods and alleging payment therefor. Trial was had to the court without a jury. The findings were for the defendant and judgment entered dismissing the cause, from which plaintiff has appealed to this court.

The plaintiff shipped the merchandise in question to the defendant at Superior, Nebraska, and to insure payment at time of delivery drew a sight draft on the defendant for the amount of the purchase price, to which it attached the bill of lading for the merchandise shipped, and sent these two, through its bank at Kansas City, to the State Bank of Superior, Nebraska, for collection and remittance, with instructions to deliver the bill of lading upon payment of the draft. Upon receipt of notice from the State Bank of Superior that the draft was in its hands for collection, the defendant, acting through its president, personally delivered its check to the bank over the counter, for the full amount claimed. This check was drawn on the collecting bank against a deposit of the defendant with the bank, then more than sufficient to meet the same, and was by the bank accepted. Upon the receipt and acceptance of the check the bank marked the draft "Paid" and delivered the same, together with the bill of lading at-

tached, to the defendant. The bank at that time had on hand in cash in its vaults more than enough to pay this check and at that time was paying all checks of its depositors presented over the counter. The bank, however, failed to charge this check against the account of the defendant, and two days later, when it was taken over by the banking department of the state, the check was found among the other papers of the bank.

The plaintiff contends that the issuance and delivery of the check amounted to a conditional payment only; that since the check was not by the bank charged against the account of the defendant it was never honored and the defendant parted with nothing of value; that the collecting bank had authority only to collect and remit and could accept nothing but cash or its equivalent in payment, and that the mere issuance and delivery of the check did not constitute a payment of the collection item. The defendant, on the other hand, insists that when a draft with a bill of lading attached is sent to a bank for collection, and the drawee of the draft tenders to the bank a check on the collecting bank, the drawee of the draft being a depositor in the collecting bank with sufficient funds on deposit to pay the check and the bank has sufficient cash on hand to pay the check, if the bank accepts such check and marks the draft "Paid" and delivers it up to the drawee with the bill of lading, the draft and the account it represents are paid; that the check is, under such circumstances, equivalent to a payment in cash.

There seems to be no doubt that the State Bank of Superior was the agent of the plaintiff for the purpose of collecting and remitting the proceeds of the sight draft. *First Nat. Bank of Pawnee City v. Sprague*, 34 Neb. 318; *Omaha Nat. Bank v. Brady State Bank*, 113 Neb. 711; *Henefin v. Live Stock Nat. Bank*, 116 Neb. 331; *State v. Nebraska State Bank*, 120 Neb. 539.

The plaintiff contends, however, that, even though the bank was its agent, the mere passing over the bank counter of defendant's check, and the surrender of the bill of

lading together with the sight draft marked "Paid," did not constitute a payment of the debt, since the bank failed to charge the amount of the check on its books against the account of the defendant. In considering a somewhat similar situation this court, in *Scotts Bluff County v. First Nat. Bank*, 115 Neb. 273, held: "When a bank gives to one of its depositors credit in his pass-book for a check drawn by another of its depositors, having on its books ample funds to pay the check, such credit is equivalent to a payment of the check so deposited; and the depositor of the check is entitled to be considered a depositor of the cash represented by the check even though, without knowledge or connivance on his part, it was not entered on the books of the bank and the money was not further actually transferred." And in the opinion said: "No duty rested upon the treasurer (depositor) to see that the bank credited the deposit on its books, nor to see that the check was charged to Barton's (the drawer of the check) account on its books. The transaction was the same as if the bank had cashed Barton's check and then had entered the cash deposit in the pass-book to the credit of the treasurer."

While in this case there is no evidence that cash was actually counted out or physically appropriated to the payment of the plaintiff's draft, it is conclusively shown that the defendant presented its check which was accepted by the bank; that defendant had on deposit with the bank sufficient funds to pay the check and the bank had cash in its vaults more than sufficient to pay the amount and was then doing business in the usual manner, cashing all checks that were presented over its counter; and that upon receipt of the check it stamped the draft for which it was given "Paid" and delivered the same to the defendant. Under the circumstances, it became the duty of the bank to allocate a sufficient amount of its cash on hand to the payment of the check and from that time it held the amount as the funds of the plaintiff. It became no part of defendant's duty to follow the transaction further

or to ascertain whether the bank made the proper entries on its books to show the true situation.

The supreme court of South Dakota, having very much the same question before it, in *Marland Refining Co. v. Penn Soo Oil Co.*, 54 S. Dak. 10, said: "By giving the check to appellant's accredited agent, so much of respondent's money on deposit in the bank as was necessary to pay the check was segregated from his account and was in the possession of appellant through his said agent. In this case there was an agreement clearly implied that the giving of the check should be payment. Respondent had sufficient funds on deposit to pay the check, and the bank had sufficient funds on hand to pay it. It was the bank's duty to have charged the amount of the check to respondent's account and to have remitted the same to the appellant, but its failure to do so was not the fault of respondent, but of the bank who was acting as agent for appellant." Had the defendant in the present case presented its check and demanded cash, then given back the cash in payment of the draft, there could be no question that the bank then held it for the plaintiff. The result of the transaction was the same, and the fact that the parties did not go through the useless process of counting out the money and then transferring it back and forth would not change the situation. When the bank accepted the check and acknowledged the payment of the draft it amounted to a payment of the debt.

In *Andrew v. State Bank of Dexter*, 204 Ia. 565, that court held: "A bank which, as agent, receives for collection a draft, with orders to collect in cash only, and to remit to the owner of the draft, and which accepts in payments of the draft the amply protected check of the drawee upon itself, must be deemed to have collected the draft in cash, even though it fails either (1) to cancel the said check or (2) to charge the account of the drawer of the check with the amount thereof." And in the opinion the court, on the question of failure to cancel the check and make the proper charges on its books,

say: "Mechanical cancelation of the check and the process of recording items on the books were acts beyond the control of both the principal and Mr. Hammond. That was a matter of mere convenience to the agent, and could and did not affect the rights and equities of the parties or the merits of this controversy."

In this case the question arose on a claim of the principal for preferential payment out of the funds of the agent bank, it having become insolvent; but we can see no reason why the rule should be different in the present case. In each instance the delivery and acceptance of the check constituted payment, and the funds were thenceforth held by the collecting bank in trust for the principal.

The supreme court of Kansas in *Goodyear Tire & Rubber Co. v. Hanover State Bank,* 109 Kan. 772, where the payment was made as in this case by a check on the collecting bank against sufficient funds to meet the same, said: "The court is of the opinion that the rule applies that where a payment to a bank is made by a check drawn thereon the result is the same as though the depositor had presented his check, received the money over the counter, and then used it in making the payment."

Undoubtedly in those cases where the bank accepts a check when it does not have funds on hand to pay the amount or when a check is accepted drawn on another bank, which is dishonored, such acceptance by the collecting bank would not constitute payment. Under the facts in the present case we hold that the acceptance of the check by the agent bank amounted to a payment of the debt.

The judgment of the district court dismissing the action is

AFFIRMED.

EDWARD WOODRING, APPELLEE, V. COMMERCIAL CASUALTY INSURANCE COMPANY, APPELLANT.

FILED MARCH 11, 1932. No. 28039.

1. Insurance: POLICY: CONSTRUCTION. The terms and provisions of insurance policies which are prepared by the insurer will be construed most strongly against the party by whom the contract was drafted.
2. ———: ———: ———. The term "hired operator" used in a policy of insurance insuring against loss or disability following bodily injuries resulting from external, violent and accidental means while operating, driving, riding in, adjusting or cranking an automobile, and providing that it shall not cover loss suffered by a "hired operator," will not be construed to include a salesman while driving his employer's automobile as an incident to his employment in selling and delivering his employer's merchandise.

APPEAL from the district court for Douglas county: CHARLES E. FOSTER, JUDGE. *Affirmed.*

Harry W. Shackelford, for appellant.

J. J. Krajicek, contra.

Heard before GOSS, C. J., DEAN, EBERLY and PAINE, JJ., and WRIGHT, District Judge.

WRIGHT, District Judge.

This is an action brought by Edward Woodring, appellee, hereinafter referred to as plaintiff, against Commercial Casualty Insurance Company, of Newark, New Jersey, a corporation, appellant, hereinafter referred to as defendant, on an automobile accident insurance policy issued by the defendant. In the district court, at the conclusion of all the testimony, both plaintiff and defendant moved for a directed verdict. Thereupon, the court discharged the jury and entered judgment for plaintiff, from which defendant has appealed.

Under date of January 9, 1929, the defendant issued to plaintiff its "Superior Automobile Accident Policy," whereby it undertook, in consideration of the premium to it

paid, to insure the plaintiff for a stipulated term against loss or disability resulting directly and independently from bodily injuries effected solely through external, violent and accidental means while operating, driving, riding in, demonstrating, adjusting or cranking an automobile. The policy contained, however, the express provision: "This policy does not cover: (1) Any loss, fatal or otherwise, suffered by a hired operator."

The plaintiff, at the time he took the policy, gave his occupation as that of a "salesman." At that time he was employed in that capacity for a mineral springs company, and later was employed by Tall-One Bottling Company, selling its soft drinks. The president and manager of this company testified that his duties were selling soft drinks; "Going from customer to customer and soliciting business, and selling right off of the truck," the truck being furnished by the employer; that he was working for a salary of $15 a week, plus commissions. The plaintiff testified that on the day of the accident which caused his disability he was driving to Plattsmouth with his employer's truck partially loaded, to sell and deliver the bottled goods; that he was hired to sell and deliver his company's products; that his work did not always consist of delivering; "It was selling wherever I could, and if I had the goods, to deliver them. I took the orders." "I solicited new customers. That was the object in going to Plattsmouth." He had made one trip to Plattsmouth before to sell goods and had one customer and he had planned to make regular trips down there about once a week as he worked up trade enough to justify. On the day of the accident he was going down to call on this customer and also to see if he could work up some new trade. We think the evidence fairly establishes that his occupation was that of a "salesman" and that much of the time he took the merchandise with him and delivered as he sold. As an incident to the business he drove the automobile or truck on which he received his injury.

The defendant contends that the plaintiff was a "hired operator" of the truck he was driving and therefore the injury he suffered was not covered by the policy. This is the only question presented for our determination. The plaintiff insists that the term "hired operator" as used in the policy means a chauffeur or one who is paid for his skill in the operation of an automobile, and that under his employment he did not come within that class.

It has long been the rule of this court, consistently followed, that "Courts will construe policies of insurance more strongly against the party by whom the contract has been drafted, and who has had the time and opportunity to select, with care and ingenuity, and with a view to its own interests, the language in which the contract is couched." *Connecticut Fire Ins. Co. v. Jeary*, 60 Neb. 338. See *Haas v. Mutual Life Ins. Co.*, 84 Neb. 682; *Coad v. London Assurance Corporation*, 119 Neb. 188.

Under the facts here presented, we are not inclined to hold that where, as an incident in carrying on his occupation of selling merchandise for his employer, the plaintiff was required to or did drive the automobile or truck, he should therefore be classed as a "hired driver" within the meaning of the policy. We know of no instance where the term "hired driver" has been defined when used, as in the present case. The term "chauffeur" has been defined as "A man who drives an automobile for hire." 11 C. J. 746. And, again, as "One who manages the running of an automobile, especially the paid operator of a motor vehicle." Webster's International Dictionary.

In *People v. Dennis*, 166 N. Y. Supp. 318, the defendant was convicted of violating a statute providing that no person shall operate or drive a motor vehicle as chauffeur upon a public highway of this state unless such person shall have complied with the statutes. The defendant was an employee of a telephone company and his duties required him to drive an automobile in servicing the telephones of his employer's patrons. The employer furnished him a "Ford runabout" which he used for that

purpose. Naylon, Judge, speaking for the court in determining that the defendant did not come under the definition of a chauffeur as used in the statute, said: "I am unconvinced, by any legal definition or authority to which my attention has been directed, that the term 'chauffeur,' as employed in the law in question, is sufficiently comprehensive to include within its provisions a person whose only duty of driving a motor car is to convey himself and the tools and implements and materials that are necessary for him to use in the doing of his work to the place where he is called upon to perform such work. The only use he made of the motor car was merely incidental to his regular employment. His duties were principally and substantially those of repairing telephones that were out of order."

The Texas court of criminal appeals in *Matthews v. State,* 85 Tex. Cr. Rep. 469, in construing the statute of that state providing that no person shall employ for hire as a chauffeur of a motor vehicle any person not licensed as in the act provided, said: "Section 25 of said Act provides that 'An application for a license to operate a motor vehicle as a chauffeur (and by "chauffeur" is meant any person whose business or occupation is that he operates a motor vehicle for compensation, wages or hire),' etc. This definition as well as the provisions of this Act seem to apply to those who are known as chauffeurs and who operate motor vehicles as such chauffeur for compensation, wages or hire. This is a legislative definition, and by this the court should be governed. It would seem from reading the definition of 'chauffeur' that in order to bring him within that class he must operate the motor vehicle as such for compensation, wages or hire, and it would further seem this would apply directly to the fact or relation of driver of the vehicle for compensation, wages or hire, and would seem to exclude the idea that the vehicle was used as an incident to carry on the business." And further says: "So it would seem from a reading of the Texas statute, viewed in the light of the

general acceptation of the term 'chauffeur,' that where a license is required of the chauffeur for hire or wages, it has a direct relation to his employment to run the vehicle itself for hire and not as an incident to the delivery of the goods, wares and merchandise of his employer. The employment in the latter case is to take orders and deliver the goods, not to run the auto, the auto being used as an incident for the purpose of soliciting orders and delivery of the goods. The chauffeur as contemplated by the statute has a direct relation to the hire for operating the vehicle, while in soliciting and delivering goods it is an incident to his employment as a means of carrying on the business for which he receives no direct pay, as in this case."

The policy in the present case beyond question insures the plaintiff against loss from injury sustained while driving or riding in an automobile, and we are not willing to say that the mere fact that he was driving such automobile as an incident to his employment, for which he was receiving compensation, would bring him within the class of "hired drivers" so as to relieve the defendant from liability.

The judgment of the district court is affirmed, with an allowance of $100 for attorney's fee, to be taxed as costs in this court.

AFFIRMED.

STATE, EX REL. WALTER M. HERBERT, APPELLEE, V. WALTER S. ANDERSON, CHIEF OF POLICE OF THE CITY OF LINCOLN, ET AL., APPELLANTS.

FILED MARCH 17, 1932. No. 28096.

1. **Municipal Corporations**: ZONING ORDINANCE: CONSTITUTIONALITY. Ordinarily, a court will not declare an ordinance unconstitutional at the suit of one who is not injuriously affected thereby.
2. **Mandamus**: PUBLIC OFFICERS. Mandamus may issue against a public officer to compel him to act, when (1) the duty is imposed on him by law, (2) the duty still exists at the time the writ is applied for, and (3) the duty to act is clear.

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

Max Kier, Lloyd E. Chapman and *Clark Jeary,* for appellants.

Herman Ginsburg and *Joseph Ginsburg, contra.*

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

GOSS, C. J.

Relator was granted a peremptory writ of mandamus against the chief of police, the mayor and the building inspector, as respondents, ordering them to file complaints, cause arrests and proceed to recover fines and penalties against violators of a zoning ordinance, affecting certain lots in the city of Lincoln. Respondents have appealed.

The city of Lincoln is a city of the first class and operates under a home rule charter. April 23, 1929, its council passed a zoning ordinance, numbered 3039, under the powers granted by section 15-1003, Comp. St. 1929. By it the real property located between Thirtieth and Thirty-second and Apple and Y streets was classified as a residence district. This included all of lot C and the west 250 feet of lot B, both being a subdivision of block one in Peck's Grove Addition to the city, as well as a tract 66 feet wide and about 145 feet deep (marked "vacated" and evidently intended originally for a street) lying between the lettered lots. The only other classifications into which the city is divided are apartment, local business, commercial, and industrial districts. Section 3 provided that no premises in the city should be used except in conformity with the provisions applying to the particular district where classified. It provided that a lawful use of premises at the time of adoption of the ordinance, though not in conformity with the provisions of the ordinance, might continue until such nonconforming use is abandoned. Section 4 affirmatively stated the uses to

which premises in a residence district might be put and prohibited other uses.

Relator lived about a block north of the premises involved. The tract is slightly irregular in its measurements. It is about 705 feet long east and west and about 145 feet deep. Lot C comprises the west portion of the tract. On the north, the east and the west of it are homes. Across Apple street on the south is lot D and south of that is the main-line track of the Missouri Pacific Railroad Company to Union, still south of which is a considerable tract of tillable land on which corn was grown in 1931. There are no residences on lots B, C, the "vacated" strip, and D. Lot C has a small street-car barn formerly used as a garage for street cars used on the Bethany line, the main line of which was operated on the south side of Y street. This car line has switch tracks from the main line running southwesterly to the barn from about the middle of the west 250 feet of lot B. The Missouri Pacific Railroad Company also had transfer tracks coming from the southwest and connecting with the street railroad tracks. There was also a so-called "industrial track" or stub by which the tract could be served by switching cars and leaving them on the tract without interfering with the other tracks.

While respondents suggest that the tract was eligible for classification for industrial uses, and that it was a mistake not to classify it thus, we are faced with the fact that it was not so classified when the ordinance was passed in 1930. On April 11, 1930, Tri-State Cement Products Company began on the "industrial tract," near the west end of lot B, the manufacture of concrete pipes. This operation continued until June 2, 1931, about four days after this action was begun. They had no building. The concrete mixer was carried on a conventional truck devised for that purpose and having an engine used only in moving it. The mixer itself had a four-cylinder motor for power used in elevating and mixing the ingredients and in dumping them into the forms. No more than sev-

en men were used at any time and the maximum number of 94-pound sacks of cement used in a day was about 65. The pipes manufactured were in nine sizes, varying from 12 inches in diameter to 60 inches. An inspection of the daily reports shows that there were not many larger than 36 inches. After setting over night the forms would be stripped and the manufactured pipe would be lifted and set out of the way of the next day's operation. Usually there were only two periods each day, of an hour or so each, in which the mixing was carried on. Sometimes there were three such periods.

Each sack of cement was lifted by a man and emptied. He then tossed the sack aside. These operations caused some cement to be liberated in the form of dust and to be carried varying distances, depending upon the wind. Considerable noise was made and some gaseous odors were emitted in the operation of the mixer and its motor. As we have already shown, the premises in question were clearly used for manufacturing concrete pipe. This would be classified under the ordinance as a use permissible only in an industrial district. Section 3 of the ordinance also prohibits the use "for any trade, industry or purpose that is noxious or offensive by reason of the emission of odor, dust, smoke, gas, fumes or noise." In respect of this the district court found that the business was operated in such a manner as to violate all of the restrictions above quoted. While there was evidence of the emission of dust that was offensive to some of the residents nearby, that was due rather to the manner of handling the cement sacks than to the inherent nature of the business; as to the emission of smoke, gas and the noise, it is doubtful that the evidence of these things alone was sufficient to constitute a violation of this general section 3 of the ordinance relating to all five types of districts. So we prefer to consider the case on the ground that the general use of the premises for the purpose of manufacturing pipe was a use unauthorized by its classification in the ordinance as a residence district, rather than upon the manner in which the actual use was conducted.

Section 3 of ordinance 3039 also provides that an existing lawful use of premises at the time of the adoption of the ordinance, though not in conformity with the provisions of the classification under the ordinance, may be continued. Under this theory of a nonconforming use, the respondents claim exemption from the control of the court as prayed and allowed by the writ. The evidence does show that at times in years past these premises had been used for the mixing of concrete, taken away for use elsewhere for paving and other purposes, that to some extent shipments of cars of hay, lumber and coal, and once a load of live stock, had been unloaded there and taken away. These acts were not regular or continuous as were the acts of the Cement Products Company. So we are of the opinion that the evidence amply justifies the finding of the trial court that such prior use was an entirely different use from that of the manufacturing of pipe carried on at and for over a year before the time this action was commenced; and that the plea and proof do not warrant the claim of respondents in relation to a prior nonconforming use.

Respondents suggest that the classification of the property as residential works a confiscation of the property—in violation of the Fourteenth Amendment of the Constitution of the United States, in violation of the Bill of Rights of the Nebraska Constitution, and unenforceable. If the owner of the premises were here in a case where the question of the constitutionality of the ordinance or any part of it was involved in the issues, we would consider that phase. In a general way, prior to its amendment, we have held this very ordinance constitutional as against a claim that it discriminated against an owner's right to use his residence property for business purposes or for a fraternity house. *City of Lincoln v. Foss*, 119 Neb. 666; *City of Lincoln v. Logan-Jones*, 120 Neb. 827. But the respondents are in no way injuriously affected by the classification of the premises in the ordinance passed by the present city council. The ordinance passed

under the home rule charter is subject to the same rules as to its constitutionality as if passed under the authority of a statute. The reason for this lies in the fact that in its proper realm the charter has the effect of a statute. *Consumers Coal Co. v. City of Lincoln,* 109 Neb. 51. Generally, "The court will not declare a statute unconstitutional at the suit of one who is not injuriously affected thereby." *State v. Hall,* 99 Neb. 95.

We believe the city council (who were made parties but dismissed) and the respondents acted in good faith but were mistaken as to their duties in the matter. The evidence shows they desired the zoning board of appeals to pass upon an application of the owners for a reclassification of the premises, the result of which they thought might do away with the necessity of filing complaints against violators of the ordinance as it then stood. Relator was not satisfied with this and demanded action Under the law and the terms of the zoning ordinance the duty of the respondents to prosecute the violations was clear. We have recently said: "To warrant the issue of mandamus against an officer to compel him to act, (1) the duty must be imposed upon him by law, (2) the duty must still exist at the time the writ is applied for, and (3) the duty to act must be clear." *State v. Barstler, ante,* p. 167.

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

AFFIRMED.

U. S. THEATRE SUPPLY COMPANY, APPELLEE, V. WILLIAM H. CREAL ET AL., APPELLANTS.

FILED MARCH 17, 1932. No. 28168.

1. **Pleading:** DEMURRER. "A demurrer to a pleading admits the truth of the facts well pleaded for the purpose of determining their sufficiency as a cause of action or defense, but it does not admit the correctness of the conclusions of law drawn therefrom by the pleader." *American Water-Works Co. v. State,* 46 Neb. 194.

2. Fraud: PLEADING. "In an action to recover money alleged to have been obtained by misrepresentation, fraud, duress and deceit, the petition must set forth the facts showing such fraud, and a mere allegation of fraud or misrepresentation is not sufficient." *Chapman v. Meyers*, 84 Neb. 368.

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

Battelle, Travis & Strehlow, for appellants.

Lee & Bremers, contra.

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

GOSS, C. J.

Plaintiff, described as a corporation, sued defendants, described as a copartnership, on account for goods, wares and merchandise. Defendants answered, admitting the allegations of the petition, and then each defendant claimed a set-off on account of a certain note. Plaintiff demurred to the set-off; the demurrer was sustained; judgment was rendered for plaintiff on its account, motion for new trial was overruled, and defendants appealed.

The pleading of defendants is entitled "Answer and Set-Off." In three lines the answer admits on behalf of each defendant the allegations of the petition. Then follows the "Set-Off:"

"Further answering said petition, and by way of set-off, defendant William H. Creal alleges and shows to the court that:

"1. Under date of September 24, 1928, the said plaintiff, U. S. Theatre Supply Company, by and through its agents, F. H. Parker and William C. Raapke, owners of all the stock of said corporation, for valuable consideration, executed and delivered to defendants its certain promissory note in words and figures following, to wit:"

The note is for $750, dated September 24, 1928, due in two years, in favor of William H. Creal, and signed by F. H. Parker and William C. Raapke. The set-off of

Walter H. Creal, being the preamble and second paragraph of the pleading, is identical in every respect with that above quoted and abstracted, save that his name appears in place of William H. Creal. The rest of the pleading down to the prayer we quote:

"3. Said defendants and each of them allege that no sums have been paid them or either of them by the said F. H. Parker and/or William C. Raapke, either on the principal or interest of said notes; that there is now due and owing to defendant William H. Creal from the plaintiff by reason of said note the sum of $882.50 upon his set-off; and that there is due and owing defendant Walter H. Creal upon his set-off the sum of $882.50, together with interest thereon at the rate of six per cent. to be computed semi-annually.

"4. Further, defendants and each of them allege and show to the court that said F. H. Parker and William C. Raapke have no other properties or interests than those in the plaintiff corporation and the United States Scenic Studios, Inc.; that the effect of their relations in said corporation is merely that of copartners; that in the conduct of their business and particularly all the transactions out of which plaintiff's claim and the claims of these defendants and each of them arise were all on the same basis in so far as said F. H. Parker and William C. Raapke are concerned, and that they and each of them have the same interest in each of said transactions; that the organization and operation of their businesses under corporation names aforesaid are for the sole and only purpose of defrauding creditors; that unless the prayer of this pleading be granted the said F. H. Parker and William C. Raapke will be permitted to obtain and collect upon plaintiff's claim against these defendants, and these defendants will be unable to make collection in whole or in any part of their respective items of set-off."

The above reference to the United States Scenic Studios, Inc., is explained by stating that the second cause of action in the petition declared on an account for $13,

assigned to plaintiff as a debt of defendants to "the U. S. Scenic Studios, Inc., a corporation."

The demurrer challenged the set-off because (1) it showed on its face that it did not state facts sufficient to constitute a cause of action, set-off or counterclaim against the cause alleged in the petition, and (2) because it attempted to bring into this action improper parties defendant.

The only question to be decided is whether the demurrer was good as against the pleading of the defendants. The defendants had admitted in their answer that both the U. S. Theatre Supply Company, the plaintiff, and U. S. Scenic Studios, Inc., assignor of plaintiff's second cause of action, were corporations, organized under the laws of Nebraska; and admitted that the defendants William H. Creal and Walter H. Creal are a copartnership under the name and style of William Creal & Son.

This is the established rule: "A demurrer to a pleading admits the truth of the facts well pleaded for the purpose of determining their sufficiency as a cause of action or defense, but it does not admit the correctness of the conclusions of law drawn therefrom by the pleader." *American Water-Works Co. v. State,* 46 Neb. 194. See *State v. Ramsey,* 50 Neb. 166; *Bresee v. Preston,* 91 Neb. 174; *Salsbury v. City of Lincoln,* 117 Neb. 465; *Dobney v. Chicago & N. W. R. Co.,* 120 Neb. 824.

Down to paragraph 3 of the pleading of the defendants there is nothing that indicates any cause of action in favor of the defendants. Paragraph 3 alleges like amounts "now due and owing" from the plaintiff to each defendant by reason of his respective note; but this is not only contrary to the facts so far pleaded but is a pure conclusion of law.

Considering paragraph 4 as if Parker and Raapke were parties to the action (which they were not) and were owners of all the stock in plaintiff corporation (as suggested but not directly and affirmatively pleaded in paragraph 2) every material allegation is a conclusion with-

out basis in facts pleaded. Allegations that transactions are on the same basis without pleading the facts, that parties have the same interest in transactions without stating the facts for comparison and conclusion thereon, that the organization and operation of corporations by Parker and Raapke was for the purpose of defrauding creditors without pleading the facts from which fraud might be concluded, are insufficient. "In an action to recover money alleged to have been obtained by misrepresentation, fraud, duress and deceit, the petition must set forth the facts showing such fraud, and a mere allegation of fraud or misrepresentation is not sufficient." *Chapman v. Meyers*, 84 Neb. 368.

Tested by the fundamental rules heretofore stated, the pleading of the defendants did not state facts sufficient to constitute an affirmative cause of action on its set-off. It follows that the demurrer was properly sustained.

The conclusion we have reached makes it unnecessary to consider the second point of the demurrer. The judgment of the district court is

AFFIRMED.

METROPOLITAN LIFE INSURANCE COMPANY, APPELLEE, V. JOHN HEANY, APPELLANT.

FILED MARCH 17, 1932. No. 28194.

1. Judicial Sales: SETTING ASIDE: INADEQUACY OF PRICE. "A judicial sale of real estate will not be set aside on account of mere inadequacy of price, unless such inadequacy is so gross as to make it appear that it was the result of fraud or mistake." *First Nat. Bank v. Hunt*, 101 Neb. 743.
2. Equity: DECREE: WRIT OF ASSISTANCE. Where not violative of any right or agreement as to possession, or where the issuance of the writ does not work injustice, chancery practice authorizes the issuance of a writ of assistance to give effect to the decree or judgment of an equity court.

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

Edgar S. Hickey and *John A. McKenzie,* for appellant.

Cranny & Moore, contra.

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

GOSS, C. J.

This is an appeal from an order confirming the sale of 160 acres of land under a decree of foreclosure and awarding plaintiff purchaser a writ of assistance. The appellant relies on error because of inadequacy of sale price, error in confirming the sale over defendant's objection that a subsequent sale would realize a greater amount, and error in ordering the writ of assistance directing the sheriff to put the purchaser in possession.

The decree, dated July 2, 1930, awarded plaintiff a first lien for $11,873.70, at 10 per cent. from that date, and gave E. T. Collins a judgment lien for $5,298.75, bearing 8 per cent. from June 5, 1930, with $27.75 costs. Defendant took the nine months' statutory stay of the order of sale. The order was issued April 6, 1931, and the property was sold May 8, 1931, to plaintiff for $12,954.87. On objection of defendant another sale was ordered. It was had June 12, 1931. Plaintiff was the purchaser for $13,085.15. Again defendant objected to confirmation, chiefly as to inadequacy of amount. The court made an order giving him "until August 15, 1931, to find a purchaser who will raise the present bid by at least $500." On August 26, 1931, the court made an order confirming the sale to plaintiff.

On the subject of values, the parties stipulated to use the evidence on the objections to the first sale. That was done. There were only two oral witnesses for plaintiff, one of whom valued the land at $14,000 and the other placed its value at "between $90 and $100" an acre; and only the defendant testified for himself on the subject. He first placed the value at $22,000, but finally testified that it ought to bring over $100 an acre on a subsequent

sale. Defendant offered *ex parte* affidavits of five parties, who put the value at $22,000 to $24,000.

"A judicial sale of real estate will not be set aside on account of mere inadequacy of price, unless such inadequacy is so gross as to make it appear that it was the result of fraud or mistake." *First Nat. Bank v. Hunt,* 101 Neb. 743; *Lindberg v. Tolle,* 121 Neb. 25. We think the court gave the defendant a fair opportunity to test the sale value put by himself and his witnesses, and that his inability to obtain one who would agree to raise the bid on the last sale at least $500 was sufficient to show that there was no gross inadequacy in the price for which the land sold and to authorize the court to confirm the sale.

In the absence of any showing of any agreement or alleged agreement subsequent to the decree giving defendant any rights to continue in possession or of any showing that the issuance of the writ might work injustice, we are of the opinion the court did not err in granting a writ of assistance as a part of the order confirming the sale. Such a writ is authorized by chancery practice to give effect to the decree and judgment of the court.

The judgment of the district court is

AFFIRMED.

LILLIAN G. NETUSIL, APPELLEE, V. JOHN J. NOVAK, APPELLANT.

FILED MARCH 17, 1932. No. 28147.

1. **Appeal: REVIEW.** Questions once determined on appeal will only be reexamined on a second appeal in exceptional instances of plain errors prejudicial to appellant.
2. ———: ———. An instruction, the giving of which was not assigned as error in the motion for a new trial, is not reviewable on appeal.
3. **Damages: LIABILITY FOR FRIGHT.** "There is a liability for damages for physical injuries which are proximately caused by fright and terror produced by one who owes a legal duty to the one injured." *Netusil v. Novak,* 120 Neb. 751, followed.

4. Animals: VICIOUS DOG: DUTY OF OWNER. "The owner of a dog, known by him to have vicious and mischievous propensities, owes a legal duty to every one to protect them from injury. He especially owes this duty to a traveler passing along the highway adjacent to his premises." *Netusil v. Novak*, 120 Neb. 751, followed.

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

Kennedy, Holland & De Lacy, for appellant.

Grenville P. North, contra.

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

ROSE, J.

This is an action to recover damages resulting from an attack on plaintiff by a dog known by its owner, the defendant, to be vicious. Defendant in his answer denied the facts on which the action was based and pleaded that the personal injuries of which complaint was made were not due to an attack by his dog. Upon a trial of the issues the jury rendered a verdict in favor of plaintiff for $4,500, upon which judgment was entered. Later the trial judge, on his own motion, without ruling on defendant's motion for a new trial, set aside the judgment on the verdict and dismissed the action. From the dismissal plaintiff appealed. Upon a review in the supreme court the judgment of dismissal was reversed and the cause remanded, with directions to the court below to reinstate the verdict and the judgment thereon and to rule on the motion by defendant for a new trial. *Netusil v. Novak*, 120 Neb. 751.

In compliance with the mandate of the supreme court, the district court reinstated the verdict and the judgment for $4,500 and required plaintiff to remit therefrom $1,000 as a condition of overruling the motion of defendant for a new trial. Plaintiff filed the remittitur conditionally required. The motion for a new trial was overruled and defendant appealed from the judgment for $3,500.

Evidence tending to support the allegations of the petition was summarized in the former opinion wherein it was held that plaintiff made a case for the consideration of the jury. Evidence sufficient for a recovery and pertinent rules of law were explained on the first appeal. On the present appeal it was vigorously argued that the questions of law and fact considered on the former appeal should be reexamined and different conclusions reached. The exceptional course suggested has occasionally been taken, but there is no error in the rulings on the former appeal to call for a restatement of evidential facts or principles of law or for different conclusions.

An instruction is criticized in argument as erroneous and prejudicial, but it is not now subject to review, for the reason the giving of it was not assigned as error in the motion for a new trial.

Other questions are raised and discussed by defendant, but an error prejudicial to him has not been found. The judgment as reduced by remittitur is

AFFIRMED.

WILLIAM BURES, APPELLANT, V. EDWARD C. STEPHENS ET AL., APPELLEES.

FILED MARCH 17, 1932. No. 28068.

1. **Waters:** DRAINAGE. Owner may drain basin in natural course of drainage, discharging water in natural watercourse.
2. ———: ———. Where such drain is wholly on owner's land, there is no liability for damages.
3. **Easements:** DRAINAGE. An owner of a drainage ditch in continuous use for more than ten years acquires an easement for the purpose of drainage.
4. **Waters:** DRAINAGE: DAMAGES. One who sells a right of way for a drainage ditch, which empties into a natural watercourse thereon, and settles all damage resulting from said drainage cannot thereafter recover damages.
5. ———: ———: INCREASE OF USE. Cleaning out and deepening a ditch sufficient to drain a basin, for which an easement exists, does not increase the use beyond the original terms.

6. ———: ———: DAMAGES. Damages for use of an easement for a drainage ditch cannot be recovered by the owner of the servient estate against the owner of the easement, unless the owner is negligent in its use.

APPEAL from the district court for Fillmore county: ROBERT M. PROUDFIT, JUDGE. *Affirmed.*

Bartos, Bartos & Placek, for appellant.

Sloans, Keenan & Corbitt, contra.

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

DAY, J.

This is a suit in equity to enjoin defendants from draining surface waters from their lands upon the plaintiff's land. The plaintiff appeals from a judgment in favor of defendants denying the injunction sought.

The plaintiff owns the E. ½ of the N. E. ¼ of section 2, township 6, range 2 west of the sixth P. M., and the several defendants own all the remainder of the section. Upon the land of the defendants there is a large basin embracing about 300 acres in which surface water collects. This basin has no natural outlet and until the construction of the artificial ditch, which is the subject of this controversy, the surface water collected and remained until it escaped by percolation and evaporation. For the purpose of draining this land within the basin, the predecessors in title to the parties herein entered into a contract, whereby the owners of defendants' land purchased from the then owners of plaintiff's land one acre and twelve square rods of land, for the purpose of maintaining an open ditch thereon, said purpose being part of the consideration for the deed. At the same time and as a part of the same transaction, the then owner of plaintiff's land was paid a certain sum in full for all damages which had accrued or might thereafter accrue in the future from the water flowing from said ditch. Pursuant to said agreement the drainage ditch was con-

structed in 1904, from the basin, and made to drain into a draw which was located on one of the defendants' land, which crossed plaintiff's land on its way to the creek. This ditch has been open and in use from that date.

Regardless of the deed and contract in this case, an owner of land has a right to drain a temporary basin or pond by means of an artificial ditch into a natural watercourse upon his own land. This right is given by statute. Sections 31-301 and 31-302, Comp. St. 1929, provide as follows:

"Owners of land may drain the same in the general course of natural drainage by constructing an open ditch or tile drain, discharging the water therefrom into any natural watercourse or into any natural depression or draw, whereby such water may be carried into some natural watercourse; and when such drain or ditch is wholly on the owner's land, he shall not be liable in damages therefor to any person or corporation."

"Any depression or draw two feet below the surrounding lands and having a continuous outlet to a stream of water, or river or brook shall be deemed a watercourse."

This statute was first construed in *Aldritt v. Fleischauer*, 74 Neb. 66, wherein the court said that the right to drain in such a manner existed without it. This statute has engaged the attention of the court in *Muhleisen v. Krueger*, 120 Neb. 380; *Flesner v. Steinbruck*, 89 Neb. 129; *Mapes v. Bolton*, 89 Neb. 815; *Steiner v. Steiner*, 97 Neb. 449; *Beem v. Davis*, 111 Neb. 96; *Miksch v. Tassler*, 108 Neb. 208; and *Arthur v. Glover*, 82 Neb. 528. The appellant contends that the ditch does not follow the general course of drainage; that without the ditch the water would never run there. That is undoubtedly true, for without it the basin would not drain. We are of the opinion that the ditch carries the water in the general course of drainage. This question is not discussed because, for the reason hereafter given, it is unnecessary in this case.

In addition to this statutory right, the defendants con-

structed this ditch in 1904 and it has been in use ever since. The defendants have acquired an easement as against the plaintiff for the purpose of the drainage of their land. *Central Irrigation District v. Gering Irrigation District, ante,* p. 199, citing *Moll v. Hagerbaumer,* 98 Neb. 555, *Majerus v. Barton,* 92 Neb. 685, and *Dunbar v. O'Brien,* 117 Neb. 245.

It is argued by appellant that certain work done upon the ditch by the appellees in 1930 changed it by deepening, widening and lengthening it, so that the speed and volume of water was such that the situation was entirely changed, and as a result the damage was greater and different than contemplated by appellant and different from the right acquired by prescription. The evidence does not support this allegation. The work done in 1930 was necessary because the ditch had filled up during the years. It was necessary to clean it out as well as the laterals running into it. The volume of water was always the amount that would collect in the basin. In different years the volume would be larger or smaller depending upon the rainfall. But that is a variant incidental to the right to drainage. The ditch as it existed at the time of the trial was only deep enough to drain the basin, a thing the defendants had a right to do. There is no evidence of negligence in the prosecution of the work. The defendants would be liable to plaintiff for negligence in the construction and/or maintenance of the ditch. However, the evidence does not support a finding that plaintiff has suffered any damage resulting from the work done in 1930. The trial court found that the ditch was constructed and maintained in a careful and proper manner and causes the plaintiff's land no appreciable damage. We reach the same conclusion from the evidence.

Finally, this case is determined by the fact that the plaintiff's predecessor in title sold a strip of land to the defendants for the purpose of constructing this ditch and draining this basin. At the same time a settlement was

made for all future damages resulting from this drainage. The plaintiff cannot now complain of damages resulting from the creation of an easement across the land for drainage.

The judgment of the district court is

AFFIRMED.

ROY GROVER, APPELLANT, V. AARON FERER & SONS, APPELLEES.

FILED MARCH 17, 1932. No. 28121.

1. Appeal: FAILURE TO INSTRUCT. The trial court did not err in failing to instruct the jury as to a provision of the statute which was not pleaded or called to the court's attention by an appropriate instruction, or otherwise.
2. Master and Servant: INJURY TO SERVANT: ACTION FOR DAMAGES: INSTRUCTION. In a common-law action to recover damages for lead poisoning by an employee in a foundry, an instruction on assumption of risk is examined and approved.
3. Appeal: ISSUES: INSTRUCTIONS. Where the trial court has given a correct instruction covering the law of contributory negligence, and error is alleged because there was no specific allegation relating thereto in the answer, the character of the plea must be determined by all of the facts set out therein, and not by any particular language, and if the parties, by their introduction of evidence, have assumed that such a defense was in issue, it is not reversible error for the court to instruct thereon.

APPEAL from the district court for Douglas county: CHARLES E. FOSTER, JUDGE. *Affirmed.*

Albert W. Jefferis and *Reed, Ramacciotti & Robinson,* for appellant.

Kennedy, Holland & De Lacy and *Monsky, Katleman & Grodzinsky, contra.*

Heard before GOSS, C. J., DEAN and PAINE, JJ., and BROADY and RHOADES, District Judges.

PAINE, J.

The plaintiff, Roy Grover, was employed for a few weeks to work in the metal plant of the defendants in Omaha, and brought suit against them at common law for $40,000, alleging that he had contracted an occupational disease, known as lead poisoning, while in their employ. The jury returned a verdict in favor of the defendants. The plaintiff's motion and supplemental motion for a new trial having been overruled, he appeals to this court.

The amended and substituted petition, filed January 10, 1931, alleged that the defendants, Aaron Ferer & Sons, constitute a copartnership, consisting of the eight defendants named, and that their business is the purchase and sale of lead, copper, iron, and other metals, and the melting and refining thereof. The plaintiff entered their employ and worked for a few days in the junk yards, and then was directed to work in the melting room, where lead from old automobile batteries was melted in a large kettle, the aggregate weight of a single melting amounting to several tons, and plaintiff was directed to mix and stir certain chemicals therein. That one complete process required about nine hours, during which time a large quantity of poisonous dust, fumes and gases were constantly ascending from said kettle and impregnating the air in said room. That the defendants failed to furnish the plaintiff with a safe place to work, and failed to warn him of the latent and other dangers connected with said employment, and neglected to furnish any sort of mats or respirator to protect him from the dangerous effects of said fumes and gases, and that by reason of working therein, and under the conditions set out, the plaintiff became afflicted with lead poisoning, contracted because of the negligence of the defendants.

Defendants allege, in their amended answer, that plaintiff had had previous experience in foundries, where scrap lead was melted, and that he was familiar with the nature of the defendants' business and the condition of their plant, and that the risks, if any, therein were so open and

obvious to the plaintiff that they were assumed by him. Defendants deny that the plaintiff became afflicted with lead poisoning while working in their plant, but allege that, while plaintiff was employed by them, some hot water splashed upon his foot, causing him to jump, and, because of the fact that he was handling some metal at the same time, he strained his right arm, and deny that he received any injury whatever except the strained right arm, as set out above.

Defendants further charge that the records of the defendant company show that the plaintiff began work in the defendants' plant upon May 19, 1930, at which time he stated to one of the defendants that he had worked in a foundry in Kansas City; that after he worked for the defendants three or four days, sorting metal in the yards, he then worked on the big cutting shears, also out in the yard for five or six days, and thereafter worked at dumping the melted lead from a pipe running out from the bottom of a pot. The reply was a general denial.

Upon direct examination, the plaintiff stated that he worked six weeks in the foundry of the defendants, while the pay checks and time books showed that he started to work May 19 and quit work on June 20. He testified he worked part of the time in the yards and then worked for some days on the big shears before he went to work in the foundry.

Plaintiff testified that upon June 20, 1930, he reached down and got hold of a mould and turned it over, and that his wrist gave way and he let it drop, and it splashed hot water on his foot. He was given a slip and went to see Dr. Green, who put his wrist and arm under a light and then bandaged it, and that he went to see Dr. Green five or six different times; that his arm turned black, and swelled, and he was taken to the Nicholas Senn hospital; that shortly after the 4th of July he left the hospital, and then went back to see if the defendants would let him go back to work. Upon cross-examination, the plaintiff stated that he had worked three weeks at Council Bluffs

in the deaf and dumb school, had been on a farm for two months, where he got hit on the back of the right hand with an ear of corn. He testified that he had worked on different farms and in a logging camp, but he could only recall two places he had worked in the year 1929, being two months on a farm and three weeks at the deaf and dumb school in Council Bluffs, and the balance of the time he stayed at home with his mother. Before that, he was in Texas, came back to Kansas and was married, and then went back to Texas; that during 1928 he worked only enough to get gasoline for his car, as he was traveling around a good deal of the time. In 1927 he had worked three weeks for the American Radiator Company, filling moulds with sand, but quit work because he wanted to travel around.

The evidence disclosed that the foundry building is 60 feet long, 27 feet wide on one end and 45 feet wide at the other; that it has one window in the north end, the opening being 3 by 3 feet; that it has four windows on the east, with openings about four feet square; that it had a double door leading out to a platform about six feet four inches by eight feet; that there are three windows on the west side, the openings being larger than four feet square; that there is a large ventilator on the roof, with seven windows on the east side and seven windows on the west side; that this ventilator is 36 feet long and three feet two inches wide, and that in this there is an open louver, which is permanently open. Several photographs were introduced in evidence, showing the large ventilator in the top of the room and the location of the various equipment installed in the room. A large number of witnesses testified, and the bill of exceptions consisted of two large volumes.

Five errors of law are set out in appellant's brief as grounds for new trial: (1) The court erred in failing to instruct the jury as to the principles of statutory law applicable to plaintiff's cause of action; (2) the court erred in giving instructions numbered 8 and 11 as to the

assumption of risk, and in overruling plaintiff's thirteenth and sixteenth grounds for new trial, relating to said instructions numbered 8 and 11; (3) the court erred in giving instructions 5, 13, and 14, and in overruling plaintiff's tenth, eighteenth, nineteenth, and twenty-ninth grounds for new trial, whereby the issues of contributory negligence and comparative negligence, which were not in issue under the pleadings, were injected into the case for the consideration of the jury, and were necessarily prejudicial to the plaintiff's cause of action; (4) the court erred in giving undue prominence to the workmen's compensation law, when the same was not mentioned in defendants' answer, by giving instruction numbered 17; (5) the court erred in overruling appellant's supplemental motion for new trial because of newly discovered evidence.

1. The appellant first complains of the court's failure to instruct the jury concerning certain statutes applicable to the health and welfare of employees, and insists that the court should have instructed with reference to sections 48-403, 48-418, and 48-419, Comp. St. 1929. However, the appellant in his petition did not mention these provisions, nor call them to the court's attention, nor request any instructions with reference thereto, and no proof was offered that the plant was not constructed and operated, as to ventilators and windows, subject to the approval of the department of labor. The testimony shows that there was a blower or exhaust fan in the plant, near the south end of the melting room. The ventilators and the windows would tend to carry away the dust and fumes, as shown by the evidence. We see no reason which would require the court to instruct as to sections 48-418 and 48-419, Comp. St. 1929, as the evidence failed to show that any machinery was used in the melting room, or that such sections applied to this plant.

The court, in the tenth instruction, set out the law substantially as established by this court in the case of *Wiseman v. Carter White Lead Co.*, 100 Neb. 584, and we see no error therein.

The trial court did not err in failing to instruct the jury as to provisions of the statute which were not pleaded or called to the court's attention by offering an appropriate instruction, or otherwise.

2. In the second error relied upon for a reversal, complaint is made that instructions Nos. 8 and 11 do not state the law upon assumption of risk. In the recent case of *Campbell v. Chicago, R. I. & P. R. Co.*, 120 Neb. 499, we held: "An employee of mature years is taken to assume the risk of such dangers as are normally and necessarily incident to the occupation, whether he is aware of them or not." See *Walters v. Chicago G. W. R. Co.*, 98 Neb. 783.

The court, in the last part of instruction No. 11, said: "If you find that the plaintiff contracted lead poisoning or plumbism as a result of his employment with defendants, and further find that his injury was the result of a risk ordinarily incident to the performance of such work as he was doing, or if you find that his injuries resulted from dangers which were open, obvious and apparent to him or one of his understanding, or that were known by him, or that in the exercise of ordinary care should have been known by him, then the plaintiff cannot recover, and your verdict should be for the defendants." We cannot agree with the appellant that this instruction is contrary to the law, and we see no error therein.

3. The appellant, in his third proposition, charges that the court committed error by giving instructions setting out the law relating to contributory negligence, and that there was no specific allegation in the answer upon which to found such instruction. Our attention is called to the holdings that, where a servant continues to work with knowledge of dangers which an ordinarily prudent man would refuse to subject himself to, such servant is guilty of contributory negligence, especially where the danger is as open and obvious to the servant as to the master. 39 C. J. 838. It is contended by the appellee that the allegations of the answer amount in law to a plea of contribu-

tory negligence. The character of such plea must be determined by all the facts set up therein, and not by any particular language, and where each of the parties, by their introduction of evidence, have treated an issue as being raised in the pleadings, this court will not hold that the district judge was in error in instructing thereon. *Farnsworth v. Tampa Electric Co.*, 62 Fla. 166; *Pittsburgh, C., C. & St. L. R. Co. v. Cole*, 260 Fed. 357; *Fail v. Gulf States Steel Co.*, 205 Ala. 148; *Johnson v. Weskamp, ante*, p. 381.

The fourth ground for reversal insisted upon by the appellant is the undue prominence given by the court to the workmen's compensation law, as set out by the court in instructions No. 8 and in No. 17, which instructions told the jury that the suit on trial was for lead poisoning, and that they could not consider the accident which had occurred to the plaintiff when he dropped a mould and splashed hot water on one of his feet and strained one of his arms, as any disability resulting from that accident would come under the workmen's compensation law, for which accident he had been sent to the company doctor and treated for several days, and after which accident he had not worked for the defendant company at all; that the alleged error complained of was in the impression left with the jury, by these two instructions, that the workmen's compensation law was the important factor in the case, whereas there was no connection whatever between the accident and the alleged contracting of lead poisoning, for which this suit was brought under the common law, and appellant claims that without these two instructions the verdict would have been returned for the plaintiff.

The defendants admit that the plaintiff endeavored to show that no accident had happened to him on June 20, but the evidence discloses that an accident did happen, and plaintiff's arm was strained, and that he was given a slip which he took to the company's doctor, who treated him for several days, and, with this evidence before the jury, we see no error in the court giving the instructions mentioned.

The last ground insisted upon for reversal is based on newly discovered evidence, found in certain affidavits attached to the motion for a new trial, among them being the affidavits of two of the attorneys and of Joseph Anuskewicz, who was employed May 1, 1930, and who also had a suit for lead poisoning pending against the defendants, and in which he states that the day before the trial of the case at bar one of the defendants came to him and told him not to mention the dust or smoke or fumes in his evidence, and to say that the doors and windows were always open, and one of the attorneys told him to say it was all open and fresh air everywhere, and not a bad place to work, when the fact was that the room was always filled with heat and smoke and fumes and dust. In opposition to this last affidavit, the defendants submitted a counteraffidavit by the same Joseph Anuskewicz, in which he now states that he remembers that new respirators were brought to the foundry, and that he saw old respirators there that day, and that the smoke was bad in the foundry from about 9 o'clock to 10:30 in the morning, while the rubber was burning off from the battery tops, and that after that there was no smoke in the foundry, and that if he were again called to testify he would give the same testimony that he had originally given on the trial of the case at bar, and gave his reasons for signing the affidavit prepared by the attorneys for the appellant. We have carefully examined all of these affidavits, and this court has recently held: "If newly discovered evidence presents a material and important fact, germane to the issue in controversy, which, considered with the evidence presented on the trial, might cause a jury to take the other view, then a new trial should be granted, if diligence to secure the same has been shown." *Nelson v. State,* 121 Neb. 658. We do not consider that the evidence presented in the affidavits would add any new and important evidence which would cause the jury to change the verdict which they have rendered in the case.

Having examined all of the contentions set out by the

appellant with care, we are brought to the conclusion that the record shows that the case was carefully tried to the jury, that the instructions given were proper, and that no reversible error is to be found in this record, and the verdict of the jury for the defendants is sustained by the evidence. The judgment of the lower court is therefore

AFFIRMED.

VANCE SIEDLIK, APPELLANT, V. JOSEPH J. SCHNEIDER, APPELLEE.

FILED MARCH 17, 1932. No. 28115.

1. Appeal: INFANTS: CONTRIBUTORY NEGLIGENCE: INSTRUCTION. A child of tender years is not chargeable with contributory negligence, and an instruction submitting that question to the jury is error.
2. ———: INSTRUCTION: REVERSAL. Where an instruction given to the jury is not founded upon either the law or the evidence in the case, and is calculated to mislead the jury, a verdict and judgment rendered in favor of the party aggrieved by the instruction will be set aside on appeal.

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

John C. Barrett, for appellant.

James T. English and *Crofoot, Fraser, Connolly & Stryker, contra.*

Heard before GOSS, C. J., DEAN and PAINE, JJ., and BROADY and RHOADES, District Judges.

BROADY, District Judge.

This is an action to recover damages for personal injuries received in an automobile accident. The plaintiff is a boy seven years of age, and he, together with other boys of a like age, were playing football on a public municipal playground. Larger boys, among whom were high school students, were likewise playing ball and engaged in other athletic sports on other parts of the field, when

the defendant, a youth approximately twenty years of age, drove his father's car upon the grounds toward the group of smaller boys, who, at the approach of defendant's car, scattered. The plaintiff and the car collided. The plaintiff received injuries, consisting of a broken collar bone, both bones of the lower right leg fractured between the knee and the ankle, and plaintiff was unconscious for a time, probably due to a concussion of the brain. In two months' time the plaintiff had recovered so that he could engage in his usual activities, and while there was some testimony that the injured leg was a trifle shorter than the other his own doctors stated that his recovery was complete, and that the shortening of the leg was noticeable only with difficulty and only upon measurements, and stated that, in their opinion, the boy would make a complete recovery. There was no medical testimony in opposition to the foregoing. The jury returned a verdict in favor of the plaintiff for $250 from which he appeals to this court, claiming error (1) in the instruction of the court on the subject of contributory negligence of the plaintiff, and (2) that the verdict is inadequate. The defendant did not appeal.

The principal error complained of by the plaintiff was the instruction of the court relating to contributory negligence. The defendant in his answer denied negligence on his part, and directly pleaded contributory negligence on the part of the plaintiff, and in the forepart of the instructions the court so stated to the jury. In instruction numbered 10 the court first defined negligence; and in a separate paragraph defined contributory negligence, as follows: "By contributory negligence is meant any negligence of the plaintiff directly contributing to the accident." And in the same instruction followed a definition of slight and gross negligence.

In instruction numbered 6 the court, in the first paragraph, dealt with the general subject of the care required and duty of small children, or children of tender years. This was followed by a direction that, if the jury found

the plaintiff had exercised such care, he would not be guilty of *contributory negligence* and would be entitled to recover in this case. Then followed the third paragraph in which the court stated that if the plaintiff "was not using proper diligence commensurate with his age, discretion and experience, * * * and that had he exercised such care he would not have received the injuries by colliding with the defendant's automobile, then his own carelessness and failure to exercise such care would preclude any recovery in this action and your verdict should be for the defendant."

While the last part of instruction numbered 6, standing alone and without consideration to the first part thereof, and also apart from the reference to contributory negligence in instructions numbered 1 and 10, might not be construed as submitting to the jury the question of contributory negligence, if any, of the plaintiff, certainly under the whole of instruction numbered 10, when taken in connection with the other two instructions referred to, one cannot believe but that the jury must have considered that the contributory negligence of the plaintiff was submitted for their consideration.

A child of tender years—and it must be conceded that the plaintiff was a child of tender years—is not chargeable with negligence or with contributory negligence. *Sacca v. Omaha & C. B. Street R. Co.*, 98 Neb. 73; *De Griselles v. Gans*, 116 Neb. 835. That does not mean, however, that the defendant was the insurer of plaintiff's safety or that the defendant would be responsible for injuries received by the plaintiff which were caused by the recklessness or carelessness of the plaintiff alone with which there was no negligence on the part of the defendant. Contributory negligence presupposes some negligence on the part of both parties and that both are at fault at least to some degree. In determining whether the defendant was negligent at all the jury might well, and should, be told they could consider the acts and conduct of the plaintiff considering his age, discretion and experience.

"An instruction is erroneous which submits to the jury questions not within the issues in the case." *Linch v. Nebraska Buick Automobile Co.*, 120 Neb. 819. And it is prejudicial error to misstate in an instruction the law as to contributory negligence. To do so is sufficient to confuse the jury, and it is impossible to tell which rule the jury attempted to follow. *Gerish v. Hinchey*, 120 Neb. 51.

The defendant argues that the error, if any, was not detrimental to the plaintiff's interest, and since he recovered a verdict he could not have been prejudiced. Ordinarily that is true, but on the record before us we feel that there is no way of knowing but that the jury may have attempted to weigh, unguided, the degrees of negligence of the parties, when, under the law of this state, the plaintiff could not be chargeable with contributory negligence. "When an instruction is not founded upon the evidence (or law), and is calculated to mislead the jury in considering the facts of the case, the judgment must be reversed." *Mannion v. Talboy*, 76 Neb. 570; *Trute v. Holden*, 118 Neb. 449.

For the reasons above stated, we feel that there must be a retrial of this case; therefore the judgment is reversed and the cause remanded.

REVERSED.

W. H. HARDING V. STATE OF NEBRASKA.

FILED MARCH 17, 1932. No. 28151.

1. **Burglary: PROOF.** Testimony of large foot tracks found about the affected premises immediately after a burglary, together with the fact that the accused had big feet, is not competent or sufficient to prove the accused guilty of the crime of breaking and entering.
2. ———: **SUFFICIENCY OF EVIDENCE.** Where the owner of a stolen welding machine is unable to identify the various separate parts of an identical make and model as those taken, other than that the manufacturer's serial number had been erased and his machine and all its parts disappeared at the same time and on the

same day as the accused, together with evidence of large foot tracks about the entered building from whence the machine had been taken and the fact that the accused possessed big feet, is not sufficient to sustain a verdict of guilty of one accused of burglary.

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

Frank A. Anderson, for plaintiff in error.

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

Heard before ROSE, GOOD and EBERLY, JJ., and BROADY and CHASE, District Judges.

BROADY, District Judge.

This is a criminal prosecution against the defendant on the charge of breaking and entering, or burglary. From a verdict of guilty and a sentence of one year in the penitentiary the defendant appeals on two principal grounds: First, that the court erred in not sustaining defendant's objection to testimony of footprints which was received in evidence; and, second, that the evidence is insufficient to sustain a verdict. There are other assignments of error which this court does not deem it necessary to consider.

The village of Loomis, of small population, is located in Phelps county. Approximately a week prior to July 13, 1930, the defendant came to Loomis and procured odd jobs in the neighboring harvest fields, during which time he lived at what is called the "shack" on the edge of the town, and which was located two or three blocks from a blacksmith shop belonging to James Anderson. The defendant had had some experience as a mechanic and had a few mechanical tools in his shack. During the time he was at Loomis he visited at the blacksmith shop and on one or two occasions was hired to do small jobs for the smith. During this time the blacksmith had shown the defendant his acetylene gas welding machine and the

parts and attachments thereto which were kept in the desk or bench drawer. During the nighttime of July 13 a slight rain had fallen so that foot tracks were visible the next morning. The next morning, July 14, when Anderson went to his shop he found the side window and the back door open and his welding machine gone. He called the sheriff and together they investigated the premises and found footprints made by a large shoe leading from the graveled highway across lots leading to the open window in the shop. The attachments and parts of the welding machine were all missing, and the footprints led from the rear door of the shop across the potato patch and vacant lots to the same point in the highway from whence the tracks coming in an opposite direction started, and on the highway were distinct marks of automobile tires. The blacksmith looked at the footprints, but left it to the sheriff to take the measurements, which the sheriff did by stepping with his own foot in the tracks, but he took no measuremnts. The sheriff said that the footprints were of a large foot, an inch longer and inch wider than his own shoes; and at the trial the defendant, who did not take the witness-stand, was referred to by the prosecution and the sheriff's attention called to his feet. The prosecution then asked the sheriff, in substance, how the size of the footprints compared with the size of the feet of defendant, who was then sitting in the courtroom. The sheriff replied that they were the same size.

The burglary complained of occurred on the night of July 13, 1930. On the afternoon preceding the burglary the defendant called upon the blacksmith and told him he was going to Kansas where he had work operating a threshing machine outfit and bade the blacksmith goodbye. He also paid the owner of the shack one dollar for rent and told him he was going to Kansas for a like purpose. The defendant was not again seen in the town or about the community until the following April when he was located in South Dakota, arrested and returned to

Phelps county. Inquiry at the place in Kansas where defendant said he was going disclosed that he was unknown.

One of the merchants in this town said that he saw the same footprints and made measurements of the tracks near the window and through the potato patch, taking measurements with a stick and also by himself stepping in the tracks, and that he also saw and took measurements of tracks near the gate or fence of the premises where defendant had lived. All of the tracks corresponded in size. There is no evidence whatever of any distinct mark in the footprints showing other than the ordinary shoe, except that they were larger than common. There is no other inference that the footprints were made by the defendant or that they were not made by some other person. The comparison of the size of the tracks with the defendant's feet as shown in the courtroom at the trial, approximately a year after the burglary, was wholly incompetent. At the trial, defendant's counsel called a witness, the chief of police of the town of Holdrege, merely identified him, and asked what size shoes he wore, to which the police officer replied, "Number 12." The witness was then excused. Reference was also made to other persons with large feet. The defendant's objection to this testimony should have been sustained.

When the defendant was arrested in Dakota, in April, he had in his possession a welding machine of the same make and pattern as that which disappeared from the blacksmith shop. While the tank did not appear in evidence, the attachments, consisting of ten or fifteen different parts, were produced. These consisted of two heads on each of which was fastened a gauge, several valves and brass connections, also two separate lengths of cloth-covered hose with brass couplings, and two or three brass, or copper, nozzles and tubes and a pair of goggles. In all probably ten or more such parts. The machine is known as a standard Smith welding outfit, model No. 62. The parts are all interchangeable and may be fastened and used on any other machine of a like model. The

owner of the blacksmith shop, Anderson, went with the sheriff to Dakota when the defendant was arrested and saw the attachments there. They were brought back to this state and at the prosecution Anderson was unable to identify any of these parts, except one of the tips was bent in a certain way that he recognized and identified, saying that he had dropped this tip at one time and that caused this bend. This tip, so-called, consisted of a brass or copper tube probably three-eighths of an inch in diameter, probably eight inches long, with a triangle at one end probably four inches long. He was shown each part separately, including the goggles, but could not identify any of them except the tip referred to. The manufacturer's serial number had been defaced, and when Anderson was asked how he could identify the parts, said, "Well, the serial number was gone. Q. That would be the only way you could identify it, would be by the serial number? A. Yes, sir; that is the only way." The prosecution went over with Anderson in great detail each of the parts. Anderson could identify none other than the tip referred to. Then Anderson was asked, "Q. Then is there any way by which you can identify the gauge which I have just handed to you as ever having been your property? A. Well, it all disappeared at the same time."

The court sustained an objection to further questions as follows: "No; he (Anderson) said that he couldn't say that was the piece or was his. There might be a thousand pieces of that kind, and he said he could not identify it as being from his shop." Then followed an argument between the county attorney and the judge, and the court said further: "There are thousands of that kind, and he said he could not identify it as being in his shop. He had one like it, but that is all that he can say."

From the foregoing it is beyond dispute that the evidence adduced at the trial was not sufficient to sustain the verdict. The testimony of the footprints was, under this record, incompetent and insufficient; and the trial court properly says there might be a thousand different

parts such as the prosecuting witness was trying to identify. Therefore, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

HARRY WIXSON, GUARDIAN, APPELLEE, V. NEBRASKA CONFERENCE ASSOCIATION OF SEVENTH DAY ADVENTISTS, APPELLANT.

FILED MARCH 17, 1932. No. 27998.

Gifts: UNDUE INFLUENCE: PRESUMPTION. When one of extreme age and infirm makes a conveyance of his or her property, without consideration and without independent advice, to one in a position of trust and confidence or in whom the donor places dependence for advice or spiritual guidance, *held* from such facts a presumption arises of undue influence, and the burden is upon the donee to overcome such presumption by evidence that is clear and satisfactory.

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

John J. Ledwith, for appellant.

Sterling F. Mutz and *Edward C. Fisher, contra.*

Heard before ROSE, GOOD, DAY and PAINE, JJ., and LESLIE, District Judge.

LESLIE, District Judge.

This is an action brought by Harry Wixson, guardian of the person and estate of Amy E. Wixson, incompetent, against Nebraska Conference Association of Seventh Day Adventists.

Briefly, it is alleged in the petition that the ward had on the 10th day of July, 1928, certain building and loan stock of the value of $3,000, which the defendant, Nebraska Conference Association of the Seventh Day Adventists, induced her to assign to it without consideration. The plaintiff claims that this $3,000 represented practically all of the ward's estate; that she was at the time

mentally incompetent to manage her business affairs, and was persuaded by undue influence on the part of the defendant and its representatives to assign and transfer the certificate of stock, representing $3,000, to said association. The defendant by its answer admits that it received the certificate in controversy, but denies that Mrs. Wixson was incompetent to enter into the contract, or that undue influence was brought to bear upon her by the association, or any of its representatives, to induce her to turn the stock over to it. The cause was tried to a jury on these issues, and a verdict returned for the plaintiff. Motion for a new trial was overruled by the trial court, and the defendant has brought the case here on appeal.

A brief statement of facts will suffice. The plaintiff's ward, Amy E. Wixson, was at the time of the transaction involved 79 years of age, a widow, the mother of several children, a grandmother, a devout member of the Seventh Day Adventists church, and possessed of $3,000 in the Nebraska Central Building & Loan Association of Lincoln, and perhaps $500 worth of other property.

The contract, by which conveyance was made, was prepared at the office of the defendant association at Grand Island; one of its officers submitted it to Mrs. Wixson for execution before defendant's counsel at Lincoln, and subsequently she was escorted by the same officer of the defendant association to the building and loan association, where formal transfer was made of the stock to the defendant by Mrs. Wixson.

The record of the evidence is voluminous, but it is unnecessary to quote from it, since it is ample to sustain the verdict, assuming that the issues were submitted to the jury under proper instructions. We shall, therefore, consider the assignments of error in relation to instructions. The first of these relates to instruction No. 8 given by the court. This instruction is as follows:

"Where a person who is mentally infirm from old age and feeble of mind or diseased, and because of such condition may be easily persuaded, deals with another in

whom she reposes special trust, confidence or dependence either for advice or spiritual guidance, under circumstances which suggest an unfair advantage, undue influence or fraud, and without consideration, makes a voluntary gift or conveyance of all or nearly all of her property in an unnatural or improvident manner and without independent or disinterested advice, the law presumes that such gift or conveyance was obtained by undue influence, and the burden is upon the donee or person receiving the gift to prove by a preponderance of the evidence that the gift was fairly obtained and without undue influence and that it was the free and voluntary act of the giver. Therefore, if you find from the evidence that the plaintiff's ward, Amy E. Wixson, was old and mentally weak or so enfeebled by age or disease as to be readily susceptible of easy persuasion, and that she had placed trust, confidence or dependence in and upon the defendant conference or its agents, officers or ministers, and that the gift, as claimed by the defendant, represented all or nearly all of the property of the ward and was so improvident and ill-advised on her part as to leave her without means of support in her old age, and that the gift was made without independent or disinterested advice, and that the gift was an unnatural disposition of her property as ignoring the rights of her family, then you are instructed that the defendant must prove by a preponderance of the evidence that the transaction was voluntary, open and fair, and that there was no fraud, imposition or undue means, and that the ward understood the nature and the consequence of her act and that it was not done through the undue influence of the defendant or its agents."

The defendant's contention is that this instruction does not properly state the law, that it places the burden upon the defendant to prove that there was no undue influence, and contradicts instruction No. 2, which assumes to place the burden of proving undue influence and mental incapacity upon the plaintiff. Instruction No. 2 is as follows:

"You are instructed that in this case the burden is upon the plaintiff to prove by a preponderance of the evidence that the defendant, some of its officers, ministers or agents acting for and on behalf of the defendant, by some act or persuasion, or because of some special trust or confidence which Mrs. Amy E. Wixson imposed in such person, unduly influenced her to make the transfer or assignment in question."

Instruction No. 8 merely says, in substance, that if the jury find from the evidence that Mrs. Wixson was mentally so enfeebled by age or disease as to be easily susceptible of persuasion, and that she had placed trust or dependence in the defendant, and without consideration made a conveyance of nearly all of her property to the defendant without independent or disinterested advice, the law presumes that such conveyance was obtained by undue influence, and the burden is then upon the donee to rebut the presumption. We think this instruction correctly states the law.

In *Gibson v. Hammang*, 63 Neb. 349, the court held:

"Where a conveyance from a parent to one of several children * * * is not a just or reasonable disposition of the parent's property, and the age and physical condition of the parent, the proportion of the property conveyed to the whole estate, and the circumstances surrounding the gift suggest * * * undue influence, * * * the burden is upon the donee to overcome the presumption of fact arising from such circumstances."

In *In re Estate of Noren*, 119 Neb. 653, the court again held:

"It may be stated generally that, where a testator who is aged and infirm, with his mental faculties impaired, makes a will * * * in favor of a confidential adviser who is actively concerned in the execution thereof, and who receives * * * valuable property or rights under the will, there arises a presumption of undue influence, and * * * it devolves upon the beneficiary to overcome the presumption * * * by competent evidence sufficient for the purpose."

The rule announced in the foregoing cases has been consistently adhered to by the courts of this state and a majority of the other states. In some states it is held that, where a person of extreme age donates property to one in whom the donor has trust and confidence, lack of independent advice alone is sufficient to cast the burden upon the donee to prove that undue influence was not exerted to induce the donor to make the donation.

It is not necessary to discuss other assignments of error, as they relate largely to the refusal of the court to give certain instructions tendered by the defendant, and we are of the opinion that the instructions given by the court were sufficient.

Finding no reversible error, the judgment of the trial court is

AFFIRMED.

PAINE, J., dissenting.

I am entirely unable, after a careful study of the bill of exceptions and the briefs, to agree with the opinion adopted in this case. The facts as shown by the evidence disclose that Mrs. Wixson, a woman about 80 years of age, attended Adventist camp meetings for many summers; that at the Shelton meeting held in 1926 or 1927 she met two old ladies who told her that each of them had purchased annuities of the Nebraska Adventist organization, one in the amount of $2,000, and the other for $2,900. She thought this matter over for several years, but did not consult her children. It is proved beyond question that no minister, or officer of the organization, ever talked to her about this matter, or solicited this annuity, directly or indirectly, until she approached the president of the organization, Rev. S. G. Haughey, who signed all such documents. His testimony is that, at the close of a service in the Adventist camp meeting, held in Epworth Park, Lincoln, in August, 1928, as he was walking directly from the pavilion to his tent, Mrs. Wixson came up to him. "Q. Now, tell the jury what talk you had with Mrs. Wixson at that time. A. After pass-

ing the time of day and stating she was enjoying the meetings she said that she had a little business and mentioned the fact she had some money and wanted to know if the Conference didn't have provision to take it and allow an annual income from it; that was the way she approached me." In this conversation he told her the details of such an investment, and that they would pay 5 per cent. interest on an annuity, and she told him that was what she wanted. When he returned to his office in Grand Island, he had the same form of annuity contract drawn up that had already been used in some $30,000 of annuities in force in the state, and he returned to Lincoln upon September 10, 1928, with the treasurer, Rev. Marshall, and with Rev. Emery they took Mrs. Wixson to the office of Clarence G. Miles, an attorney, and handed the instrument to Mr. Miles, who did most of the talking with her, and testified as follows: "Q. Do you recall what you said in explaining the instrument to her? A. * * * My best recollection is that I explained to her or asked her if she knew she would never get this money back, that this was an annuity and she would only get the interest on it, and she said yes, she did. She said yes, she understood that. I asked her if she knew that at her death it would not go to her estate or her heirs but would be retained by this association which I see on this paper was the Nebraska Conference Association. I would not remember the exact name. I asked her if she knew that would be retained by the association at her death. She said, 'Yes; I am glad to make this gift.' She said, 'I have been thinking about it for some time.'" And his next answer is: "I then asked if she realized the full import of this and was satisfied to do this. She says, 'Yes; I am, I am glad to do it and it is not anybody's business.'" She then signed and acknowledged the annuity contract and it was signed by the two officers of the association, and on that contract she was regularly paid her 5 per cent. interest in semiannual payments. She did not tell her children of this for some months.

The evidence of Mr. Miles, an attorney and notary, is clear and convincing. In the case of *Little v. Curson,* 114 Neb. 752, it is said in the third paragraph of the syllabus: "The evidence of the attorney who prepared the deed, of the notary who took the acknowledgment, and of the witnesses to the execution of the deed, alleged to have been obtained by undue influence exerted by the grantee, that the deed was executed by the grantor understandingly and voluntarily, cannot ordinarily be overcome by evidence relating to different occasions."

The children of Mrs. Wixson charge that their mother was incompetent and that undue influence was practiced upon her by this church organization, but no proof thereof is submitted by them. Her son Harry, who is her guardian, testified that she told him she transferred it to the association because they paid her 1 per cent. more interest than the bank would pay her, and added that "banks went busted," but that "God was back of the Conference." He further testified that his mother did not approve of the children trying to get the money back from the church. Her son Silas also testified that she was incompetent, and that he had borrowed $300 of her so nobody else would get it, but admitted that she took a mortgage back on his threshing machine for security for the loan to him. To prove her incompetence, her children testified that she lived miserly, nearly starved herself, that she saved milk tops, old cans, and used bread wrappers for napkins, and insisted on wearing old, ragged and patched garments, and lived in a little three-room hut with her oldest son, a rheumatic cripple. No one testified to her incompetency except her own children, who may share the money after her death if it is recovered, and who have now placed her under guardianship. Against this evidence we find that of men who are not personally interested in the outcome of the case. H. F. Bauman, a coal dealer and neighbor, had had many deals with her, and was of the opinion that she was entirely competent. W. H. Crouse, another neighbor, considered her rational

in all her business dealings. George Adams, a leading attorney of Lincoln, to whom Mrs. Wixson went for advice in July, 1930, testified that she was, in his opinion, entirely competent. W. M. Folsom, of the Nebraska Central Building & Loan Association, testified to the same effect.

It is claimed that she parted with her money without consideration, yet the purchase of annuities is the most popular form of investment for old people in England, and many in this country regret not having purchased annuities. Upon what basis can this court declare that the purchase of a safe annuity, with a legal contract binding a large state-wide church organization, is entirely without consideration?

Upon this state of facts, the trial court gave instruction No. 2, set out in the opinion, in which it was rightly stated that the burden of proof of undue influence was upon the plaintiff alleging it, and in No. 6 the jury were told that there must be proof that the assignment was obtained by undue influence. *Latham v. Schaal,* 25 Neb. 535; *Seebrock v. Fedawa,* 30 Neb. 424. Commissioner Pound said, in *Boggs v. Boggs,* 62 Neb. 274: "Undue influence, in order to invalidate a will, must be of such character as to destroy the free agency of the testator and substitute another person's will for his own." And Judge Day said, *In re Estate of Bayer,* 119 Neb. 191, that, 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. Now, departing from the line of these decisions, the trial court, in instruction No. 8, set out in the opinion, in my judgment confused the jury by changing the burden of proof, under certain conditions not found in the evidence in this case, and instructed the jury that the burden shifts and requires the person receiving the gift to prove by a preponderance of the evidence that it was obtained without undue influence. The jury from this instruction would conclude that the judge considered that all of the requisite

conditions existed in this case, or the instruction would not have been given. The evidence in no way warranted the giving of instruction No. 8, and in my opinion this constituted reversible error.

If a determined old lady, who knows her own mind and without consulting her children, carries out her own wishes in that regard and buys an annuity contract, can have her wishes held for naught and the contract set aside upon evidence such as offered in this case, then no such annuity can stand in this state against such attacks. The entire evidence discloses that the conduct of the officers of this church organization was above reproach, for, even after she sought them out and asked for the investment, they did not press the matter, but gave her every opportunity to seek other advice and change her desires.

It is a matter of common knowledge that colleges, hospitals, homes for the aged, universities, ministerial benefit funds, missionary societies, American Bible Society, and many forms of individual church organizations, all seek to pledge payment of annuities on funds placed with them on practically the same form of contract as used in this case. If this decision becomes the law of Nebraska, it will be useless for such organizations to seek such deposits without securing the consent of all of the prospective heirs of the annuitant.

WILLIAM F. BRUETT, APPELLANT, V. CITY OF OMAHA ET AL., APPELLEES.

FILED MARCH 18, 1932. No. 28183.

1. **Municipal Corporations**: CHARTER: AMENDMENT. Section 17-A, art. IV of the home rule charter of the city of Omaha, does not amend or modify section 57, art. III of that charter.
2. ———: AIRPORTS: ISSUANCE OF BONDS. Section 17-A, art. IV of the home rule charter of the city of Omaha, does not limit to $50,000 the amount of bonds which that city may issue in any one year, without being authorized by the electors, to pay for lands acquired by the exercise of the power of eminent domain, for the purpose of an addition to the city's municipal airport.

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

Brome, Thomas & McGuire and *Amos Thomas,* for appellant.

John F. Moriarty, Harry B. Fleharty, Thomas J. O'Brien and *Bernard J. Boyle, contra.*

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

PER CURIAM.

As a resident taxpayer of the city of Omaha, plaintiff brought this action to enjoin the issuance of bonds by the city to pay for real estate acquired by the exercise of the power of eminent domain, for the purpose of an addition to the city municipal airport.

In effect, plaintiff alleged that the city was limited by its charter provisions to an issuance of bonds to the extent of $50,000 in any one year, for the purpose of paying for real estate for an airport, and that the city had exhausted its power by previously issuing bonds to that amount in the same year. A general demurrer to the petition was sustained. Plaintiff refused to further plead, and the action was dismissed. Plaintiff has appealed. The controversy depends upon the proper interpretation of certain provisions of the city's home rule charter.

The city of Omaha previously and during the same year had issued bonds to the extent of $50,000, under the provisions of section 17-A, art. IV of the charter (hereinafter referred to as section 17-A), and at the commencement of this action was about to issue bonds to the extent of $23,150, pursuant to the provisions of section 57, art. III of the charter (hereinafter referred to as section 57).

Plaintiff contends that section 17-A was enacted as an amendment to the charter, modifies or amends section 57, and, in effect, limits the power of the city to issue bonds to pay for lands for an airport, or an addition thereto, to the sum of $50,000 in any one year.

Section 57 is voluminous. It confers general powers upon the city council to purchase and acquire, by the exercise of the powers of eminent domain, property for many public purposes, and provides a complete scheme for the payment of lands so acquired. Pursuant to the provisions of this section the city had previously acquired land for an airport, and discovered that it was without funds with which to improve the air field. Thereupon section 17-A was adopted as an amendment to the charter. That section provides: "Notwithstanding the limitations contained in section 22, art. IV of the charter the council is authorized to issue and sell bonds of the city, without a vote of the electors, in the year 1929 and annually thereafter for five (5) years, to and including the year 1933, in an amount not to exceed fifty-thousand dollars ($50,000) in any one year. Bonds so issued shall be denominated 'Aviation Bonds' and the proceeds therefrom shall not be used for any other purpose than to acquire lands for use as an aviation field and to improve lands acquired and used as an aviation field."

It is contended that section 17-A imposes a limitation on the authority granted by section 57; that the latter section is a general provision and the former a special and therefore controls the general. Section 17-A does not purport to amend, modify or repeal section 57 or any of its provisions. The latter section authorizes the issuance of bonds, to pay for lands acquired for an airport, in an amount largely in excess of that provided by section 17-A. The amount so authorized is solely for the purpose of paying for the land, and not for any improvement thereof as an airport.

A charter provision in the home rule charter has the same force and effect as a statute. In Lewis' Sutherland, Statutory Construction (2d ed.) sec. 363, it is said: "If a statute is valid it is to have effect according to the purpose and intent of the lawmaker. The intent is the vital part, the essence of the law, and the primary rule of construction is to ascertain and give effect to that intent.

'The intention of the legislature in enacting a law is the law itself, and must be enforced when ascertained, although it may not be consistent with the strict letter of the statute. Courts will not follow the letter of a statute when it leads away from the true intent and purpose of the legislature and to conclusions inconsistent with the general purpose of the act.' 'Intent is the spirit which gives life to a legislative enactment.'" And in section 364 of the same work it is said: "The intent of a statute being the law, it necessarily follows that the object of all interpretation is to find out that intent."

While the language of section 17-A, which provides that the proceeds from the bonds "shall not be used for any other purpose than to acquire lands for use as an aviation field and to improve lands acquired and used as an aviation field," may seem to imply a limitation of the power to pay for lands acquired for an air field, yet, when we take into consideration the purpose of its enactment, which was undoubtedly to provide for an additional fund with which to improve an air field, it would seem clear that the intent in the enactment of that section was not to curtail or limit the power given the council by the provisions of section 57.

We believe that the purpose and intent in enacting section 17-A was to give to the council a power additional to that granted in section 57, and not to limit the power granted by that section. It seems to be conceded that the defendant city and its officials have complied with every requisite of section 57 in the issuance of the bonds in question. We conclude that the city had the power which it sought to exercise, and that the trial court properly sustained the demurrer to plaintiff's petition.

It follows that the judgment of the district court should be and is

AFFIRMED.

SELMA L. SMITH, APPELLEE, V. CLIFFORD P. FALL, APPELLANT.

FILED MARCH 18, 1932. No. 28180.

1. **Evidence:** PRESUMPTION. "A 'presumption' is a rule of law that courts or juries shall or may draw a particular inference from a particular fact or from particular evidence, unless and until the truth of such inference is disproved." Lawson, Law of Presumptive Evidence (2d ed.) 639.
2. ———: ———. If a particular fact upon which a presumption is required to be based is not shown to exist, then the presumption cannot be indulged.

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

Sackett & Brewster and *Loren H. Laughlin*, for appellant.

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

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

GOSS, C. J.

Plaintiff recovered a judgment as at common law for damages for injuries caused by negligence of defendant. Defendant appealed.

The petition, both in body and prayer, was in the usual form of a common-law action for damages. It was filed in Lancaster county May 14, 1930. It pleaded that plaintiff was a nurse employed by defendant in a hospital owned and operated by him at Beatrice, in Gage county, and was injured on May 21, 1929, through defendant's negligence, in a defective elevator, while she was riding in it in the duties of her employment. The petition did not state (1) whether either plaintiff or defendant had or had not elected (Comp. St. 1929, sec. 48-112) not to accept the provisions of Part II of the workmen's compensation law, or (2) whether or not defendant had provided compensation insurance or had furnished the compensation commissioner with proof of his financial ability to

pay compensation (Comp. St. 1929, sec. 48-146). Defendant was duly served with process while in Lancaster county. In a common-law action such service is good in the circumstances here shown. He specially appeared for that purpose only and objected to the jurisdiction of the Lancaster county district court. The objection was overruled. Defendant then demurred to the petition on the ground (1) that the court had no jurisdiction over the subject-matter, and (2) that the petition did not state facts sufficient to constitute a cause of action. When the cause came on to be heard on the demurrer, plaintiff requested and was given leave to amend her petition instanter by interlineation. She did this by interlining these words—"and plff states that the dft has rejected the compensation act." No allegation of such fact was in the petition as originally filed.

Thereupon defendant filed his special appearance for that purpose only and objected to the jurisdiction of the court over him on the ground that the petition, as amended, stated an entirely different cause of action against him than the original one in which summons was served on him. Having made no general appearance to this amended petition, he challenged the jurisdiction of the court over his person. The court overruled this special appearance. Defendant answered, preserving his objections to the jurisdiction. The cause was duly heard before a jury, resulting in a verdict and judgment against defendant.

Defendant's theory is that the original petition stated a cause of action under Part II of the compensation law. If it did so, the district court had no jurisdiction. For such claims must first be submitted to the compensation commissioner for an award. If either party is dissatisfied with the award, then the matter may be submitted to the district court. Comp. St. 1929, sec. 48-137. If the process served on defendant was based on an original petition for compensation, of which the district court had no original jurisdiction, then the amendment of the petition so as to

state a common-law action affirmatively was in effect the commencement of a new action in which it was necessary to serve defendant with process.

The real question therefore is whether the original petition stated a cause of action independent of Part II, as claimed by plaintiff, or whether it showed the parties to be under Part II of the compensation law, as asserted by defendant.

The application of section 48-112, Comp. St. 1929, is indispensable to the sustaining of the position of defendant. So much of that section as declares the elemental basis of the presumption to be indulged is quoted as follows:

"In the occupations described in section 97 (48-106) hereof, and all contracts of employment made after the taking effect of this act shall be presumed to have been made with reference, and subject to the provisions of Part II (48-109 to 48-115) hereof unless otherwise expressly stated in the contract, or unless written or printed notice has been given by either party to the other, as hereinafter provided, that he does not accept the provisions of Part II. Every such employer and every employee is presumed to accept and come under Part II hereof, unless prior to accident he shall signify his election not to accept or be bound by the provisions of Part II."

The call in the statute must find its affirmative answer in the pleading before the presumption becomes effective as an applicable rule of law. The very first element stated in the section is that it is applicable to "all contracts of employment made after the taking effect of this act." The legislative intent was that contracts of employment theretofore made were not affected. The act was approved, without any emergency clause, April 21, 1913. Laws 1913, ch. 198. Section 12 of this original act contained the exact phrase above quoted. The petition does not tell when the contract under which plaintiff was employed was made. It merely says: "That on or about the 21st day of May, 1929, and for some time prior thereto, plain-

tiff was employed by defendant in said hospital and sanitarium as a professional nurse." The objections to jurisdiction on behalf of defendant entitle him to a technical search of the petition. Plaintiff, reciprocally, is entitled to any fruits of such an examination. We do not know from the petition whether the contract of employment was "made after the taking effect of this act" or before. The petition alleges that plaintiff was 39 at the time of her injury. It is readily conceivable that she may have been employed by defendant as a nurse before the compensation law went into effect. If she was, then the contract would not be subject to Part II of the law.

"A 'presumption' is a rule of law that courts or juries shall or may draw a particular inference from a particular fact or from particular evidence, unless and until the truth of such inference is disproved." Lawson, Law of Presumptive Evidence (2d ed.) 639. It follows that if a particular fact, upon which the rule requires the inference to be based, is not shown to exist, then the presumption cannot be indulged. This is especially true where, as here, the statute states the particular fact upon which the presumption must be based. In this instance, because it arises upon a special appearance and objection to the jurisdiction, we must find definite evidence of the particular fact within the language of the petition. No such fact appears there. Therefore the presumption does not exist. The district court was right in overruling the objections to the jurisdiction.

No assignments of error refer to any other subject. The judgment of the district court is

AFFIRMED.

FRED C. H. MEESKE ET AL., APPELLANTS, V. J. T. BAUMANN ET AL., APPELLEES.

FILED MARCH 18, 1932. No. 28079.

1. **Municipal Corporations: POWERS: EMPLOYMENT OF ATTORNEY.** Power of a city to sue and defend implies power to employ counsel for those purposes.

2. ———: ———: IMPLIED POWERS. A grant of official power necessarily implied from a specific provision of statute is part of the legislative act.
3. ———: ———: EMPLOYMENT OF SPECIAL ATTORNEY. A city having a regular salaried attorney is not for that reason prevented from employing special counsel in particular instances when the city attorney is absent or ill or disqualified.
4. ———: ———: ———. In particular instances when the city attorney is ill, or absent or disqualified, implied power of the city to employ special counsel to sue and defend is not taken away by subsequent enactments creating the office of city attorney, imposing upon him the duty to prosecute or defend all actions to which the city is a party and providing that for duties devolving upon any city officer compensation shall not be paid to any other person.
5. ———: ———: ———. When a salaried city attorney is ill or absent or disqualified, the making of a defense in a pending suit against the city is not a duty devolving upon a regular city officer within the meaning of a statute providing that the council shall not pay compensation to any other person.
6. ———: ———: ———. In absence or illness of a salaried city attorney, or in the event of his disqualification, a city having power to sue and defend may employ special counsel to dissolve a preliminary restraining order wrongfully granted to prevent the purchase of equipment for the city light plant and may also incur liability for payment of reasonable counsel fees, unless inhibited by statute.
7. Officers: DUTIES: PRESUMPTION. "The law presumes that a public officer faithfully performs official duty." *Paxton v. State*, 59 Neb. 460.
8. Pleading: DEMURRER. A petition challenged by demurrer charges what by reasonable and fair intendment may be implied from the facts stated.
9. Injunction: TEMPORARY RESTRAINING ORDER. The purpose of a temporary restraining order is to impose judicial restraint until litigants can be heard on application for a temporary injunction.
10. ———: ———: ACTION ON BOND: DAMAGES. In an action on a bond to pay all damages resulting from a preliminary restraining order, if wrongfully granted, obligees may recover expenses incurred in procuring the dissolution of the order, including reasonable counsel fees, where liability therefor is properly incurred.
11. ———: ———: ———: PETITION. In an action on a bond for a preliminary restraining order wrongfully granted and dis-

solved, obligees need not allege they paid reasonable counsel fees, legal obligation to do so being sufficient, if pleaded.

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

J. P. O'Gara, Perry, Van Pelt & Marti and *H. R. Ellenberger,* for appellants.

Zacek & Nicholson, contra.

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

ROSE, J.

This is an action on a 2,000-dollar bond for a temporary restraining order which was wrongfully granted. The bond was executed and delivered by J. T. Baumann as principal and Otto H. Zacek as surety, obligors, in a former suit in equity for injunctive relief preventing obligees, Fred C. H. Meeske, John Benne, Fred Heilman, Roy Senden, and Henry Schwinch, who were respectively the mayor and the councilmen of West Point, from proceeding in a purpose to purchase an engine and other equipment for the city light plant. The order was dissolved on motion of obligees and the suit in which it was granted was subsequently dismissed. Obligees in the bond are plaintiffs herein and obligors are defendants. Plaintiffs claim unpaid damages in the sum of $1,287.35 for attorney fees and expenses, liability for which was incurred in procuring the dissolution of the temporary restraining order. To the petition in the action on the bond defendants interposed a general demurrer, which the trial court sustained. Plaintiffs elected to stand on their petition. Their action was dismissed and they appealed.

The sufficiency of the petition to state a cause of action on the bond is the question presented by the appeal. Plaintiffs allege the following as ultimate facts, in substance: They are respectively the mayor and the councilmen of West Point. In a suit for injunctive relief obligors procured a temporary restraining order and the ef-

fect thereof was to delay proceedings to purchase equipment for the West Point light plant. The restraining order was granted July 25, 1930, and went into effect the same day upon the giving of the bond which was duly executed, approved and delivered, a copy being attached to the petition as part of it. The bond binds obligors to pay obligees "All damages which they or any of them may sustain if it be finally decided that said restraining order ought not to have been granted." August 18, 1930, the restraining order was dissolved upon the hearing of a motion presented by obligees. The suit in equity for injunctive relief was dismissed by the district court. The final judgment therein determined that the restraining order ought not to have been granted and is in full force and effect, the time to appeal therefrom having long since expired. The resulting damages have not been paid. The facts thus summarized are alleged in detail. One paragraph of the petition in the present action follows:

"Plaintiffs have sustained damages to the amount of $1,287.35 by the granting of said restraining order, in that plaintiffs have necessarily incurred expenses in the sum of $1,287.35 as attorney fees and expenses in having said restraining order dissolved; that said expenditure was necessary because the hearing on the application for temporary order of injunction was set for September 29, 1930, and the restraining order, if not dissolved, would have remained in full effect until that date and would have prevented plaintiffs herein from performing the duties for which they were elected."

The sustaining of the demurrer and the dismissing of the action on the bond are assigned as error. In support of these rulings of the district court obligors, defendants, argue that it was the duty of the city attorney, a salaried officer, to act for West Point and for the mayor and the city council, and that those officers and the city were without power to incur liability for the fees and expenses which plaintiffs seek to recover. In support of these propositions the charter of cities of the second class to which

West Point belongs is invoked. The charter provides that the mayor with the consent of the council may appoint a city attorney to serve for a year. Comp. St. 1929, sec. 17-107. He is the legal adviser of the council and, when necessary, shall, on behalf of the city, prosecute or defend all actions in which it is a party. Comp. St. 1929, sec. 17-516. For performance of duties devolving upon any city officer the council shall not appropriate money to or pay any other person. Comp. St. 1929, sec. 17-517. In this connection counsel for defendants cite opinions of text-writers and courts to the effect that employment of special counsel to perform duties imposed by law upon the city attorney is unauthorized. At the bar there was a formidable argument in favor of the position thus taken, but whether it is tenable depends upon the allegations of the petition, the pertinent statutes and the presumptions of law.

As already indicated the petition pleads the allowance and dissolution of the restraining order, the execution and delivery of the bond, the dismissal of the equity suit for injunctive relief, the necessity for expenses incurred in procuring the dissolution of the restraining order, including attorney fees, and the condition upon which obligors became liable for unpaid damages.

In addition to the law relating to the city attorney and his duties, the statute provides that the city may sue and be sued. Comp. St. 1929, sec. 17-401. This means also the right to defend and implies power to employ counsel when a defense is necessary. *Cheesebrew v. Town of Point Pleasant*, 71 W. Va. 199. A grant of official power necessarily implied from a specific provision of statute is part of the legislative act. It has been wisely held that a city having a regular salaried city attorney is not for that reason prevented from recovering on an injunction bond reasonable fees of special counsel for services in dissolving the injunction. *Vicksburg Water Works Co. v. Vicksburg*, 99 Miss. 132, 33 L. R. A. n. s. 844, and note citing *Howard v. Burke*, 248 Ill. 224; *Ford-*

ham v. Thompson, 144 Ill. App. 342; *Luchini v. Police Jury,* 126 La. 972; *Babcock v. Reeves,* 149 Ala. 665. See, also, *Mollohan v. Cavender,* 75 W. Va. 36, and cases cited in note in L. R. A. 1917D, 255.

The power of the city to employ counsel, implied as it necessarily is from the legislative grant to sue and defend, is not wholly taken away by statutory provisions creating the office of city attorney, prescribing the duties of that officer and restricting payment of city funds to regular city officers and employees. Otherwise, absence, illness, refusal to act, hostility to public interest, or other temporary incapacity of the regular city attorney might leave the municipality without necessary counsel even in a grave emergency. When a salaried city attorney is ill or absent, or disqualified in a particular instance, the making of a defense in a pending suit against the city is not a duty devolving upon a regular city officer within the meaning of the statute providing that the council shall not pay compensation to any other person. Comp. St. 1929, sec. 17-517.

The power of the city to defend a suit to prevent the mayor and councilmen from buying essential equipment for the municipal light plant was granted by the city charter and the exercise of that power did not necessarily await the action of the city attorney, if ill or absent or otherwise temporarily incapacitated for official duty. If alleged liability for fees of special counsel was incurred by the mayor and councilmen on motion to dissolve the preliminary order, the presumption is that they performed their duties in that respect. "'The law presumes that a public officer faithfully performs official duty." *Paxton v. State,* 59 Neb. 460. A petition challenged by demurrer charges what by reasonable and fair intendment may be implied from the facts stated. *Roberts v. Samson,* 50 Neb. 745. The purpose of a temporary restraining order is to impose judicial restraint until litigants can be heard on an application for a temporary injunction. *Gyger v. Courtney,* 59 Neb. 555. According to the petition herein

the restraining order was granted July 25, 1930, and the hearing on the application for a temporary injunction was set for September 29, 1930. Between those dates the city would have been prevented from purchasing equipment for the light plant, except for the dissolution of the wrongful restraining order. The petition therefore shows an occasion for the removal of the judicial restraints imposed and for the services of counsel.

If the petition in the action on the bond, therefore, is viewed as a pleading demanding relief on behalf of the city, or of the mayor and councilmen officially, it does not seem to be demurrable for want of municipal power to incur liability for reasonable fees for services of special counsel in procuring the dissolution of the restraining order.

The result is the same if the action on the bond is viewed as a demand for the enforcement of individual, as distinguished from municipal, rights. The city is not a party to this action on the bond. The individual persons who held the offices of mayor and councilmen are plaintiffs herein. The bond itself is part of their petition and it shows that, with the city, they were sued as individuals in the former suit for injunctive relief. Referring to obligors and to the parties named in the suit in which the preliminary restraining order was granted, obligors bound themselves as follows:

"We, J. T. Baumann, one of the above named plaintiffs, as principal, and Otto H. Zacek, as sureties, do hereby undertake to said defendants in the sum of $2,000 that said plaintiffs will pay to said defendants all damages which they or any of them may sustain if it be finally decided that said restraining order ought not to have been granted."

If plaintiffs herein were sued in equity as individuals, as shown by the bond, and if they incurred liability for necessary counsel fees in procuring the dissolution of the restraining order, as stated in their petition, their pleading brought them within the terms of the bond. In any

aspect of the petition it does not seem to be open to a general demurrer.

Under the circumstances disclosed, necessary expenses incurred in procuring the dissolution of the restraining order, including reasonable counsel fees, may be recoverable in an action on the bond. *Gyger v. Courtney,* 59 Neb. 555; *Trester v. Pike,* 60 Neb. 510. Other cases to the same effect are collected in a note in 16 L. R. A. n. s. 55. The courts of the country are almost unanimous in the opinion that, in an action on such a bond, obligees need not allege they paid counsel fees, legal obligation to do so being sufficient, if pleaded. See note in 16 L. R. A. n. s. 76. In view of the law and the facts outlined, the general demurrer was erroneously sustained. The judgment of the district court is therefore reversed and the cause remanded for further proceedings.

REVERSED.

GEORGE F. HOWELL, APPELLEE, V. WILLIAM F. POFF ET AL., APPELLANTS.

FILED MARCH 18, 1932. No. 28144.

1. **Receivers:** APPOINTMENT: APPEAL. A Nebraska statute authorizes an appeal from an order appointing a receiver. Comp. St. 1929, sec. 20-1090.
2. **Corporations:** DIRECTORS: TRUSTEES. A director of a corporation bears to it and its stockholders a fiduciary relation and is treated by courts of equity as a trustee.
3. ———: ———: ACCOUNTABILITY. A director of a corporation should refrain from all acts inconsistent with his corporate duties and is accountable as trustee.
4. ———: ———: ———. The accountability of a director, president and manager of a corporation is determined by the strict standards of rectitude that bind a fiduciary.
5. ———: OFFICERS: COMPENSATION. The president and manager of a corporation is not entitled to profits beyond the earnings of his stock, proper compensation and expenses.
6. ———: ———: DUTIES. It is the continuing duty of a president, manager and director of a corporation to keep an accurate account of its expenses and earnings and to make the data available to stockholders.

7. ———: RECEIVERS: APPOINTMENT: EVIDENCE. Duties of the managing officer and controlling stockholder of a corporation, and disregard thereof, may be considered with proof of other facts in determining the merits of an application for a receiver.
8. ———: ———: ———: DISCRETION OF COURT. An application for a receiver for a corporation is directed to the sound discretion of the court and except for an abuse thereof the conclusion reached will not generally be disturbed on appeal.
9. ———: ———: ———: EVIDENCE. A petition positively verified by the oath of plaintiff may be considered with supporting affidavits on the hearing of a preliminary motion for the appointment of a receiver for a corporation named as defendant, though the facts stated in the petition are contradicted by other affidavits resisting the application.
10. Receivers: APPEAL. An order overruling a motion to vacate the appointment of a receiver is not appealable.

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

Gerald E. La Violette and *Harry B. Fleharty,* for appellants.

Frost, Hammes & Nimtz, contra.

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

ROSE, J.

This is a suit in equity for an accounting and for the appointment of a receiver for the City Ice Company of Omaha, a solvent corporation engaged in manufacturing and selling ice. The shares of corporate stock were owned by George F. Howell and William F. Poff. Howell, plaintiff, was minority stockholder, director and secretary. Poff was controlling stockholder, director, president and manager. Poff, City Ice Company, and Poff doing business as Dundee Ice Company are defendants. The petition states a cause of action for an accounting. Alleged wrongs necessitating the appointment of a receiver are attributed by plaintiff to Poff and include fraud; engaging in hostile enterprises; making and retaining secret profits; misappropriation and conversion of corporate funds; neglect of duty; concealing data relating to busi-

ness transactions; failure to keep the manufacturing property in repair; permitting ice plant, equipment, machinery and buildings to deteriorate, thus causing waste and loss. The trial court heard the application for a receiver on the petition and on supporting and resisting affidavits and ruled in favor of plaintiff. Exercising a statutory right, Poff and the other defendants appealed from the order appointing the receiver. Comp. St. 1929, sec. 20-1090; *McCord, Brady & Co. v. Weil,* 33 Neb. 868.

It is contended by defendants that the City Ice Company has long been a solvent corporation making profits for its stockholders; that plaintiff accepted corporate earnings for years without complaining of the management, knowing as director and secretary what the president and manager had done, and consequently is not entitled to relief in equity; that alleged wrongs are denied, but, if found to exist, can be fully redressed without the appointment of a receiver; that no reason for taking the management away from the corporation has been shown; that more harm would result from a receivership than from future management by the corportion itself; that allegations of the petition, when contradicted by affidavits, as they are, should not be considered evidence on application for the appointment of a receiver; that the order appointing a receiver should be reversed. The contention that the City Ice Company is solvent and that its business is profitable seems to be well founded, but the other propositions submitted require attention.

A director of a corporation bears to it and its stockholders a fiduciary relation and is treated by courts of equity as a trustee. He is accountable as such and should refrain from all acts inconsistent with his corporate duties. *Nebraska Power Co. v. Koenig,* 93 Neb. 68; *Bodie v. Robertson,* 113 Neb. 408. The accountability of a director, president and manager of a corporation is determined by the strict standards of rectitude that bind a fiduciary. Poff was not entitled to profits beyond the earnings of his stock, proper compensation for services,

and expenses. It was his continuing duty as director, president and manager to keep an accurate account of the expenses and earnings of the corporation and to make the correct data available to stockholders. He was not entitled to make for himself secret profits from the business of the corporation. It was his duty to account for the results of his acts as a fiduciary without being asked. *Baird v. Lane,* 115 Neb. 413. These rules of equity and the duties of the managing officer and controlling stockholder of the corporation, and disregard thereof, may be considered with proof of other facts in determining the merits of the application for a receiver. The inquiry is directed to the discretion of the court and, except for an abuse thereof, the conclusion reached will not generally be disturbed on appeal. 4 C. J. 804.

Defendants take the position that the allegations of the petition, though positively verified by oath, when contradicted by affidavits, must be disregarded as evidence on the hearing of the application for a receiver. This position does not seem to be tenable. The course generally pursued has been outlined as follows:

"Ordinarily the evidence heard on a motion for the appointment of a receiver consists of the sworn pleadings of the parties and such affidavits or depositions as may, within the rules of practice, be offered on either side." 53 C. J. 64. See, also, *Farmers & Merchants Bank v. German Nat. Bank,* 59 Neb. 229.

The petition and affidavits on behalf of plaintiff tend to show the following summarized facts: In addition to the City Ice Company, Poff conducted for his own benefit an ice business in the name of the "Dundee Ice Company;" allowed and received unauthorized salary increases as president and manager of the City Ice Company; used corporate funds for his own individual purposes; entrusted to others the performance of duties devolving upon himself as manager; subjected the City Ice Company to penalties and high rates of interest by failing to pay taxes before they became delinquent; sold below cost to

himself, in the name of the Dundee Ice Company, ice belonging to the City Ice Company, thus making a secret profit resulting in a corresponding loss to the corporation of which he was president and manager; took ice at $3 a ton from the supply of the City Ice Company, though it was required to pay $4 a ton when compelled to buy ice to supply customers; used employees and equipment of the City Ice Company for the benefit of the Dundee Ice Company; failed to keep complete accounts of corporate transactions; impaired efficiency of the ice plant and caused waste and loss by neglecting to make necessary repairs; allowed the building and machinery to deteriorate for want of essential upkeep; unnecessarily closed the ice plant temporarily during hot weather when the demand for ice increased.

The facts summarized were stated in detail in the petition or in affidavits on behalf of plaintiffs. Though contradicted by affidavits resisting the application for a receiver, the showing by plaintiff seems to be the more convincing. The finding on appeal is that the showing on behalf of plaintiff was sufficient to justify the appointment of a receiver, but this conclusion will not determine any other fact upon a trial of the cause on its merits.

Defendants brought up also a record of proceedings on an application for an order dissolving the appointment of a receiver, but it is not a final order and presents nothing for review on this appeal.

AFFIRMED.

STATE, EX REL. C. A. SORENSEN, ATTORNEY GENERAL, V. STATE BANK OF BELVIDERE, APPELLANT: JOE M. BURBACH ET AL., APPELLEES.

FILED MARCH 18, 1932. No. 28150.

1. Banks and Banking: GUARANTY FUND: DRAFTS. The purchaser of a bank draft is a purchaser of a bank's credit and a holder of exchange, and, as such, is entitled to share *pro rata* with depositors and other holders of exchange in the assets of a

failed state bank and in the depositors' final settlement fund, but, in the absence of special circumstances, is not entitled to have his claim allowed as a trust fund.

2. ———: ———: STATUTORY PROVISION. The former rule, that a bank check or a draft is an assignment *pro tanto* of the fund in the drawee bank, having been changed by statute (Comp. St. 1929, sec. 62-1606), the decisions in *Fonner v. Smith*, 31 Neb. 107, *Columbia Nat. Bank v. German Nat. Bank*, 56 Neb. 803, and *Falls City State Bank v. Wehrli*, 68 Neb. 75, are no longer applicable.

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

F. C. Radke, Barlow Nye and *W. A. Crossland,* for appellant.

W. C. Weiss, contra.

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

DEAN, J.

The State Bank of Belvidere was taken over by the department of trade and commerce on or about September 21, 1929, and thereafter, namely, on April 12, following, the bank was declared insolvent and a receiver was appointed by the district court for Thayer county to take charge of its affairs. And on July 30 of the same year, the court allowed certain claims of Joe M. Burbach and Joe Wiedel as preferred claims that were entitled to payment from the assets of the failed bank and the depositors' final settlement fund on the same basis as that of claims of depositors and holders of exchange therein. The interveners objected to the classification so made, and, upon trial, the court sustained their contention and decreed that the claims of the interveners should be allowed as trust funds payable in full and prior to the claims of depositors and holders of exchange. The receiver has appealed.

In respect of Burbach's claim, the parties stipulated that he was indebted to the Northwestern Mutual Life

Insurance Company of Milwaukee, and that, on or about September 17, 1929, Burbach purchased a draft for $504.20 from the Belvidere bank, payable to the insurance company. The draft was drawn on the First National Bank of St. Joseph, Missouri, and was paid for by a check in favor of the cashier of the Belvidere bank. In due course the draft was returned to the St. Joseph bank, but payment thereon was refused on the ground that the Belvidere bank was then in the hands of a receiver.

It was also stipulated that Wiedel purchased a draft from the Belvidere bank, on or about September 21, 1929, in the sum of $163, payable to the Securities Investment Corporation of Omaha, and also drawn on the St. Joseph bank, the draft being paid for by Wiedel in cash or its equivalent. In due course this draft was presented to the St. Joseph bank for payment, after the Belvidere bank came into the hands of a receiver, but payment thereon was refused. Subsequently the draft was returned and Wiedel filed his claim against the Belvidere bank.

The parties also stipulated that neither Burbach nor Wiedel was the owner of an account in the Belvidere bank and that the bank was not indebted to either of them except in the amounts of the drafts in question here. And it was also stipulated that, at the time the bank was closed, it had cash on hand and credit with its correspondent banks in a sum greater than the amounts of the drafts.

The receiver contends that the interveners are merely holders of exchange and purchasers of the bank's credit. We agree with counsel. We have held that, in order to create a deposit which will be protected by the guaranty law, it is essential that money or the equivalent of money shall, in intention and in effect, be placed in the bank or at its disposal under circumstances which are in accord with the specific limitations of the bank guaranty law. *State v. Farmers State Bank*, 111 Neb. 117. And we have held that a bank draft, drawn upon another bank

wherein the drawer has sufficient funds to cover it, may be the equivalent of money sufficient to bring the draft within the protection of the depositors' guaranty fund. *State v. First State Bank,* 117 Neb. 370. And while the holder of a bank draft comes within the protection of the depositors' final settlement fund, we do not think the claims of the interveners should be allowed as trust funds payable in full and prior to the claims of depositors and holders of exchange. The amounts of the drafts in question were not set aside for a special or specific purpose and the elements of a trust are entirely lacking.

In some jurisdictions the rule has been stated in this manner: "The purchaser of a bank draft, a cashier's check or a certified check becomes a general creditor of the bank and is not entitled to a preference over other creditors upon the bank's becoming insolvent." *Standard Oil Co. v. Veigel,* 174 Minn. 500. "The purchase of a bank draft creates the relation of debtor and creditor between the bank and the purchaser, and the holder has no preferred claim over other general creditors of the bank." 3 Michie, Banks and Banking (Perm. ed.) sec. 207, p. 316. And in *Leach v. Exchange State Bank,* 203 Ia. 790, the court held: "The purchase of a draft on a drawee which has ample funds of the drawer's is but the purchase of the credit of the drawer. In other words, the purchaser of such a draft voluntarily makes himself one of the *general* creditors of the drawer." To substantially the same effect is *Leach v. Battle Creek Savings Bank,* 202 Ia. 875. And in *Clark v. Bank,* 72 Kan. 1, it was held that, where the bank there failed and passed into the hands of a receiver, after the issuance of a draft upon a correspondent bank in which it had funds on deposit, and where the drawee had notice of such receivership proceedings before the draft was presented for payment, the title passed to the receiver, and that the holder of the draft, in the absence of any special circumstances, was entitled to no priority over other creditors of the failed bank. See, also, *Spiroplos v. Scandinavian-American*

Bank, 116 Wash. 491; *Grammel v. Carmer*, 55 Mich. 201; *Legniti v. Mechanics & Metals Nat. Bank*, 230 N. Y. 415.

We conclude that the interveners, in purchasing the drafts in question, were purchasers of the bank's credit and holders of exchange, and, as such, they are entitled to share *pro rata* with depositors and other holders of exchange in the assets of the failed state bank and in the depositors' final settlement fund, but, in the absence of special circumstances, they are not entitled to have their claims allowed as trust funds. And the former rule, that a bank check or a draft is an assignment *pro tanto* of the fund in the drawee bank, having been changed by statute (Comp. St. 1929, sec. 62-1606), the decisions in *Fonner v. Smith*, 31 Neb. 107, *Columbia Nat. Bank v. German Nat. Bank*, 56 Neb. 803, and *Falls City State Bank v. Wehrli*, 68 Neb. 75, are no longer applicable.

The judgment is

REVERSED.

FRANK W. BERGGREN, APPELLANT, V. CLARENCE G. BLISS, RECEIVER, APPELLEE.

FILED MARCH 18, 1932. No. 28206.

1. **Homestead.** The fact that a husband conveyed to his wife the title to certain land, whereon his family had resided for about 20 years, does not constitute an abandonment of the homestead character with which the land was imbued, and where the wife refused to leave the home and continued to reside there without her husband, the homestead remained undisturbed.
2. ———. "A person cannot at the same time have two homesteads, nor can he have two places either of which at his election he may claim as his homestead." *Hair v. Davenport*, 74 Neb. 117.

APPEAL from the district court for Polk county: LOVEL S. HASTINGS, JUDGE. *Affirmed.*

John Tongue, for appellant.

F. C. Radke, Barlow Nye, M. Craft Radke, L. T. Fleetwood and *Stanton & Stanton, contra.*

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

DEAN, J.

Frank W. Berggren, plaintiff, filed his petition in the district court for Polk county to obtain a $2,000 homestead exemption in a certain tract of land formerly owned by him, but which was sold to satisfy a certain judgment rendered against him and in favor of the receiver of the Farmers State Bank of Stromsburg, December 18, 1929. From a judgment denying his application for such homestead exemption, the plaintiff has appealed.

The record discloses that the plaintiff and his family resided for about 20 years on the southeast quarter of section 26, township 13, range 2, in Polk county. It appears that all of his children are now of age. On October 14, 1929, the plaintiff transferred the record title to the above described land to his wife and, at the same time, he executed two mortgages in favor of his sons. In an action thereon by the receiver, the transfer of the title to the plaintiff's wife was upheld, but the mortgages to the sons were decreed by the court to be of no force and no effect.

From the plaintiff's evidence it appears that, on October 15, 1929, he selected the northwest quarter of section 36, township 13, range 2, in Polk county, which he then owned and which is the land now here in controversy, as his homestead. Some time in April of the following year he moved thereon, but his wife remained on the old farm and refused to go with her husband to the quarter section last above described. From the evidence of the plaintiff it appears that he moved some of his machinery, together with certain miscellaneous articles, to the above described land, where he occupied one or two upstairs rooms in a house also occupied by his son. But the plaintiff appears to have spent much of his time on the quarter section of land occupied by his wife and, in several instances, he was served with summons at his old home. He admits that he told no one of his selection of the new

"homestead." When the land was sold and, later, when the sale thereof was confirmed, the plaintiff had an opportunity to declare his selection of a homestead and to claim exemptions thereto, but he failed to do so.

In *Meisner v. Hill*, 92 Neb. 435, it is said: "Our statute uses the term 'homestead' in its commonly accepted meaning—the house and land where the family dwells." And at an earlier date, this court held that a homestead is a parcel of land on which a family resides, and that such homestead is constituted by the act of selection and the fact of residence thereon. *Galligher v. Smiley*, 28 Neb. 189; *Palmer v. Sawyer*, 74 Neb. 108. And where the title to the family residence is in the wife, it is nevertheless the homestead of the family and is exempt from judgment, but, in such case, the head of the family is not entitled to further exemption of other property. *Stout v. Rapp*, 17 Neb. 462.

As noted above, the quarter section of land occupied by the plaintiff's wife was the family home for many years and it was therefore the family homestead. And the fact that the plaintiff conveyed the title thereto to his wife does not constitute an abandonment of the homestead character with which the land was imbued, and where the wife refused to leave the home and continued to reside there, the homestead remained undisturbed. And, in view of this fact, the plaintiff cannot be said to have acquired another homestead exempt from judgment. It is elementary that "A person cannot at the same time have two homesteads, nor can he have two places either of which at his election he may claim as his homestead." *Hair v. Davenport*, 74 Neb. 117. "Bare intention to occupy such property as a homestead at some future time is not of itself sufficient to impress it with the character of a homestead, while it remains unoccupied; there must be a present intention so to occupy the property as soon as circumstances reasonably permit, evidenced by acts of preparation indicating such intention." *Davis v. Kelly*, 62 Neb. 642. And we have held: "A party cannot be

permitted to defeat the payment of his just debts, by afterwards removing thereon and asserting a claim of homestead." *Bowker v. Collins*, 4 Neb. 494.

We conclude that the plaintiff has not established his right to exemption in the land in question. The judgment is

AFFIRMED.

AGNES WALDEN, APPELLANT, V. ARCHIE WALDEN, APPELLEE.

FILED MARCH 18, 1932. No. 27745.

Marriage. A valid marriage can be contracted in this state only when the parties have previously obtained a license to marry, and when the marriage has been solemnized by a person authorized by law to solemnize marriages.

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

Thomas & Vail and *John Tongue*, for appellant.

Elmer E. Ross, Donald F. Sampson and *J. H. Grosvenor, contra.*

Cranny & Moore, amici curiæ.

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

GOOD, J.

This is a rehearing of the case reported in 121 Neb. 715. The action is for divorce. Defendant denied that there was a valid marriage. The trial court found there was no valid marriage and dismissed the action. Plaintiff has appealed.

The evidence discloses that the parties held themselves out to the public as husband and wife, and that they lived and cohabited together as such for a considerable period, but that there was no solemnization ceremony. The alleged marriage occurred in 1927. Its validity must be determined by the provisions of section 42-104, Comp. St. 1929.

In the case of *Collins v. Hoag & Rollins*, p. 805, *infra*, it is held that this section prohibited a common-law marriage, and that to constitute a valid marriage in this state there must be a license previously issued and the marriage must be solemnized by a person authorized by law to solemnize marriages. It follows that there was no valid marriage between the parties. The judgment of the district court was a correct disposition of the case.

Our former opinion and judgment entered pursuant thereto are hereby vacated, and the judgment of the district court is

AFFIRMED.

PAINE, J., dissents.

ELVIRA COLLINS, APPELLEE, V. HOAG & ROLLINS, INC., APPELLANT.

FILED MARCH 18, 1932. No. 27906.

1. Marriage. A valid marriage can be contracted in this state only when the parties have previously obtained a license to marry, and when the marriage has been solemnized by a person authorized by law to solemnize marriages.
2. ———: STATUTE: AMENDMENT: CONSTITUTIONALITY. The amendatory matter contained in chapter 40, Laws 1923, is germane to the sections of the statute amended, and is not broader than its title. Its enactment does not violate that part of section 14, art. III of the Constitution, which reads: "No bill shall contain more than one subject, and the same shall be clearly expressed in the title."
3. ———: ———: ———: ———. Chapter 40, Laws 1923, is not amendatory of either section 42-103, section 42-114, or section 42-115, Comp. St. 1929, and does not violate that provision of section 14, art. III of the Constitution, which reads: "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."

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

Dressler & Neely, for appellant.

Cranny & Moore and *O'Sullivan & Southard, contra.*

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

GOOD, J.

This is a rehearing of the case reported in 121 Neb. 716. Reference is made to that opinion for a statement of the facts.

This case arises under the workmen's compensation law. The vital point herein is the validity of the alleged marriage between the claimant for compensation and the deceased workman. The facts proved were sufficient to constitute a common-law marriage, which the trial court held to be a valid marriage. The alleged marriage occurred in this state in 1929, and its validity depends upon the proper interpretation of section 42-104, Comp. St. 1929, and the constitutionality of that section.

Prior to the enactment of chapter 40, Laws 1923, this court had held on numerous occasions that neither a marriage license nor a solemnization ceremony was necessary to constitute a valid marriage. It had repeatedly held that if a man and woman, each competent to marry the other, agreed to become married, lived and cohabited together as husband and wife, and so held themselves out to the public, such acts constituted a valid marriage. Prior to 1923 there was no statute in this state declaring that to constitute a valid marriage it was necessary for the parties to obtain a marriage license and have their marriage solemnized by a person authorized by law to solemnize marriages. In that year the legislature enacted chapter 40, Laws 1923, which, as amended by chapter 84, Laws 1925, now appears as section 42-104, Comp. St. 1929. In so far as applicable to the present case that section reads: "Previous to the solemnization of any marriage in this state, a license for that purpose must be obtained from the county judge of the county wherein the marriage is to take place, and no marriage hereafter contracted shall be recognized as valid unless such license

has been previously obtained, and unless such marriage is solemnized by a person authorized by law to solemnize marriages."

Counsel for plaintiff contend that, in law, marriage is purely a civil contract, and only the consent of competent parties is essential to creating the marriage relation. Section 42-101, Comp. St. 1929, reads: "In law, marriage is considered a civil contract, to which the consent of the parties capable of contracting is essential." That section does not declare that consent of competent parties is all that is required to constitute a valid marriage. Consent of the contracting parties is only one of the essential elements. This statute forbids the creation of a valid marriage without the consent of the parties. It is universally recognized that the marriage relation is a status, and that the state is interested in and is, in effect, a party to it. *University of Michigan v. McGuckin,* 64 Neb. 300. If it were merely a civil contract, the parties, themselves, might dissolve it by mutual agreement. This the law forbids. The creation of the status entails certain duties and obligations upon the parties thereto; the law imposes upon the husband the duty to support the wife, and, if there be children of the marriage, the obligation of the parents is to support their offspring.

It is also argued by counsel for plaintiff that where the courts and the legislature of a state have recognized common-law marriages as valid no new statute should be held to invalidate such marriages, unless upon clear language in the statute nullifying such marriages. This rule is no doubt sound. The legislature had a purpose in enacting into law section 42-104, Comp. St. 1929. The insertion in that section of the language, "and no marriage hereafter contracted shall be recognized as valid unless such license has been previously obtained, and unless such marriage is solemnized by a person authorized by law to solemnize marriages," was intended to effect a change in the statutory law theretofore in existence, and to meet some need for additional legislation. It is a matter of

common knowledge that for many years the estates of deceased persons have been despoiled by persons claiming to be a common-law spouse of decedent, or an heir-at-law of decedent, born of a common-law marriage. In many cases such claims were in the nature of blackmail. It was no doubt this evil which the legislature sought to correct. The language used seems to us so clear as to leave no room for construction or interpretation. "No marriage hereafter contracted shall be recognized as valid unless" certain things are done is equivalent to saying that marriages not performed in the manner prescribed are void.

It has been suggested that the provisions of the statute above quoted were intended to apply only in cases where a license had been first obtained, and not to apply to common-law marriages where no license had been obtained. The language of the statute will not admit of any such interpretation. What reason could exist for making invalid a marriage where a license had been previously obtained but the marriage not solemnized, and yet leaving valid a marriage that was contracted without license or solemnization? No reason for the distinction is apparent. In our view, the statute was clearly intended to prohibit and make invalid any marriage in this state unless a license was first obtained and the marriage solemnized by a person authorized to solemnize marriages.

Counsel for plaintiff argue that if section 42-104, Comp. St. 1929, was intended to prohibit common-law marriages, then it is unconstitutional and void. They contend that chapter 40, Laws 1923, is broader than its title, and seeks to amend several sections of the statute which are not referred to in the act and which are not thereby repealed, and that this is in contravention of section 14, art. III of the Constitution. The title of said chapter 40 reads: "An act to amend sections 1490 and 1492, Compiled Statutes of Nebraska for 1922, relating to marriage, and to repeal said original sections." Section 1490 provided that at the time of the marriage the male must be of the age of 18 years or upwards, and the female of the age of 16

years or upwards. Section 1492 provided: "Previous to the solemnization of any marriage in this state, a license for that purpose must be obtained from the county judge of the county wherein the marriage is to take place." Chapter 40, Laws 1923, combines these two sections into one, fixes the age limit of parties intending to be married, provides for obtaining consent of the parents or guardian where the parties to the proposed marriage are minors, and further provides for the giving of ten days' notice before the marriage license shall be issued. The two sections, 1490 and 1492, dealt with the regulations necessary to entering into the marriage contract. The same subject-matter is contained in chapter 40, Laws 1923.

It is a rule of law that any amendment may be made to an existing section of the statute if the amendatory matter is germane to the matter contained in the original section. *State v. Majors,* 85 Neb. 375; *State v. Ure,* 91 Neb. 31; *Knothe v. State,* 115 Neb. 119; *In re Estate of Austin,* 116 Neb. 137. We think that the amendatory matter incorporated in chapter 40, Laws 1923, is germane to the sections amended, and that the act does not violate the constitutional provision that "No bill shall contain more than one subject, and the same shall be clearly expressed in the title." Const. art. III, sec. 14.

It is also contended by plaintiff that section 42-104, Comp. St. 1929, is violative of that part of section 14, art. III of the Constitution, which reads: "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," in that the act in chapter 40, Laws 1923, is, in effect, amendatory of three other sections of the statute, now appearing as sections 42-103, 42-114, and 42-115, Comp. St. 1929, without referring to or attempting, in terms, to amend or repeal either of said sections.

Section 42-103, as then and now existing, provides that four certain classes of marriage are void. It will be ob-

served that this statute does not provide that only the classes of marriage therein listed shall be void; nor does section 42-104 change or alter any provision of that section. It remains in full force and unmodified. In fact, the classes of marriage referred to in section 42-103 are void, even though a license has been obtained and the marriage solemnized in the manner provided by law. The legal effect of section 42-103 was to declare that certain persons therein described were incompetent to enter into the marriage relation. Had the legislature so desired, it might have enacted four sections, one for each class of the void marriages, instead of putting four classes into one section. Had it done so, no one would seriously question the power of the legislature to create another, or fifth, class by a separate statute without amending the other sections. However, section 42-104 does not deal with classes of persons incompetent, but with persons competent, to enter into the marriage relation. It is purely a regulatory statute, intended to regulate the manner in which the marriage relation may be created. We think that section 42-104, Comp. St. 1929, is in no sense amendatory of section 42-103.

Section 42-108, Comp. St. 1929, authorizes certain named classes of persons and officials to perform the marriage ceremony, but does not provide that such persons only shall have authority to solemnize marriages or perform marriage ceremonies. Section 42-114, Comp. St. 1929, provides: "No marriage solemnized before any person professing to be a justice of the peace, or a minister of the gospel, shall be deemed or adjudged to be void * * * Provided, the marriage be consummated with a full belief on the part of the persons so married, or either of them, that they have been lawfully joined in marriage." This section, in effect, authorizes any one to perform a valid marriage ceremony if he purports or holds himself out to be a justice of the peace or minister of the gospel, provided the marriage be consummated with a full belief on the part of either of the parties married that

they have been lawfully joined in marriage. *Haggin v. Haggin,* 35 Neb. 375. In other words, section 42-114, under the conditions prescribed, authorizes persons, other than those mentioned in section 42-108, to solemnize marriages or perform the marriage ceremony. Section 42-115 makes it lawful for any religious society to join together in marriage such persons as are in the society, according to the rites and customs of such society to which they belong, and further provides for a return to be made on the license by the clerk, moderator or person presiding in such society. This section likewise authorizes persons, other than those designated in section 42-108, under the conditions therein prescribed, to perform the marriage ceremony. Section 42-104 does not purport to limit the persons who may solemnize marriages to those designated in section 42-108. We have no doubt that a marriage solemnized pursuant to the provisions of section 42-114 or section 42-115 would be a compliance with the provisions of section 42-104. In our opinion, the latter section is not amendatory of either section 42-103, section 42-114, or section 42-115, Comp. St. 1929.

We therefore conclude that no valid marriage ever existed between Elvira Collins, the claimant, and the deceased workman. Her only right to compensation was on the theory that she was the widow of the deceased workman. It follows that she was not entitled to compensation.

The former opinion of this court and the judgment entered pursuant thereto are hereby vacated. The judgment of the district court is reversed, and plaintiff's action dismissed.

REVERSED AND DISMISSED.

PAINE, J., dissents.

IN RE ESTATE OF JOHN HENRY ZIMMERMANN. ANNA MARY POTHAST ET AL., APPELLANTS, V. RALPH H. ZIMMERMANN, APPELLEE.

FILED MARCH 18, 1932. No. 28153.

Wills: BEQUESTS: CONSTRUCTION. From the will, and the circumstances surrounding the testator at the time it was executed, we construe it as the intention of the testator, where he left a nominal bequest to one class of children and the residue to another class consisting of two, one of whom predeceased him, that this surviving residuary legatee should take the entire residue.

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

Chambers & Holland and *C. Russell Mattson,* for appellants.

Lewis & Nuss, contra.

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

DAY, J.

This action involves the construction of a will. That part of the will pertinent to the determination is: "Second, I give and bequeath unto my children, Esther, Helen, Annie, Myrtle and the baby, whose name I do not know, the sum of Five Dollars each. Third, I give, bequeath and devise unto my boys Ralph H. Zimmermann and Daniel S. Zimmermann all the rest and residue of my property, of every name, nature and amount, of which I may die seised or possessed, to be theirs absolutely." The boy, Daniel S. Zimmermann, named in the above residuary clause, died in 1918, while the testator died in 1930. The county court held that the bequest of one-half of the residue given to the deceased son Daniel lapsed, and "that said lapsed portion of the estate, being undisposed of by the terms of the will, descends as intestate property." Upon appeal to the district court, the judgment of the county court was reversed, and it was held that the surviving residuary lega-

tee and devisee, Ralph H. Zimmermann, was entitled to the entire residue of said estate.

The will was executed in June, 1909, following the divorce of the parents of the parties herein, in November, 1908. The decree of divorce gave the care, custody, education and support of the children, Esther, Helen, Anna, Myrtle and Maynard exclusively to the mother and the father was enjoined from meddling or interfering with them. By the same decree, the father, the testator here, was given the care, custody, education and support of Ralph and Daniel. Thus, the family was separated into two separate and distinct units by this decree. The father had practically no property at this time and the entire estate represents the accumulation since. The evidence demonstrates that he and the boys, Ralph and Daniel, worked together and each contributed to the estate. There was little, if any, social relations between the two divisions of the family. These are the circumstances surrounding the execution of this will.

It is urged by the appellants that the overwhelming weight of authority supports the view, in the absence of a statute, that, where one of two residuary legatees predeceases the testator, the legacy of such a legatee lapses and becomes intestate estate passing to the heirs or distributees, providing it was bequeathed to the residuary legatees in common, and not as a class, unless the intention of the testator to that effect clearly appears. This is substantially the statement in the annotation in 28 A. L. R. 1237. We refer to the comprehensive citation of cases there, which are too numerous to be cited here. The only exceptions to this rule seem to be the pronouncements of the courts of Kansas and Indiana. *Corbett v. Skaggs*, 111 Kan. 380, *Gray v. Bailey* (1873) 42 Ind. 349, and *Holbrook v. McCleary* (1881) 79 Ind. 167. However, the last two cases cited do not discuss the rule.

The rule is a legacy to American jurisprudence bequeathed to us as a part of the common law of England. The English courts, as far as our investigation informs

us, have never departed from this rule, although it has been criticized. For example, it has been said: "There is a well-known rule that where residue is given to tenants in common, and one of the tenants in common dies in the testator's lifetime, the lapsed share does not go as an accretion to the gift to the other tenants in common, but it is held that there is an intestacy and the share goes amongst the next of kin. That is, there can be no residue of a residue. The arguments by which this rule was arrived at are perfectly intelligible and, one may say, plausible. Nevertheless I think that the effect of it is to defeat the testator's intention in almost every case in which it is applied; but it is a rule by which I am undoubtedly bound." *In re Dunster* (1909) 1 Ch. (Eng.) 103. Likewise, it has also been criticized by some American courts, an example of which is: "The rule thus established does not commend itself to sound reasoning, and is a sacrifice of the settled presumption that a testator does not mean to die intestate as to any portion of his estate, and also of his plain actual intent, shown in the appointment of general residuary legatees, that his next of kin shall not participate in the distribution at all. The rule is in fact a concession to the set policy of English law, nowhere more severely asserted than in chancery, to keep the devolution of property in the regular channels, to the heir and next of kin, whenever it can be done. If this question were new in this state, speaking for myself I should not hesitate to reject the English rule as wrong in principle and subversive to the great canon of construction, carrying out of the intent of the testator." *Gray's Estate,* 147 Pa. St. 67. At a later date the same court referred to the rule in the following language: "The English rule, as we said in *Gray's Estate,* 147 Pa. St. 67, does not commend itself to sound reasoning, or to the preservation of the testator's actual intent, but we found it recognized and accepted in our own cases before these particulars in its application arose, and we felt ourselves bound by it." *Waln's Estate,* 156 Pa. St. 194.

The composite criticism of the rule gathered from many cases, including the ones cited herein, is that the application of the rule usually defeats the intention of the testator. This being a case of first impression in this state, our course is not charted and we are neither handicapped nor assisted (depending upon the reader's personal view) by former decisions. But the choice as to whether we shall follow the unquestioned weight of authority or shall disregard the multiple pronouncement of able and learned courts has been taken from us in the determination of this case by legislative enactment. This is true, because there are special features of the will under consideration which require a decision in favor of the surviving residuary legatee. Section 76-109, Comp. St. 1929, provides: "In the construction of every instrument creating or conveying, or authorizing or requiring the creation of conveyance of any real estate, or interest therein, it shall be the duty of the courts of justice to carry into effect the true interest (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." This statute applies to wills. *Reuter v. Reuter,* 116 Neb. 428, *Krause v. Krause,* 113 Neb. 22, and *In re Estate of Darr,* 114 Neb. 116, are a few of many cases so holding. Many years ago this court stated: "It is a well-established rule of law that, in the construction of a will, the intention of the testator as disclosed by the words used in the instrument, in connection with surrounding circumstances, must be carried into effect." *Lesiur v. Sipherd,* 84 Neb. 296. See *Heywood v. Heywood,* 92 Neb. 72.

It is the unanimous opinion of this court that the intent of the testator can be determined from the will considered in its setting of surrounding circumstances. When this will was executed, the family of this testator had been divided into two separate and distinct integral units by judicial decree. Each unit was to pursue its course in life without dependence on or interference from the other. One division was the father and the two boys mentioned

in the residuary clause of the will. By their joint efforts, this estate of approximately $9,000 was accumulated after the divorce and separation of the testator from his wife. By the provision of $5 each for the children, whose custody was awarded to the mother, the testator evidenced his intention that they should receive so much and no more. This is more apparent from the nominal sum of the bequest than it would have been had the bequest been for a substantial sum. If these bequests had been for a substantial sum it might have been argued with some persuasiveness that the testator did not intend to increase the share of a residuary legatee. However, the unquestioned intention of the testator was to limit the children from which he was separated to a nominal bequest. This intention could not have been more apparent than it is, if he had added the words "and no more" to the end of the sentence providing for the bequests. This view finds support in *In re Ives' Estate*, 182 Mich. 699. In this way he divided his heirs at law into two classes. One class, the children given into the custody of the mother, the other class, the children entrusted into his care. A natural classification for him to make, in view of the circumstances surrounding the testator at the time the will was made. To the latter class he bequeathed all the residue of his estate, after paying legal requirements and the nominal bequests provided to prevent the children of the first class from deriving any substantial benefit from his estate. The residue was intended to go to the children who remained with him. This view of the will, even if we followed the majority rule, would put this case within an exception to the general rule—that the share of a residuary legatee who predeceased the testator lapses. However, it is also indicative of the intention of the testator, which is the objective of our investigation in this case.

Because of the early demise of one, prior to the death of the testator, he took nothing under the will. To hold that one-half of the residue should be divided as intestate property would defeat the expressed intention of the tes-

tator by the will interpreted in the light of the surrounding circumstances. The survivor takes under the residuary clause because it was the obvious intention of the testator, gathered from the four corners of the will. This conclusion is aided somewhat by the presumption that one who makes a will does not intend any of his property to be divided as though he died intestate. *Jones v. Hudson*, 93 Neb. 561. The surviving legatee does not take as a joint tenant. There is no question of joint tenancy involved, since the interest does not vest in a legatee at the time of the making of the will but at the time of the death of the testator. From the will, and the circumstances surrounding the testator at the time it was executed, we construe it as the intention of the testator, where he left a nominal bequest to one class of children and the residue to another class consisting of two, one of whom predeceased him, that the surviving residuary legatee should take the entire residue.

We are of the opinion that, from the will and the conceded facts, our conclusion is justified. It is therefore unnecessary to consider the admissibility of certain evidence, concerning which appellants complain, for that without that evidence the same result should be reached. The judgment of the district court is accordingly

AFFIRMED.

GERTRUDE D. REED, APPELLANT, V. OCCIDENTAL BUILDING & LOAN ASSOCIATION ET AL., APPELLEES.

FILED MARCH 18, 1932. No. 28119.

1. **Judgment**: ASSIGNMENT. An assignment of a judgment given in consideration of "one-third of the original judgment, to be paid me when the judgment is collected, or for one-third of the amount collected, if less than the original judgment is accepted in settlement," and authorizing the assignee to collect said judgment at the risk and expense of said assignee, is an assignment for collection only, and not a sale of the judgment.
2. ———: ACTION: PLEADING. Where it appears upon the face of the petition that a judgment sued on has become dormant,

and has not been revived, the petition fails to state a cause of action, and is subject to general demurrer.

3. Fraud: ACTION: PLEADING. To state a cause of action for fraud or conspiracy to defraud, it is necessary for the pleader to allege not only the conspiracy and the doing of the fraudulent acts, but also facts showing that damage resulted therefrom.

APPEAL from the district court for Lancaster county: JEFFERSON H. BROADY and LINCOLN FROST, JUDGES. *Affirmed.*

Gertrude D. Reed, pro se.

Ellery H. Westerfield, Claude S. Wilson, Roy F. Gilkeson and *Hymen Rosenberg, contra.*

Heard before ROSE, GOOD and EBERLY, JJ., and CARTER and CHASE, District Judges.

CARTER, District Judge.

This is a case brought in the district court for Lancaster county by the plaintiff, appellant herein, against Trevelyan E. Gillaspie and the Occidental Building & Loan Association, defendants and appellees herein, alleging that on September 18, 1918, the defendant Occidental Building & Loan Association recovered a judgment in the district court for Lancaster county against the defendant Trevelyan E. Gillaspie, in the sum of $1,126.57 with interest at the rate of 10 per cent. per annum from the date of said judgment; that on December 22, 1920, the defendant Occidental Building & Loan Association assigned said judgment in writing to the plaintiff Gertrude D. Reed; that said assignment was placed of record on September 5, 1925, and that the defendant Gillaspie had actual knowledge of said assignment on and after its execution; that after the recording of said assignment, with full knowledge of the same by the defendant Gillaspie, the Occidental Building & Loan Association executed and delivered to said Gillaspie a release of said judgment which was filed with the clerk of the district court for Lancaster county on September 1, 1929.

Plaintiff further alleges that the defendants Gillaspie and the Occidental Building & Loan Association secretly conspired together to release said judgment and to prevent plaintiff from enforcing said judgment against the defendant Gillaspie; that pursuant to said conspiracy the Occidental Building & Loan Association, without the consent or knowledge of the plaintiff, and without paying plaintiff the amount she was entitled to recover by virtue of said assignment, executed and delivered the release of judgment hereinbefore mentioned.

Plaintiff further alleges that said judgment became dormant in September, 1923; that defendant knew that plaintiff was endeavoring to locate property subject to execution belonging to Gillaspie; that she had made preparation to revive said judgment, and that she would enforce said judgment against the defendant Gillaspie. Plaintiff thereupon prayed for judgment for damages against both defendants in the sum of $1,126.57 and interest and costs.

From the judgment of the lower court sustaining a general demurrer and dismissing plaintiff's petition, the plaintiff appeals.

The assignment through which the plaintiff claims a right in the original judgment is as follows: "For one-third of the original judgment, to be paid me when the judgment is collected, or for one-third of the amount collected, if less than the original judgment is accepted in settlement, I hereby assign to Gertrude D. Reed, all rights and interests in and to the judgment recovered in the action, the Occidental Building & Loan Association of Omaha v. Trevelyan Gillaspie, docket 61, page 197, district court for Lancaster county, Nebraska, for $1,126.57.

"And hereby authorize said assignee to collect said judgment with interest and costs from date of judgment.

"All said proceedings to be at the risk and expense of said assignee.

"Dated this 22d day of December, 1920.

"Occidental Bldg. & Loan Ass'n.
"R. A. McEachron, V. P."

It is difficult for the court to determine in this case, whether or not the petition is based upon the judgment hereinbefore mentioned, or whether it is intended as an action for fraud. In either event the court has come to the conclusion that the demurrer to the petition was properly sustained by the trial court.

If the theory of the plaintiff was that it is a suit upon the judgment of September 18, 1918, she cannot recover for the reason that the statute of limitations is a bar to a recovery thereon. Section 20-1515, Comp. St. 1929, is as follows: "If execution shall not be sued out within five years from the date of any judgment that now is or may hereafter be rendered in any court of record in this state, or if five years shall have intervened between the date of the last execution issued on such judgment and the time of suing out another writ of execution thereon, such judgment and all taxable costs in the action in which such judgment was obtained, shall become dormant, and shall cease to operate as a lien on the estate of the judgment debtor." It is clearly the law of Nebraska that where it appears upon the face of the petition that the cause of action is barred by the statute of limitations, and there are no allegations tolling the statute, a general demurrer can be properly interposed to such cause of action. *Pohle v. Nelson,* 108 Neb. 220; *Carden v. McGuirk,* 111 Neb. 350. This court has previously held that a domestic judgment is a specialty and barred by the statute of limitations within five years from the date of the judgment, the language of the court being as follows: "There seems to be some inconsistency in providing by statute that an action on a domestic judgment is barred in five years, and that it may nevertheless be revived and enforced at any time within ten years. But this inconsistency is not so great as to provide that there is no limitation, and that an action can be maintained thereon when it has been dormant for a length of time 'whereof the memory of man runneth not to the contrary.' We are, upon further consideration, convinced that the legislature never intended to

remove all limitations of such actions, and that such judgment should be regarded as a specialty within the meaning of section 10 of the code. Rev. St. 1913, sec. 7567." *Armstrong v. Patterson,* 97 Neb. 871. It is the law of Nebraska that the statute of limitations operates against a specialty within five years. "Within five years, an action upon a specialty, or any agreement, contract or promise in writing, or foreign judgment." Comp. St. 1929, sec. 20-205.

It is therefore clear that in the absence of a revivor of the judgment of September 18, 1918, no action could be maintained upon said judgment.

Plaintiff contends that said petition is one sounding in fraud and that she should be permitted to recover on that theory. An examination of the assignment clearly discloses that it was an assignment for collection only and not an absolute sale of the judgment. The assignment itself shows that plaintiff paid nothing for the same, but was to receive only a share of the amount collected. The assignment also specifically authorizes said assignee to collect said judgment with interest and costs at the risk and expense of said assignee. This all implies that said assignment was made in order that plaintiff might make the collection of the judgment for the Occidental Building & Loan Association. Even if the assignment amounted to an absolute sale of the judgment, the plaintiff under the facts disclosed in her petition could not recover. She alleges in her petition that the assignment was on record at the time the release of the judgment was executed by the Occidental Building & Loan Association to the defendant Gillaspie. This being true, the plaintiff could treat the release as of no force and effect and proceed against the original debtor in the same manner as if no release had been made. "Where the judgment has been assigned to a third person, the debtor, after notice of the assignment, must pay to the assignee; but a judgment debtor who learns that the judgment has been assigned acts at his peril in the payment thereof to any party as assignee

without ascertaining the facts." 34 C. J. 685. The plaintiff therefore having all the rights that she formerly had before the execution of the release of judgment has not suffered thereby. It is undoubtedly the law that fraud, or conspiracy to defraud, to be actionable must result in injury to the complaining party. "There is no doubt of the right of a plaintiff to maintain an action against two or more parties for conspiring to do and actually doing some unlawful act to his damage; but the courts, so far as we are aware, are unanimous in holding that confederation and conspiracy are not actionable, unless something in pursuance of the common plan is actually done, and the thing done results in injury to the plaintiff, and the facts constituting this injury, and the damage resulting therefrom, must be alleged." *Commercial Union Assurance Co. v. Shoemaker,* 63 Neb. 173. "And in the next place the party must have been misled to his prejudice or injury; for courts of equity do not, any more than courts of law, sit for the purpose of enforcing moral obligations or correcting unconscientious acts, which are followed by no loss or damage. It has been very justly remarked, that to support an action at law for a misrepresentation there must be a fraud committed by the defendant, and a damage resulting from such fraud to the plaintiff." *Jakway v. Proudfit,* 76 Neb. 62, quoting from 1 Story, Equity Jurisprudence (13th ed.) sec. 203. The plaintiff having failed to plead facts showing that she suffered a damage because of the alleged fraudulent acts of the defendants, the demurrer was properly sustained as to that theory.

The record in this case discloses that demurrers have been sustained to the first petition filed, the amended petition, and to the second amended petition. Under the circumstances, the trial court did not err when he dismissed the case. For the reasons hereinbefore set out, the judgment of the trial court is

AFFIRMED.

JOSEPH L. HARTMAN ET AL., APPELLANTS, V. RUDOLPH LIPOVSKY ET AL., APPELLEES.

FILED MARCH 18, 1932. NO. 28136.

1. **Contracts: CONSIDERATION: PAROL EVIDENCE.** The true facts as to the consideration, or a part thereof, named in a written contract can be varied by parol evidence, when it is merely a recitation of fact and not contractual or promissory in its nature.
2. ———: ———: ———. The acknowledgment of the receipt of consideration, in whole or in part, in a written contract, is a recitation of fact and may be explained or contradicted by parol.
3. **Instructions** examined and found free from prejudicial error.

APPEAL from the district court for Clay county: J. W. JAMES, JUDGE. *Affirmed.*

F. L. Carrico, Bernard McNeny, L. A. Sprague and *J. S. Gilham,* for appellants.

Waring & Waring and *D. B. Massie, contra.*

Heard before ROSE, GOOD and EBERLY, JJ., and CARTER and CHASE, District Judges.

CARTER, District Judge.

This is an action brought by Joseph L. Hartman and Rosalin Hartman, plaintiffs below and appellants herein, against Rudolph Lipovsky and John Lipovsky, defendants and appellees herein, for the sum of $2,600 claimed to be due from the defendants to the plaintiffs on a contract for the sale of real estate. The undisputed facts are that on the 17th day of November, 1927, plaintiffs and defendants entered into a contract whereby plaintiffs sold to the defendants 320 acres of land in Clay county, Nebraska, for "the sum of $38,400, payable as follows, to wit: $4,000 in cash, the receipt whereof is hereby acknowledged; $17,200 on February 1, 1928," and the balance of $17,200 on or before March 1, 1928. The evidence also discloses that at the time of the execution of the contract the defendants paid plaintiffs the sum of $1,400 in cash

and delivered two certificates of deposit to plaintiffs in the amount of $2,600, issued by the Blue Valley State Bank of Spring Ranch, Nebraska; that on the 12th day of March, 1928, said bank closed its doors and was on the 7th day of April, 1928, adjudicated to be insolvent; that said certificates of deposit were never paid except a dividend of 8 per cent. which was subsequently paid by the receiver of the bank.

It is the contention of the defendants that it was orally agreed between defendants and plaintiffs that the certificates should be taken for $2,600 without recourse upon the defendants as part payment of the purchase price, and as a part of the $4,000 cash payment, receipt whereof was acknowledged in the contract. In reply thereto the plaintiffs contended that the defendants orally agreed with the plaintiff, Joseph L. Hartman, that if the bank did not pay the certificates the defendants would guarantee the amounts thereof. The case was submitted to the jury who returned a verdict for the defendants. From the overruling of the motion for a new trial the plaintiffs have appealed to this court.

The principal ground for reversal of this case upon which the plaintiffs rely is that the trial court erred in admitting the parol evidence of the defendants tending to show that plaintiffs accepted the two certificates of deposit amounting to $2,600 as cash.

The evidence of John and Rudolph Lipovsky to the admission of which plaintiffs object was substantially as follows: That a few days prior to the execution of the contract John and Rudolph Lipovsky had a conversation with Joseph L. Hartman to the effect that they would give Hartman $35,000 in cash and $3,400 in certificates of deposit for the land in question; that on the following day Hartman informed him that he did not want to take $3,400 of the certificates of deposit, and that he would not take more than $2,600 of the certificates as that would be enough to lose if he had to lose anything at all; that they went to Fairfield, Nebraska, and caused the contract to be

drawn, at which time Hartman stated that he would not take $3,400 in certificates and that $2,600 was all that he would take on the purchase price; that on the following day they took the contract and went to the Security State Bank of Lawrence, Nebraska, where the contract was executed. The defendants further testified that they never, at any time, agreed to pay these certificates of deposit if they were not paid by the bank, and that Hartman never made demand of them for payment. The only demand that was ever made was made by plaintiff's attorney shortly before the commencement of the action. In addition to the above, Rudolph Lipovsky testified that there was some conversation with the attorney who prepared the contract, and the attorney informed them that he was "putting it in there the way he would put it, and he said, 'he is taking them now on the contract.' "

The plaintiffs contend that the above testimony was admitted in evidence in violation of the parol evidence rule. Plaintiffs' position is that the contract recites that the sale of the land was for the agreed sum of $38,400 and as the evidence shows that only $35,800 has been paid that there is still due the plaintiffs the sum of $2,600 unless the facts pleaded in the answer are established by competent evidence and constitute a legal defense to the action.

The evidence produced by the parties is in direct conflict. If the parol evidence complained of was properly admitted it was plainly a case for the jury to determine which to believe, and their verdict could not be disturbed by this court. If, however, this evidence was erroneously admitted in evidence, the defendants' affirmative defense would fail for want of proof.

As a general rule "A written contract, the meaning of which is certain and patent from its terms, may not be varied by direct explanation or interpretation in oral testimony." *Latenser v. Misner*, 56 Neb. 340. The court is of the opinion, however, that the case at bar does not fall within the above rule. In the case under consideration the words "$4,000 in cash, the receipt whereof is

hereby acknowledged," is a recitation of fact and not a contractual part of the contract. This court has held that the acknowledgment of the receipt of the consideration, or a part thereof, is not a contractual part of an agreement and may be explained or contradicted by parol evidence. In the case of *Wells v. Aufrecht,* 96 Neb. 402, Judge Letton, speaking for the court, says:

"Plaintiff contends that the facts pleaded in the answer are insufficient in law to constitute a defense for two reasons: (1) A written agreement cannot be contradicted by proof of a contemporaneous oral agreement, in the absence of fraud or mistake; (2) a party cannot plead his own fraud as a defense, but only the fraud of the opposing party. These principles, of course, are sound, but the trouble is with their application to the facts in this case. The defendant is not attempting to contradict the written agreement any more than the plaintiff is. Both parties acknowledge that the written contract does not express correctly the real facts. Plaintiff asserts that the sum to be paid is correctly expressed, but that the acknowledgment of the receipt of the sum stated is incorrect; that a receipt is always susceptible to parol explanation, but that the defendant cannot impeach the contract as to the amount.

"The actual consideration which is expressed in a deed may be shown by parol testimony. * * * This rule applies also to the consideration in a contract of sale of real estate, where there is no promise to pay depending upon the statement of the amount, but it is only a recital of an executed fact. The rule that the terms of a written contract cannot be varied by parol evidence is based upon the principle that, where parties have reduced to writing an agreement to do or refrain from doing a certain act, the writing will be taken as the best evidence of the terms of the agreement.

"This principle is not applicable here. As to the payment and receipt of the $1,600, the contract merely recites a present condition. No agreement was made to pay

any part of this sum in the future. A like rule to that permitting proof of the true consideration applies as to the recital that the consideration has been paid. * * * We conclude, therefore, that both the real consideration of the contract and whether it was actually paid may be shown by parol testimony."

The case above quoted is decisive of the point involved in this appeal and sustains the trial court in admitting the parol testimony complained of by plaintiffs.

Plaintiffs complain in their brief that one of the instructions given by the trial court "was one not readily understandable by an ordinary jury." After a careful examination of the instructions given, we find them to be free from prejudicial error, and that the case was fairly and impartially submitted to the jury. The evidence adduced at the trial was sufficient to sustain the verdict.

There being no prejudicial error in the record, the judgment is

AFFIRMED.

JOHN SEVERSON, APPELLEE, V. MARGARET MCKENZIE ET AL., APPELLEES: WILLIAM MCKENZIE ET AL., APPELLANTS.

FILED MARCH 25, 1932. No. 28233.

1. Tenancy in Common: POSSESSION BY COTENANT. The general rule is that the possession of real property by one cotenant is the possession of all.
2. ———: OUSTER: NOTICE. Before ouster of a cotenant arises there must be some notice or knowledge of acts causing such ouster.
3. ———: ———: ———: ADVERSE POSSESSION. The notice or knowledge out of which ouster of a cotenant arises may sometimes be inferred from acts or circumstances attending adverse possession, which are open, notorious and unequivocal in their character and import.
4. ———: ———: ADVERSE POSSESSION. "Where one tenant in common enters upon the whole estate, improves it, takes the profits, pays all the taxes, makes it his home, and claims the whole for more than the period of the statute of limitations, an actual ouster should be presumed, although not otherwise proved." *Lund v. Nelson*, 89 Neb. 449.

5. Quieting Title: LACHES. "Independently of any limitation for the guidance of courts of law, equity may, in the exercise of its own inherent powers, refuse relief where it is sought after undue and unexplained delay, and when injustice would be done in the particular case by granting the relief asked." *Abraham v. Ordway*, 158 U. S. 416.
6. ———: ———. "Courts of equity have inherent power to refuse relief after undue and inexcusable delay independent of the statute of limitations." *Hawley v. Von Lanken*, 75 Neb. 597.

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

A. R. Oleson, for appellants.

Zacek & Nicholson, contra.

Heard before GOSS, C. J., DEAN, GOOD, DAY and PAINE, JJ., and LANDIS and RAPER, District Judges.

GOSS, C. J.

This is a suit to quiet title to two town lots in Wisner, bought by John Severson on January 8, 1929, through partition proceedings. From a decree for plaintiff, Helen M. Oleson and other cross-petitioners appealed. There is little dispute over the important facts. Many of them are stipulated. The partition proceedings were brought by the heirs of James C. McKenzie of Wisner, who had been in actual possession of the lots for many years prior to his death, intestate, on May 13, 1928. His estate, probated in Cuming county, was closed November 20, 1928, and his heirs brought the partition suit January 8, 1929.

James C. McKenzie, Kenneth J. McKenzie and Donald McKenzie were brothers. James lived at Wisner, Nebraska, Kenneth lived at Onawa, Iowa, and Donald lived in Canada. In 1894, while on a visit with his brother James, Kenneth J. McKenzie acquired the property in controversy. Kenneth J. McKenzie died testate on March 18, 1896. On May 19, 1896, his will was admitted to probate in Iowa. On July 14, 1896, an authenticated copy was filed for probate in the county court of Cuming county,

Nebraska, for ancillary administration here, and was subsequently duly admitted to probate. On August 7, 1896, letters testamentary were issued to James C. McKenzie, as executor; no further proceedings were had in said estate after that date. By said will of Kenneth J. McKenzie the property in controversy was devised to James C. McKenzie and Donald McKenzie. It does not appear that the estate owed any debts. It would seem that the purpose of probating the will here was to show its devise of the Cuming county property, being the two Wisner lots.

After the death of Kenneth J. McKenzie and in 1896 or 1897, James C. McKenzie moved a barn upon the lots, fenced them in and continued to use them as a barnyard until his death. He put sidewalks in front of the property, paid all taxes on the lots from 1897 to his death, including $230 paving assessments, was in exclusive possession, and was reputed to be the sole owner. Neither Donald McKenzie nor any one claiming under him had ever made any claim to the property, and James C. McKenzie was testified to have stated that he was the owner.

All of the appellants except Helen M. Oleson claim an undivided one-half interest in the lots as heirs of Donald McKenzie, who died in Canada, August 2, 1897. Helen M. Oleson claims the like interest under a deed from the administrator with the will annexed of the estate of Donald McKenzie. All appellants admit that plaintiff is entitled to an undivided one-half interest in the lots but no more. The Donald McKenzie will was admitted to probate in Cuming county on October 13, 1930, by use of an authenticated copy from the Monona, Iowa, probate proceedings. It may be said generally, as to the terms of the will and for the purposes of this suit, that, if given effect here, the will served as a basis for the assertion of the interests set up by appellants.

The district court expressly held that plaintiff and his predecessors had title by adverse possession, with all of the elements operative in relation thereto, since 1896 or

1897. Appellants challenge that holding on the particular ground that, when James C. McKenzie took possession of the lots, he did so for himself and, as executor, for his brother Donald, both of whom took the real estate under the will of Kenneth, as cotenants. They rely on the general proposition so well stated in *Walter v. Walter,* 117 Neb. 671, that possession by a cotenant is presumed to be friendly and, to become adverse, requires notice that the entire estate is claimed in hostility to cotenants. Plaintiff, on the other hand, claims there was no occasion for James C. McKenzie, as executor, to take possession of these unimproved lots, as there were no rents and profits to collect and no estate debts to pay. Title vested in James C. and Donald, as devisees under the will, subject to claims against the estate. The executor was not required to take actual possession in the circumstances and unless ordered by the court. *Tunnicliff v. Fox,* 68 Neb. 811; *Lewon v. Heath,* 53 Neb. 707. We conclude from all the circumstances that, when James C. McKenzie took possession of the lots, he did so in his own right as a devisee under his brother's will and not as executor.

The general rule is that the possession of one cotenant is the possession of all. So James C. McKenzie's possession was also that of Donald McKenzie, the other devisee, unless and until there was an ouster of the latter. Such ouster may arise from open, notorious and hostile possession under claim of ownership for the statutory period. 1 R. C. L. 742, sec. 62. It is a general rule that, before ouster of a cotenant arises, there must be notice or knowledge, but these "may be inferred from acts or circumstances attending such adverse possession, which are overt, notorious and unequivocal in their character and import. From such acts it is the duty of the other cotenants to be informed thereof and to draw such reasonable inferences therefrom as prudent persons possessed of and interested in like information would naturally do, and such cotenants out of possession cannot prevent the operation of the statute of limitations by proving that they did

not know of the facts affecting their interest, or, knowing of them, did not draw correct conclusions therefrom." 7 R. C. L., 851, sec. 45.

So an ouster of a cotenant out of possession by a cotenant in possession sometimes may, in proper circumstances, be presumed from long and continued and undisturbed possession.

This rule was applied by this court in *Lund v. Nelson,* 89 Neb. 449, the syllabus of which case is as follows: "Where one tenant in common enters upon the whole estate, improves it, takes the profits, pays all the taxes, makes it his home, and claims the whole for more than the period of the statute of limitations, an actual ouster should be presumed, although not otherwise proved."

In *Walter v. Walter,* 117 Neb. 671, this *Lund* case was criticized because of making too general a statement of the rule, although the rule was approved in its application to the facts of the *Lund* case. It is true the decision in the *Walter* case was against a cotenant claiming title by adverse possession. But there was little there in common with the facts here to give notice of a hostile claim on the part of those in possession. As the opinion says: "We find nothing in the character of this possession calculated to give notice of a hostile claim by plaintiffs. The fence existed before the death of Joseph, Sr., and the digging of ditches was not an act of such notoriety as to furnish such notice. It was only such an act as would be done by an ordinary tenant seeking to make profitable use of the land. Moreover, they were dug within the ten year period."

Here James C. McKenzie took possession of two lots of little intrinsic value. (Plaintiff paid $865 for the entire title at referee's sale. Helen M. Oleson's deed called for $500 for an undivided half interest.) He moved a barn and placed it on the lots. He stated that he owned them. He fenced the lots and for more than 30 years exercised openly all the rights of ownership. He paid hundreds of dollars of taxes on the property. This situation distin-

guishes the case at bar from the *Walter* case, and the facts as to the possession here constituted such notice of hostile possession as to do away with any presumption that the possession of James C. McKenzie was for the benefit of his cotenant. If these acts were such as would put a man of ordinary prudence upon guard or inquiry, they are sufficient under the discussion in the *Walter* case, which said: "This notice need not be direct and positive, but may be inferred from acts of the tenant in possession, in hostility to the title of his cotenants, of such an open and notorious character as would put a man of ordinary prudence upon his guard. Acts of the tenant, however notorious, which are reasonably consistent with the existence of title in his cotenants are not sufficient, they must be hostile and of such a character as would put a reasonable man, aware of his rights, upon inquiry."

We call attention to another rule which we think may well be invoked. "Courts of equity have inherent power to refuse relief after undue and inexcusable delay independent of the statute of limitations." *Hawley v. Von Lanken*, 75 Neb. 597. This followed the opinion of the supreme court, by Mr. Justice Harlan, in *Abraham v. Ordway*, 158 U. S. 416, in which he said: "Independently of any limitation for the guidance of courts of law, equity may, in the exercise of its own inherent powers, refuse relief where it is sought after undue and unexplained delay, and when injustice would be done in the particular case by granting the relief asked."

Here appellants waited more than 20 years after the expiration of an ordinary time of limitation. They knew or should have been aware that for nearly a generation there had been no action in the proceedings to complete the probate of the will under which they claim, had been no income from the property devised, and no report concerning it. Altogether we are satisfied that the district court made the right disposition of the controversy by its decree for plaintiff. The judgment is

AFFIRMED.

GEORGE L. MCCARTER V. J. D. COVER, APPELLEE: JOHN J. MCCARTER, APPELLANT.

FILED MARCH 25, 1932. No. 28178.

Appeal: FINDINGS BY COURT. "The findings of the trial judge in an action at law tried by the court without the intervention of a jury are entitled to the same weight as the verdict of a jury, and, if supported by sufficient competent evidence, will not be disturbed by this court." *Manville v. Park*, 108 Neb. 285.

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

York & York, for appellant.

Nye & Nye, contra.

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

DEAN, J.

This action was begun by George L. McCarter, in the district court for Buffalo county, against J. D. Cover to recover the value of a truck and also certain rent of a bakery. Both the truck and the bakery were received as part payment by the plaintiff in the sale by him to the defendant of a certain lot in Lexington. The defendant filed a cross-petition against the plaintiff and John J. McCarter wherein the defendant alleged a breach of warranty in the deed to the lot in Lexington above named. Judgment was entered in favor of Cover on his cross-petition and against John J. McCarter for $400 with interest at the rate of 7 per cent. per annum from November 2, 1929, as damages for the alleged breach of the covenants of the deed in question. McCarter has appealed.

As grounds for reversal, McCarter contends that the cross-petition fails to state a cause of action and that the measure of damages is incorrect and that the judgment is not supported by sufficient evidence. Upon an examination of the above assignments of alleged error, however, we think they are without substantial merit.

The evidence discloses that a house and certain other buildings on the lot adjoining the one in Lexington that was sold to Cover encroach upon the Cover property and that such encroachment was known and admitted by the parties herein when the sale was negotiated. It is Cover's contention, however, that McCarter represented to him that the buildings on the adjoining lot encroached only a few inches and that McCarter agreed to remove such encroachments. But, after the deed was executed, the city engineer of Lexington was employed by Cover to make a survey of the lots and, from his evidence, it appears that a chicken house on the adjoining lot extends three feet over the boundary, and that a coal house extends three feet on one side and six feet and three inches on the other side, and that a dwelling-house extends one foot and four inches on the north side and two feet and two and one-half inches over the boundary of the Cover property on the south side. Cover thereafter demanded that the encroachments be removed, but McCarter failed to comply therewith.

We cannot, of course, lose sight of the elementary proposition that "The findings of the trial judge in an action at law tried by the court without the intervention of a jury are entitled to the same weight as the verdict of a jury, and, if supported by sufficient competent evidence, will not be disturbed by this court." *Manville v. Park*, 108 Neb. 285.

We conclude that the judgment is supported by the evidence. Nor does reversible error appear herein. The judgment is

AFFIRMED.

FEDERAL LAND BANK OF OMAHA, APPELLEE, V. PETER P. RADKE: TRACY T. FROST, APPELLANT.

FILED MARCH 25, 1932. No. 28238.

1. **Mortgages**: FORECLOSURE: SALE: CONFIRMATION. "There are no restrictions upon the means by which the trial court may satisfy itself that a fair price was obtained at a foreclosure

sale or that a subsequent sale would not realize a greater amount." *Occidental Building & Loan Ass'n v. Beal, ante*, p. 40.

2. ———: ———: ———: SETTING ASIDE. "A judicial sale of real estate will not be set aside on account of mere inadequacy of price, unless such inadequacy is so gross as to make it appear that it was the result of fraud or mistake." *First Nat. Bank v. Hunt*, 101 Neb. 743.

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

Charles Dobry, for appellant.

E. F. Dougherty, J. M. Gurnett and *H. M. Johnsen, contra.*

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

DAY, J.

This is an appeal from an order of confirmation in a foreclosure proceeding. The record discloses that a decree of foreclosure was rendered on January 11, 1930, whereupon defendant took a nine months' stay. Sale was held on November 17, 1930, at which sale plaintiff purchased the property for $3,723.88. Defendant filed objections to confirmation on November 24, 1930, and upon hearing the sale was set aside. A second sale was held on June 2, 1931, and plaintiff again purchased the land in question for the amount of its indebtedness, which was now $3,896.87. Objections to confirmation were again filed by defendant upon the same grounds as those relied upon in the first sale, namely, that the said real estate was reasonably of the value of $6,000. The same trial judge who had set aside the first sale refused, on September 7, 1931, to disturb the second, holding that "the property sold for its fair cash market value under the circumstances and conditions of said sale and that a subsequent sale would not realize a greater amount." It will be noted that defendant has made no payment to plaintiff either of taxes, or of the semiannual amortization instalments and interest due upon the loan, and has been in possession after default, since January 11, 1930.

Defendant relies for reversal upon the following assignments of error: (1) The court erred in admitting the testimony of A. W. Reinss; and (2) the land did not sell for its fair value under the circumstances and conditions of the sale. These will be discussed in order. Plaintiff introduced but one witness, one A. W. Reinss, who testified that he had been over the land in question, that he owned land in the vicinity, that little land had been sold anywhere in the vicinity, and, over defendant's objection that a proper foundation had not been laid, stated that in his opinion the fair value of the land was not more than $25 an acre. This court has held that "There are no restrictions upon the means by which the trial court may satisfy itself that a fair price was obtained at a foreclosure sale or that a subsequent sale would not realize a greater amount." *Occidental Building & Loan Ass'n v. Beal, ante,* p. 40. See, also, *Lindberg v. Tolle,* 121 Neb. 25. Undoubtedly, in the instant case, the court considered the fact that there had been a previous sale, at which time the plaintiff had been forced to bid in the property at approximately the same price, that these proceedings had been pending for almost two years, during which time defendant had not been able to dispose of the land to some one who would assume the burden of the mortgage, and that the market for real estate had been slow and in decline since the time of the first sale of the property in dispute. There is no merit in defendant's first assignment of error.

Defendant relies upon the inadequacy of price, alleging that the land did not sell for its fair value. This court has repeatedly held: "A judicial sale of real estate will not be set aside on account of mere inadequacy of price, unless such inadequacy is so gross as to make it appear that it was the result of fraud or mistake." *First Nat. Bank v. Hunt,* 101 Neb. 743. See, also, *Lemere v. White, ante,* p. 676; *Metropolitan Life Ins. Co. v. Heany, ante,* p. 747; *Vought v. Foxworthy,* 38 Neb. 790; *Kearney Land & Investment Co. v. Aspinwall,* 45 Neb. 601; *Iowa*

Loan & Trust Co. v. Stimpson, 53 Neb. 536; *Green v. Paul*, 60 Neb. 7; *Jones v. Cleary*, 2 Neb. (Unof.) 541. Defendant offered the *ex parte* affidavits of a number of persons to the effect that the fair value of said land was a sum ranging from $40 to $50 an acre, and that on a resale of said property it would bring that price. No evidence is adduced as to who or what parties were ready, willing and able to make this offer, that one had been made, or would be made, or that any fraud or mistake appeared. The property in question here had been offered for sale twice, within a period of two years, bringing approximately the same price each time. The trial court did not err in refusing to set aside the second sale, and the judgment is affirmed, with leave to redeem before the mandate is issued.

AFFIRMED.

BARBARA SWOLEC, APPELLANT, V. SYLVESTER SWOLEC, APPELLEE.

FILED MARCH 25, 1932. No. 28145.

1. **Divorce**: CUSTODY OF CHILDREN. In awarding the custody of minor children, the court looks only to the best interests of such children, and those of tender age are usually awarded to the mother. Other considerations being equal, it is usual to award the custody of children to the innocent spouse.
2. ———: ALIMONY. Permanent alimony is founded upon the right of the wife to such support from her husband as she would be reasonably entitled to expect, considering all of the circumstances. Its amount rests upon the sound discretion of the court. Comp. St. 1929, sec. 42-318.
3. ———: ———. In awarding such alimony, the financial holdings must first be considered, their value as of the time of the decree, the manner in which such property was acquired, the amounts contributed by each, its income and productiveness, as well as the respective earning capacity of each party.
4. ———: ———. In fixing the amount of permanent alimony, all evidence must be considered relating to the ages of the parties, duration of and conduct during marriage, the station in life, circumstances and necessities of each, as well as their health and physical condition.

5. ———: ———. The policy of the law being to give to an injured wife, not merely what necessity but what justice demands, various decisions, in which alimony has been fixed at from 15 per cent. to 50 per cent. of the husband's property, examined and discussed. Consideration must also be given as to whether other relatives of the husband have legal claims upon him for support.

APPEAL from the district court for Nance county: FREDERICK L. SPEAR, JUDGE. *Affirmed as modified.*

G. N. Anderson and *Wagner & Wagner*, for appellant.

Kemp & Brower, contra.

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

PAINE, J.

The appellant wife filed her petition in the district court for Nance county, asking for a divorce, custody of the two children, alimony and suit money. The husband filed a cross-petition, asking for a divorce and the custody of the two boys. The court granted the wife a divorce and the custody of the two children until September, 1931, when the decree directed that the two sons be put in school in the St. Anthony's school at Cedar Rapids, Nebraska, for the school year beginning September, 1931. The court allowed the plaintiff $2,831 permanent alimony, which amount was fixed by allowing her $1,100, which she had put into the farm property from money she had received from her parents, and $1,731, being one-third of the estimated value of the accumulated property. The wife appealed from the order of the district court.

The parties are of Polish descent, and were married October 25, 1913, and at the time of their marriage the appellee's father deeded the appellee 160 acres of land, giving him one eighty outright and selling him the other eighty for $8,000, and, as a result of their joint efforts on the farm, they have paid the $8,000 for said farm, lying 13 miles east of Fullerton, and equipped it with machinery and live stock and buildings.

The husband used intoxicating liquor frequently, and the appellant claims that all of their troubles arose from his drinking. They have separated on several prior occasions, but relatives brought them together. When they separated the last time, the appellant went to Omaha and stayed three months and learned how to operate a beauty parlor, leaving the two boys, Alvin, aged 13 years, and Leonard, aged 7 years, with her parents. Upon her return she opened a beauty parlor in Fullerton with her sister, and now conducts the same.

The wife claims that whenever a quarrel would occur between the parties the husband would assault her, but there is evidence to indicate that the appellant on some occasions was able to hold up her end in such affairs, and upon several occasions neighbors came in and tried to assist in settling the difficulties. The parties are members of the Roman Catholic church, and it is charged that the mother alienated the children from their father. The district judge directed that the boys should remain away from both parents for one year, and attend the St. Anthony's Catholic school at Cedar Rapids, Nebraska, and provided that the custody of the children be delegated during said time to the authorities conducting said school, the expenses of such schooling to be paid by the father; that, after they had finished the year's schooling, the district judge would hold a hearing and enter an order as to their permanent custody. The mother, by filing a bond and appealing to this court, has thwarted this order of the district court and has kept them with her, and has sent them to the public schools in Fullerton, and in addition they have attended a catechism class conducted at the Catholic church in Fullerton each Saturday.

The wife was 17 years of age at the time she was married, and her husband was 27 years of age. She is careful of her expenditures, and no complaint is made against her moral character. However, the evidence discloses that she lacked much in self-control.

In awarding the custody of minor children, the court

looks only to the best interests of such children, and children of tender age are usually awarded the mother. *Nathan v. Nathan,* 102 Neb. 59; *Boxa v. Boxa,* 92 Neb. 78; *Feather v. Feather,* 112 Neb. 315. Other considerations being equal, it is usual to award the custody of children to the innocent spouse.

It is to be regretted that this hard-working father, running the farm of 160 acres, has neither the time nor a suitable place in which to bring up his two boys. Neither is the mother able to devote the time she should to their care when she is devoting many hours a day to running a beauty parlor, often leaving the boys on the streets after school hours; but at the present time it appears to this court that it is the lesser of two evils to permit the mother to retain the custody of these two boys until an order for their permanent care is made by the district court.

The regular attendance at school of boys of this age is of the utmost importance, and as this appeal has defeated the order of the district court that these boys attend a certain school during this entire school year, it is ordered that the judgment of the district court in that regard be set aside, and the custody of the boys is granted to the mother until June 3, 1932. The father is directed to pay to the mother the sum of $20 a month from August 4, 1931, up to June 3, 1932, for their support and care, and the father is allowed their custody for two hours each Saturday afternoon during said time.

Under the circumstances, the order entered by the district judge is hereby modified, and the district judge will hold a further hearing and make an order for the permanent custody of these two sons.

It was insisted before this court that the amount of the alimony granted to the wife lacked much of being sufficient under all the circumstances. The district judge, in determining the amount of the alimony, may have omitted from his calculations the 80 acres of land given to the appellee by his father, and considered only the 80 acres of land for which $8,000 had been paid by their joint

efforts, and from this he deducted the $1,100 that the parents of the wife gave her at the time of their marriage. The court found that the value of the entire property accumulated by their joint efforts amounted to $6,293, and deducting from this the $1,100, he awarded the wife $1,731, or one-third of the balance, making a total amount to be paid to her in cash of $2,831.

Permanent alimony is founded upon the right of the wife to such support from her husband as she would be reasonably entitled to expect, considering all of the circumstances of the parties, and this obligation continues after their legal separation. Permanent alimony was unknown at common law, and in this state is based upon section 42-318, Comp. St. 1929, which declares that the court may award "such alimony out of his estate as it shall deem just and reasonable, having regard to the ability of the husband, the character and situation of the parties, and all other circumstances of the case." It will be seen at once that, under such a liberal statute, the fixing of the amount of the alimony rests alone upon the sound discretion of the court. The first factor that should be taken into consideration is the financial circumstances of the parties, and all of the property owned by the parties should be considered and its value ascertained as of the time of the decree. Next, the income and productiveness of the property should be considered, together with the earning capacity and future prospects of the parties; the manner in which such property was acquired, whether through joint savings or by inheritance, and the contributions made by each, together with the value of the services rendered by each of the parties during their marriage. If evidence relating to the respective ages of the parties, the duration of and conduct during the marriage, their station in life, respective wants, circumstances and necessities, has been given, it should be considered, together with the health and physical condition of the parties, especially if the wife's health has been affected by the habits or conduct of the husband, also, as to whether

other relatives of the husband have legal claims for support.

With these guiding principles in mind, let us examine a few of our Nebraska cases to see how they were applied. In cases appealed to this court, the alimony has been increased in some and cut down in others, yet not according to any ascertainable standards.

As to the amount of the alimony, it has varied greatly, for in *De Vore v. De Vore,* 104 Neb. 702, *Heist v. Heist,* 48 Neb. 794, and *Pierce v. Pierce,* 96 Neb. 511, the amount awarded to the wife was approximately one-half of the value of the property.

On the other hand, in *Cochran v. Cochran,* 42 Neb. 612, and *Smith v. Smith,* 19 Neb. 706, the alimony was but one-fourth of the value of the property.

In many cases, too numerous to cite, it has been fixed at one-third of the value of the property. This was done in *Goldenstein v. Goldenstein,* 110 Neb. 788, which involved property of $25,000, and in the case of *Nathan v. Nathan,* 102 Neb. 59, where the husband admitted that his holdings were worth $155,000, an award by the district court of $35,000 was increased in this court to $50,000. In the case of *Edholm v. Edholm,* 99 Neb. 331, an award of only $25,000 was allowed on a valuation of $110,000, while in *Kimbro v. Kimbro,* 73 Neb. 171, an award of $5,500 was cut in this court to $2,500 out of property valued at $16,700. In *Haase v. Haase,* 118 Neb. 94, an award of $1,000, out of property worth more than $16,000, was raised to $3,000 by this court. In *Tiernan v. Tiernan,* 112 Neb. 707, an award of $125 a month to the wife was set aside in this court, and she was given $40,000, payable in five annual instalments of $8,000 each, when the husband's estate amounted to over $250,000.

It must be clear, from these few illustrations, that there has never been an attempt by this court to fix any rules which would relieve the trial judge of a patient, detailed study of every fact and circumstance relating to each case as it comes on for trial.

With the above observations in mind, let us examine the record in the case at bar. The estimates as to the value of this farm land, aside from those of the litigants, ran from $62.50 an acre to $125 an acre, and the fair average of these estimates of witnesses fixed the value of the land at $88 an acre for the entire 160 acres. The debts outstanding against the property amounted at the time of the trial to $3,327, exclusive of the $1,100 contributed by the wife. Under these circumstances, this court sets aside the order for the payment of $1,731 alimony to the wife, and increases the permanent alimony to $2,500, which, with the $1,100 contributed by her, makes a total of $3,600, which shall be a lien against the property of the appellee, which amount, considering the present depression in the values of farm products and the difficulty of securing mortgages upon farms, shall be paid to the appellant at the rate of $400 each year for nine years, in payments of $200 upon June 1 and $200 upon December 1 each year, and said payments are to bear no interest if paid when due.

It is further ordered that the appellee shall pay, in addition to the costs in both courts and the attorney's fee of $250 allowed by the district court, an additional $150 for attorney's fee in this court, and that the district court, at the time of determining the permanent custody of the sons, shall make such order for their support as may be just and equitable under all the circumstances.

Judgment of the district court modified as herein set out, and affirmed as modified.

AFFIRMED AS MODIFIED.

LOUISE THOMPSON, APPELLANT, V. YOUNG MEN'S CHRISTIAN ASSOCIATION OF OMAHA, APPELLEE.

FILED MARCH 25, 1932. No. 28061.

1. **Negligence: CARE REQUIRED OF OWNER OF BUILDING.** The owner of a building is not an insurer against accidents to an invitee who is leaving by steps provided for that purpose; but the

owner is bound to exercise reasonable care and prudence to keep those steps reasonably safe for the use of such invitee.

2. ———: PRESUMPTION. The fact that an invitee falls upon the steps leading from the exit of a building to the sidewalk below does not raise any presumption of negligence on the part of its owner, and the doctrine of *res ipsa loquitur* does not apply.
3. ———: PROOF. Facts constituting negligence must be proved and not left to inference.
4. ———: BURDEN OF PROOF. Where a recovery is sought for personal injury sustained by an invitee in falling upon the steps of a building, on the ground that the owner of that building was negligent in permitting water to accumulate on one of those steps, the burden is upon the plaintiff to prove that said condition existed and was known to the owner before the accident, or that it had existed for so long a time theretofore as to charge the owner with notice and to have afforded him a reasonable opportunity to remove it.
5. ———: ASSUMPTION OF DANGERS. A person lawfully on the premises of another assumes the dangers which are open and obvious and which can be seen readily and avoided by the exercise of ordinary care.

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

Crofoot, Fraser, Connolly & Stryker, for appellant.

Brown, Fitch & West, contra.

Heard before ROSE, GOOD and DAY, JJ., and FROST and MESSMORE, District Judges.

FROST, District Judge.

This is a suit to recover for personal injuries suffered by Louise Thompson, plaintiff and appellant, who is hereinafter referred to as patron or invitee. In her petition she alleges that the Young Men's Christian Association of Omaha, Nebraska, defendant and appellee, hereinafter referred to as association, maintains steps leading to the entrance of its building from the sidewalk, and that these steps, by constant use, have become worn, recessed and uneven in surface, by reason of which they have become unsafe and dangerous. She also alleges that they were unsafe on the day of the accident because water had been

spilled upon one of them. On the other hand, the association contends that the steps were in an ordinary and usual safe condition, and that if one of them was wet at the time of the accident the association had no knowledge thereof and was not responsible for that condition and had no opportunity to learn of it before the accident. At the conclusion of the evidence the trial court sustained the association's motion to discharge the jury and dismiss the patron's cause of action. A motion for a new trial was filed and overruled and the case is brought to this court.

The complaint is that the court erred in finding that there was not sufficient evidence of negligence on the part of the association to require a submission of the case to the jury.

The patron in her brief says that undoubtedly the accident "happened on account of the condition of this step, combined with the fact that water had been spilled thereon." The negligence of the association depends upon whether the steps had become so worn that their use was not reasonably safe, and whether the water which she claims had been spilled thereon had made them unsafe for use, and that this condition was known to the association or by the exercise of reasonable diligence should have been known to it. There is still another question to be met in disposing of this appeal: Was the patron's knowledge of the condition of these steps such that she assumed any risk that might be involved in their use?

These steps are limestone and have been in use twenty-five years. They have in that time been worn by the heavy travel over them. We are fortunate in having the result of this use shown in exhibit 1, attached to the bill of exceptions. This exhibit does not leave the wear shown by the steps, and particularly the first step, which was the one on which the accident happened, to conjecture, but gives the exact amount of wear upon the face of the tread. The tread is 11½ inches wide and there is some wear thereon at the center back 9½ inches. The wear

extends along the front 2 feet on either side of the center, where it is 1 inch, while on the two sides, 6 inches away, it is 1¾ inches, and at 1 foot away five-eighths of an inch and seven-sixteenths of an inch. In the center, back 6 inches, the wear is nine-sixteenths of an inch, while 6 inches on the two sides it is three-fourths of an inch and seven-sixteenths of an inch. Other figures showing the exact wear at different points on the face of the tread are given in the exhibit, and, generally speaking, the wear becomes less as the distance from the front center becomes greater, until the depression becomes nothing at 9½ inches back and at 2 feet on either side. Exhibit 1 gives the facts which present to the mind a perfect picture of the depression at any point in the face of the tread. There is nothing in the evidence which indicates that the wear has not been fairly uniform or that any particular holes have been made by that wear. The trial court evidently took the view that there was nothing in the wear of this step or of all the steps which indicated that it was negligence for the association to allow their continued use.

The patron says in her testimony that there were a few drops of water just outside the entrance door, and that as she started to step down to the first step she saw a small amount of water upon that step. She further says that, when her foot slipped under her, she sat down on the step and then could see no water, and that later she found her dress that had absorbed the water on the step was wet a distance of six to nine inches across. A few minutes after the accident the business manager of the association went out to observe the place where the accident happened and he testifies at that time he could see no evidence of any water. The patron testified that when she went in the building on the day of the accident she approached over these same steps, and at the time a boy was washing the door windows on one side of the entrance, and when she came back out five minutes later he was just crossing to wash the windows on the other

side and was carrying a pail of water, the inference being that he had spilled the water. The business manager testified that a company was employed to do this work and he knew nothing of anybody being there to wash windows on the morning of the accident.

The law applicable to this case is well settled and most of the legal propositions involved are outlined in the case of *Broadston v. Beddeo Clothing Co.*, 104 Neb. 604. This law puts upon the association the duty to use reasonable care and prudence to keep the steps by which approach is made to the entrance of the building reasonably safe for their use by those having business inside. The association would limit its duty by adding that it is not an insurer against accidents and the *Broadston* case justifies such limitation. The patron claims that she fell on the steps, not only because they were defective from wear, but also because they were wet and slippery. To establish her claim in this latter regard, according to another legal principle announced in the *Broadston* case, she must prove, unless the evidence shows the condition existed and was known to the association, either that the latter had caused the condition or that it had existed a long enough time prior to the accident to charge its servants with notice to afford them a reasonable opportunity to remedy it. The patron's own testimony shows that the window washing was going on as she was entering and during the five minutes that she was inside the building, and that she saw, as she was leaving the building, the drops of water on the sill and at one spot in a depression in the first step. According to the manager of the association the work was being done under contract and the one doing it was not under the control of the association. Therefore, the trial court was justified in concluding that if there was any water on the step the association could not be blamed therefor, because the window washing was done by the servant of another, and because of the very short time between the washing and the accident. In other words, the association had no knowledge

of the water being there, had not itself caused it to be there, and the time that it had been there was too short to charge the association with notice and to afford it a reasonable opportunity to remedy that condition. *Broadston v. Beddeo Clothing Co.*, 104 Neb. 604; *Schnatterer v. Bamberger & Co.*, 81 N. J. Law, 558, 34 L. R. A. n. s. 1077; *Chick v. Gilchrist Co.*, 208 Mass. 183.

The patron's contention is that the condition of the steps was in itself evidence of negligence which required that question to be submitted to the jury. Ordinarily, where oral testimony is depended upon in order to show wear that might be true. The different descriptions of the conditions of the steps then would necessarily vary and there probably would be questions upon which the jury must pass. However, in this case exhibit 1 was prepared by the patron's witness, a civil engineer, and was received in evidence without objection. This exhibit supplies the facts from which we must draw the conclusions as to the condition of the steps. We think the trial court was right in holding that their condition was not such as to make their continued use evidence of negligence. This position finds confirmation in the *Broadston* case, which holds that a customer falling upon a stairway does not necessarily raise a presumption of negligence on the part of the proprietor of the store, and the doctrine of *res ipsa loquitur* does not apply.

In the case of *Garland v. Furst Store*, 93 N. J. Law, 127, it was charged that the defendant maintained a slippery tile floor in the basement which was dangerous for persons to walk upon. The court in the opinion makes use of this significant language: "A mere fall of a person on the premises of another, without any evidence to show how the fall was occasioned, raises no presumption of negligence on the part of the owner, and the doctrine of *res ipsa loquitur*, which is only applicable when the thing shown speaks of the negligence of the defendant, not merely of the happening of the accident, does not apply."

Another closely related legal principle is that the facts that go to show negligence must be established by evidence and not left to inference. This question and other pertinent ones are discussed by the Colorado court in the case of *Thompson Grocery Co. v. Phillips*, 22 Colo. App. 428, a case where the defendant appeared at the plaintiff's place of business for the purpose of purchasing a turkey, and when approaching the counter where the birds were on display fell and seriously injured her arm. The supreme court gives this succinct summary of the facts in the case: "Then taking the testimony in its most favorable light for the plaintiff we find that she had been for some years a patron of the store, in good health with good eyesight, in a well lighted room, walked down an aisle in the meat department of the store that had just been swept, paused at a counter near a clerk to whom she was about to give an order, slipped and fell, sustaining the injuries complained of, and after being seated found a piece of fatty substance on her shoe between the ball of the foot and the instep. There is at least no stronger evidence as to defendant's negligence, and there was no testimony offered tending to contradict the evidence of the defendant as to the custom and efforts to keep its store clean and free from refuse or débris upon the floors. Neither is there any testimony tending to show that defendant could by the exercise of diligence have discovered the existence of the particular substance in question upon its floor, if it in fact was there, which at best can only be inferred from plaintiff's testimony, to the effect that she found such upon her shoe after the accident."

Later in the opinion the court draws these conclusions: "There is no testimony in the case at bar that can in any sense be said to show want of 'reasonable prudence and care,' or that the plaintiff was 'unnecessarily or unreasonably exposed to danger.' At best the testimony in this case can show only by inference that the greasy substance was on the floor." The court, after declaring

that it can find no evidence of negligence, finally concludes as follows: "In this the case of a working woman, dependent upon her labor for support, and with a probably permanent injury, is presented one which strongly appeals to both a court and jury, but to determine otherwise than we do, would be to hold that the mere fact of the accident is sufficient in itself to charge the defendant with the fault, for there does not appear from the evidence a failure upon its part to perform any duty which the law enjoins."

In the report of this case in 125 Pac. 563, these propositions are stated as pertinent to the facts:

"1. Evidence, in patron's action against a grocery company for injuries from slipping upon the floor of the store, held not to show defendant's failure to perform any duty resting upon it.

"2. Facts constituting negligence must be proved and not be left to inference.

"3. A grocery company is not liable for injuries to a patron from a fall due to her slipping upon a fatty substance on the floor, unless it or its agents knew, or by the exercise of reasonable diligence could have known, of the presence of such substance."

With the case of *Thompson Grocery Co. v. Phillips,* just discussed, in mind, let us glance at the situation which we have before us. The testimony that there was water on the step must be eliminated from our consideration, as the evidence does not show that the servants of the association had caused the water to be there, or knew of its being there, and it had not been there long enough to charge the association with knowledge and permit of its removal. There remains for consideration the wear of the step at the time of the accident as shown by exhibit 1 and the patron's statement of how she was injured. The character of the injuries are immaterial in view of the instructed verdict. We have already discussed the condition of the step as shown by exhibit 1. The patron states that, as she stepped down into where the

water stood, her right foot slipped and her ankle turned so that the bottom of her right foot was turned towards her left foot. She speaks of stepping into a depression, but exhibit 1 does not show any depression worthy to be named such. The decline, lengthwise of the step, and that was the way she says her foot slipped, was at most only one inch in a distance of two feet. It seems incredible that such a slight decline could have caused her foot to slip towards the other. The patron does not say that her foot slipped out from under her. In view of her testimony, when considered in connection with exhibit 1, we agree with the trial court that there was no justification for holding the association negligent or in concluding that the step was not reasonably safe for the use of its patrons.

There is still another question that is worthy of attention. The patron's prior knowledge of the wear of the steps, which she declares in her testimony could be seen from the street. Bear in mind that these steps furnished the outside approach to the entrance. The patron testifies that she entered the building on the day of the accident about 8:45 a. m. over the same steps and through the same door over and through which she later left. Her knowledge of the steps was therefore quite fresh in mind, as she says she was in the building about five minutes. The authorities generally hold that the risks which are obvious to a person are assumed by her, where, as in the present case, the relation is that of owner and invitee or patron. *Mullen v. Sensenbrenner Mercantile Co.*, 260 S. W. (Mo.) 982, 33 A. L. R. 176; *Hogan v. Metropolitan Building Co.*, 120 Wash. 82; *Woolworth Co. v. Graham*, 257 S. W. (Tex. Civ. App.) 574.

Mullen v. Sensenbrenner Mercantile Co., supra, is also instructive and persuasive because of its analogy to the case at bar. There plaintiff was injured while leaving by a tiled exit which she charges had an unusually slick, smooth, and glassy surface and had a dangerous angle or slope in which there was a crack, and that defendant

had failed to warn the plaintiff of these dangerous conditions. The court concluded that the defendant was not liable to the plaintiff, basing its conclusion partially, at least, upon her having a knowledge of the conditions surrounding the place of the accident through having observed that place as she entered shortly before.

Hogan v. Metropolitan Building Co., supra, is another analagous case. The plaintiff had entered the defendant's place of business, bought a pair of shoes, and in going out lost her footing on the cement way and fell. That court, in holding that as matter of law the risk was hers, refers to the fact that the accident happened as she came out, the same way she had used on entering the store, and that the situation was perfectly plain, open, and obvious, and known to her.

The case of *Woolworth Co. v. Graham, supra,* is another case of an accident to a customer while leaving the defendant's store. It seems that a customer had dropped a bottle of liquid on the floor outside the store entrance, and that a porter had been called and had attempted to clean it up. However, the patron alleged that the store had negligently permitted the liquid to remain upon the floor. The court declared that, while the evidence failed to show any negligence on the part of the defendant, it did show negligence on the part of the plaintiff in going over the particular spot, "instead of taking the obviously safe course that the most ordinary prudence would have dictated of stepping over or walking around the spot, so it is obvious that her fall and consequent injuries were brought about by her own thoughtlessness."

The conclusions of the court in the last case are of unusual significance because of its close analogy to the case at bar. The plaintiff in her testimony states that she saw the water on the step as she stepped down. There does not appear to have been any reason why she could not have stepped a few inches one way or the other and thus avoided stepping upon that particular spot where she says the water had gathered, and to which, by inference, she attributes her slipping.

This case has been ably briefed and a large number of cases have been cited by the opposing attorneys. However, an extensive analysis of these authorities would serve no useful purpose, as the legal questions involved are not much controverted; while the most of these questions involve negligence based upon facts which present but little similarity to those upon which the plaintiff claims negligence herein.

The trial court, therefore, was right in discharging the jury and in dismissing the plaintiff's cause of action. The judgment is

AFFIRMED.

WILBUR F. BRYANT, APPELLANT, V. CEDAR COUNTY, APPELLEE.

FILED MARCH 25, 1932. No. 28163.

Limitation of Actions: COUNTIES. The statute of limitations, section 20-206, Comp. St. 1929, applies to claims against counties.

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

Wilbur F. Bryant, pro se.

Clarence E. Haley, contra.

Heard before GOSS, C. J., DEAN, GOOD, DAY and PAINE, JJ., and LANDIS and RAPER, District Judges.

RAPER, District Judge.

The petition of plaintiff, Wilbur F. Bryant, alleges that the county of Cedar is indebted to him on account of certain sums of money paid for official recording while he was county judge. The items are for several dates between January 2, 1918, and January 7, 1919. There is no allegation that said account was audited or passed on by the county board; nor is a written agreement pleaded. The county of Cedar demurred to the petition on the ground that the claim was barred by the statute of limitations. The demurrer was sustained and plaintiff's action dismissed. From that judgment he appeals.

This court held in an opinion by Judge Reese, in *May v. School District,* 22 Neb. 205, that the statute of limitations applies for or against school districts and other municipal corporations deriving their power from the sovereign. Counties come within the purview of this principle of law. In *Arapahoe Village v. Albee,* 24 Neb. 242, this court held that a registered village warrant was barred in five years from the time it became due. The statute of limitations runs in favor of a county, as it does in favor of school districts and cities.

The judgment of the district court is

AFFIRMED.

MAUD N. HAMILTON, APPELLANT, V. FRED D. WEAD, APPELLEE: MAUD N. HAMILTON, TRUSTEE, APPELLANT.

FILED MARCH 25, 1932. No. 27889.

1. **Contracts:** CONSTRUCTION. Written contract set out in opinion construed.
2. ———: ———. In the construction of a contract, not only the express terms but what is necessarily implied from those terms should be considered.
3. ———: ———. Where the context of a written contract clearly implies or suggests that a certain word has been omitted, such word will be supplied by construction to fully express the intention of the parties.

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

A. H. Murdock and *Arthur C. Pancoast,* for appellant.

Swarr, May & Royce, contra.

Heard before GOSS, C. J., DEAN, EBERLY and PAINE, JJ., and REDICK, District Judge.

REDICK, District Judge.

March 13, 1906, C. Will Hamilton, party of the first part, and Fred D. Wead, party of the second part, entered into a contract, the terms of which were as follows:

"Memorandum of Agreement

"By and between C. Will Hamilton, hereafter known as party of the first part, and Fred D. Wead, the party hereafter known as party of the second part, witnesseth:

"That whereas, Fred D. Wead has purchased for C. Will Hamilton the following described property: * * * for the sum of $4,900; and whereas said party of the first part proposes furnishing the money necessary to purchase said property it is therefore mutually agreed as follows:

"First. That said party of the first part pays for and takes title to said property.

"Second. That said second party takes charge of and cares for said property, collecting rent and making such repairs as seems necessary, paying taxes, both regular and such instalments of special taxes before they become delinquent each year during the term of this contract.

"Third. It is understood that said party of the first part is to receive six per cent. interest per annum, payable semiannually on the money he invests in purchasing said property whether the property rents for sufficient amount to pay that or not, after making necessary repairs. Said party of the second part to make up from his own funds any deficit in rents so that said first party shall in no event receive less than six per cent. interest semiannually.

"Fourth. Any excess received from rent above six per cent. after paying necessary repairs and taxes is to be divided equally between the parties hereto.

"Fifth. When it is deemed advisable to sell said property by said second party, at not less than purchase price, said first party is to make conveyance and receive the consideration thereof, until the purchase price this day paid is fully refunded together with interest aforesaid.

"Sixth. It is further agreed if after five years from date in case the above described property has not been sold or disposed of and the party of the first part not reimbursed for all moneys paid out by him, be it pur-

chase money or moneys paid for taxes or repairs on said property, then said party of the second part shall pay said party of the first part 50 per cent. of the amount still invested and receive a deed for an undivided one-half of said property or as much thereof as has not been previously disposed of, subject to special taxes not delinquent.

"Seventh. When party of the first part shall have received payment in full of his principal and interest from sale of said property, then the remainder of the property, if any, shall belong to the parties to this agreement in equal shares.

"The intention of this agreement being that said C. Will Hamilton is first guaranteed repayment of principal and six per cent. interest on purchase price of said property, and that profits or losses shall be shared equally by the parties hereto.

"This agreement to be binding upon the respective heirs and assigns of the parties hereto.

"Executed this 13th day of March, A. D. 1906.

"Executed in duplicate in presence of Pauline Prince.

"(Signed) C. Will Hamilton.

"(Signed) Fred D. Wead."

The agreement, it will be noted, was originally for the term of five years, but on June 8, 1912, by mutual consent, the time was extended to May 19, 1916. Subsequent to that date, however, the contract was treated and acted upon by both parties as still subsisting up to the death of Hamilton January 14, 1928, the defendant Wead retaining possession and control of the property, collecting the rents, paying the expenses and taxes, and paying to Hamilton 6 per cent. interest on the purchase price, $4,900, until November, 1927.

By the will of Hamilton, after devising and bequeathing his estate to be held in trust, said Hamilton bequeathed to his widow, Maud N. Hamilton, plaintiff, "all of the annual income of said estate so held in trust to be used and enjoyed by her during the term of her natural life for her own sole and separate use."

The present action was brought by plaintiff to recover $588 and interest, being two years' interest claimed to be due under said contract from November, 1927, to November, 1929. Defendant Wead filed an answer and cross-petition in which he alleged that he was not obligated to guarantee or pay interest on said investment subsequent to May 19, 1916; that the transaction evidenced by said contract was a joint venture, and that defendant had paid more than half of the cost of the venture; that any interest of the plaintiff in said contract was held by her as trustee under another provision of the will, and prayed that said trustee be made a party defendant, which was done, and for an accounting of the amount due defendant under said contract, and that the same be declared a lien upon the interest of said trustee in said real estate. Replies were filed by Maud N. Hamilton as an individual and trustee, putting in issue the allegations of the answer.

It appears from the record that defendant Wead has paid out the following amounts:

Interest on $4,900 to November, 1927, to Hamilton,	$6,174.00
Taxes, including 1929, the sum of	6,089.17
Expenses, including 1930, the sum of	2,143.24

He collected rents, including 1930, in the sum of $6,438.21. It will therefore be noted that the taxes and expenses paid ($8,232.41) were in excess of the income ($6,438.21) in the sum of $1,794.20, which represents the total amount of Wead's investment in the venture, leaving out of consideration the interest paid to Hamilton ($6,174).

By decree of the district court it was found that the interest paid by Wead to Hamilton was a voluntary payment and that Wead was not entitled to credit therefor, nor any interest thereon. With this finding we concur. It was then found that Wead had paid out $7,968.20 more than he had received and treated this amount as the investment Wead had in the property. The above amount was arrived at by adding together the three items paid by Wead, viz., interest $6,174, taxes $6,089.17, and ex-

penses $2,143.24, total $14,406.41, and deducting therefrom amount received, $6,438.21, remainder $7,968.20. Discarding the fraction, this amount was compared with $4,900 taken as amount of Hamilton's investment, and respective interests in the property declared to be: Wead 7968/12868, Hamilton 4900/12868, and ordered partition in those proportions. Maud N. Hamilton individually and as trustee appeals.

The principal dispute arises over the allowance of the interest paid by Wead to Hamilton to be considered as a part of Wead's investment, and in view of the finding that Wead's payment of interest was voluntary and that he is not entitled to any credit therefor, we are unable to understand why it should be included in the figure $7,968. On the basis of the findings the proportions should be: Wead 1794/6694 and Hamilton 4900/6694.

The property has probably decreased in value, and partition other than by sale does not seem practicable; it will be interesting, therefore, to glance at the results should the property be sold under the decree of the district court:

Under the decree if the property sold for		$12,868
Wead's share	$7,968	
Hamilton's share	4,900	12,868

This would simply give Hamilton his money back with interest, to which he is entitled *before any profits or losses are divisible.* Wead would make a profit of $7,968 less $1,794; in other words, Wead gets $6,174, interest on $1,794, and Hamilton the same amount on $4,900, and this notwithstanding Hamilton's investment of $4,900 has run for 24 years while Wead's $1,794 has accumulated during that period. Wead would therefore receive over 14 per cent. on his investment if he had put $1,794 into the original purchase price.

The same result in proportion is reached if the property sells for ½ or ¼ of the above price, e.g.:

If property sells for ¼		$3,217
Wead's share	$1,992	

Hamilton's share	1,225	3,217
Wead's profit $1,992 less $1,794		198
Hamilton's loss 4,900 less 1,225		3,675

It seems to me these results demonstrate the incorrectness of the decree.

Upon the proper basis, as above suggested, and property sells for $6,694

Wead's share	$1,794	
Hamilton's share	4,900	6,694

Hamilton receives his money back with interest and Wead is made whole on his investment, but is out the interest paid to Hamilton which he was to make good "from his own funds" in case of a deficit in rents. (Par. 3 of contract.)

If property sells for ½ above $3,347

Wead's share	$ 897	
Hamilton's share	2,450	3,347

To equalize the losses Wead must pay Hamilton $776.50, thus the loss of each would be $1,673.50 or ½ of $3,347.

In the above illustrations the sale figures are considered net.

That Hamilton was to receive 6 per cent. on his investment, *at all events*, is clearly established by five provisions of the contract, viz.: Third. Hamilton "is to receive six per cent. interest per annum, payable semiannually on the money he invests in purchasing said property whether the property rents for sufficient amount to pay that or not, after making necessary repairs. Said party of the second part to make up from his own funds any deficit in rents so that said first party shall in no event receive less than six per cent. interest semiannually." Fourth. "Any excess received from rent above six per cent. after paying necessary repairs and taxes is to be divided equally between the parties hereto." Fifth. Upon sale of property at not less than purchase price, first party to receive the purchase price together with interest aforesaid. Seventh. When Hamilton "shall have received payment in full of his principal and interest

from sale of said property, then the remainder of the property, if any, shall belong to the parties * * * in equal shares." The intention being that "Hamilton is *first* guaranteed repayment of principal and six per cent. interest on purchase price."

There is nothing in the contract indicating that Hamilton shall refund to Wead any interest, and yet by the decree under review he is required so to do to the extent of 50 per cent. by the inclusion of interest paid as part of Wead's investment.

It is claimed by appellee that the contract should be treated as terminated upon the expiration of the five-year extension, but this is quite inadmissible. The parties treated the contract as existing for nearly twelve years thereafter until the death of Hamilton, Wead continuing to manage the property and paying interest according to its terms. In fact, no step was taken by either party to terminate the contract until the filing of the cross-petition in this case by Wead. Such action was open to either party during that period, but, not having been taken, the conduct of the parties under it is conclusive evidence that it was considered still in force, and the law so declares.

It is further claimed by appellee that under the sixth paragraph of the contract Hamilton was to advance money for taxes and repairs, but there is nothing in the language of that or any other part of the contract warranting such claim. True, that paragraph provides that if property has not been sold after five years and Hamilton not reimbursed for all moneys paid out by him, "be it purchase money or moneys paid for taxes or repairs," then Wead shall pay 50 per cent. of the amount still invested and receive a conveyance of one-half of the property. Technically considered, Wead would be required to tender or pay Hamilton 50 per cent. of the purchase price before he would be entitled to a conveyance or become the owner of one-half; but both parties seem to consider this paragraph operative upon any sale of the property and

such construction appears proper and equitable, and we adopt it.

Let us see what the situation would have been if the property had been sold after the five-year extension, say at end of year 1916 for $4,900 net:

Expense to that date	$ 894.41
Taxes	2,316.73
	3,211.14
Rents	2,602.44
Loss in operation	$ 608.70

Hamilton would receive his money back and would have to pay Wead $304.35.

The lower court found that the contract was a joint venture, and then proceeded to adjudicate the rights of the parties on a 50-50 basis. But joint ventures are not always on that basis, and the present one surely not. Wead paid no portion of the purchase price, but in addition guaranteed Hamilton should first receive his money back with 6 per cent. interest. The contract or venture in short was this: Wead was a realtor and was convinced that the property in question was a good speculation in view of the fact that it was seriously contemplated that a new Union Station would be built in the vicinity, and that this property would be needed or would greatly increase in value. Hamilton was a wealthy banker, as suggested by counsel for appellee. The banker was probably concerned about the safety of his principal and interest; so it was arranged that Hamilton put up the purchase price, Wead to manage the property, and after repaying Hamilton, the anticipated profits would be divided equally when the property was sold; or if there was a loss it should be borne equally after Hamilton had been repaid. Suppose the property had been sold the next day after its purchase for $4,000, Hamilton would be entitled to the money and Wead would have had to pay him $450 in addition. Can there be any question about this?

Appellee contends that the entire contract, taken to-

gether, should be construed and enforced by comparing the total moneys paid out by each party, the difference representing the loss; and special stress is laid upon the second part of the seventh paragraph reading as follows:

"The intention of this agreement being that said C. Will Hamilton is *first guaranteed repayment of principal and six per cent. interest* on purchase price of said property, and that profits or losses shall be shared equally by the parties hereto." (Italics ours.)

Appellants claim that the provision as to profits or losses must be disregarded as "hopelessly irreconcilable with the remainder of the contract;" but such course is not necessary, if permissible.

In the construction of contracts as well as statutes it is often necessary to supply a word which the context indicates was intended to be inserted by the parties or which is necessary to express the real intent. A contract is to be construed upon what it expresses in terms and what is necessarily implied from those terms. *Goodrich v. Hubbard,* 51 Mich. 62. Omitted words clearly in place by implication may be supplied by construction of a statute. *Irwin v. Nichols,* 87 Ark. 97; *Dodd v. Mitchell,* 77 Ind. 388; *State v. Railroad Commission,* 137 Wis. 80.

It would seem clear that interest and principal are excluded from "profits and losses" by the requirement that it be "first guaranteed," and the context suggests the word to be supplied in order that the writing may express the full intention of the parties.

In this sentence the word "then" or "thereafter" must be considered as implied or understood between the words "and" and "profits," as otherwise the words "first guaranteed" have no meaning. When one thing or operation is placed "first," any other thing or operation must necessarily follow. Two things cannot be first. In the sentence "We will first go to the opera and to supper" the word "then" is understood.

For the reasons above stated we think the learned district judge erred in the construction of the contract and the judgment must be reversed.

Inasmuch as neither party took any step to terminate the contract until the filing of the cross-petition herein, we have experienced some difficulty in fixing the time at which it should be terminated, but have concluded to fix it at the date of filing of this action, at which time litigation began.

It is therefore ordered that the judgment of the district court be reversed and the cause remanded, with directions to state the account between the parties at the time of such accounting; that the investment of Hamilton shall be $4,900, plus interest at 6 per cent. to date of suit, and that of Wead the total amount of taxes and expenses paid less rents received, and that partition be ordered in the proportion thus determined.

In case partition cannot be made, that the property be sold and proceeds applied, first, to payment of Hamilton's principal and interest, second to Wead's investment, any balance to be divided equally.

If the proceeds of sale are insufficient to satisfy the investments of both parties in full, they shall be applied, first, to the payment of Hamilton, second to Wead, and any loss to be borne equally, and decree rendered requiring payment necessary to equalize such loss to the party entitled.

REVERSED.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

SEPTEMBER TERM, 1931, AND JANUARY TERM, 1932

ALBERT BULKOWSKI, APPELLEE, V. CHARLES N. HERTERT, APPELLANT.

FILED NOVEMBER 10, 1931. No. 27901.

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

P. F. O'Gara, for appellant.

Peterson & Barta, contra.

Heard before ROSE, GOOD, DAY and PAINE, JJ., and BEGLEY, District Judge.

PER CURIAM.

This is an action in the nature of a creditors' bill by which plaintiff seeks to recover money alleged to have been transferred to defendant Charles N. Hertert by John Isbaner, the judgment debtor. The trial court found for plaintiff and defendant Charles N. Hertert has appealed.

We have carefully examined the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

E. S. FLOWER, APPELLEE, V. OTTO JENSEN ET AL., APPELLANTS.

FILED NOVEMBER 10, 1931. No. 27903.

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

Davis, Hendrickson & Davis, for appellants.

H. E. Burkett, contra.

Heard before ROSE, GOOD, DAY and PAINE, JJ., and BEGLEY, District Judge.

PER CURIAM.

Plaintiff brought this action in the district court for Cedar county to foreclose a real estate mortgage. The trial court found for plaintiff and defendants have appealed.

We have carefully examined the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

NATIONAL CASH REGISTER COMPANY, APPELLANT, V. HARRY B. CHIPMAN, APPELLEE.

FILED NOVEMBER 10, 1931. No. 27905.

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

Scott & Scott, for appellant.

J. F. Ratcliff, contra.

Heard before GOSS, C. J., DEAN and EBERLY, JJ., and RAPER and RYAN, District Judges.

PER CURIAM.

This is an action brought by the appellant, National Cash Register Company, plaintiff below, to recover the amount of a promissory note alleged to have been made and delivered to it by the defendant below, appellee here.

So far as material, the answer, as well as the basis of the cross-petition, included the allegations that the only consideration for the note in suit, as well as for a certain sum of money alleged to have been paid by defendant to plaintiff, was an executory written contract of purchase entered into by the parties, by the terms of which the cash register company agreed to sell, deliver and install register No. 1098, represented by the plain-

tiff's agent to be "a combination cash register and calculating machine, which would perform mechanical calculations." Subsequent to the making of this contract, the payment of the sums sought to be recovered in the cross-petition, and the execution and delivery of the promissory note, a machine was shipped by the plaintiff to defendant, and by the latter, upon examination, returned to the sender for the reason, alleged in behalf of the purchaser, that it had no calculating attachment, and was not as represented. The plaintiff denied the making of the representation that the machine in question was a combination cash register and calculating machine. There was a trial to the court, in which a jury was waived by the parties, and a finding and judgment for the defendant as prayed in his answer and cross-petition.

Plaintiff's evidence, it may be said, was to the effect that no such representation was made at the time of the making of the contract. Two witnesses in behalf of the defendant contradicted plaintiff's evidence, and testified to the making of the representation substantially as alleged. On this controverted evidence the trial court evidently determined the pivotal fact in favor of the defendant, and entered a judgment in his favor.

This being a law action, the case is not here for trial *de novo,* and the findings of the trial court must be given the same effect as a verdict of a jury. We are satisfied, in view of the testimony in the record, that it cannot be said that the evidence is insufficient to support the judgment.

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

AFFIRMED.

IRENE BROWN, APPELLEE, V. CLARENCE A. BROWN, APPELLANT.

FILED NOVEMBER 10, 1931. No. 27948.

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

York & York, for appellant.

F. J. Byrd and *Drake & Drake, contra.*

Heard before ROSE, GOOD, DAY and PAINE, JJ., and BEGLEY, District Judge.

PER CURIAM.

This is a suit in equity by a wife for a divorce from her husband on the ground of extreme cruelty. The facts constituting the alleged cruelty are stated in the petition. The parties to the suit are the parents of four children, and plaintiff prayed for their custody, for an allowance for their support, and for permanent alimony. Defendant denied the cruelty charged by plaintiff, and prayed for a divorce in his favor on the ground of extreme cruelty on the part of plaintiff. Upon a trial of the cause the district court found the issues in favor of plaintiff, granted her a divorce, gave her custody of the children, and allowed her permanent alimony in the sum of $1,566.66, and in addition $20 a month for the support of the children. Defendant appealed.

Upon a trial *de novo* the findings of fact are the same as the findings of the district court on the issues as to divorce, as to extreme cruelty, as to the custody of the children, as to the allowance for their support, and as to the amount of alimony. Owing to the present pecuniary situation of defendant, however, the amount of alimony allowed by the district court is made payable as follows: One hundred dollars when the mandate is received by the clerk of the district court, and $100 every three months thereafter until the entire sum of $1,566.66 is paid, deferred payments not to bear interest until due. The judgment below is modified accordingly and as thus modified is affirmed.

AFFIRMED AS MODIFIED.

CLARKE-BUCHANAN COMPANY, APPELLEE, v. GIDEON B. HARDIN, APPELLANT.

FILED NOVEMBER 20, 1931. No. 27909.

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

Perry, Van Pelt & Marti, for appellant.

Herman G. Schroeder, Franklin L. Pierce and *J. L. Fults, contra.*

Heard before GOSS, C. J., DEAN, EBERLY and PAINE, JJ., and REDICK, District Judge.

PER CURIAM.

This is an appeal from an order confirming a sale of farm lands under a decree of foreclosure entered November 20, 1929. The decree was for $6,311.51 for plaintiff, as a first lien, for $1,391.22 for a cross-petitioner, as a second lien, and for $5,325.25 for another cross-petitioner, as a third lien. The order of sale was stayed and did not issue for nine months. On September 29, 1930, the sheriff sold the land to the highest bidder for $7,900. A motion was duly filed to set aside the sale on the ground of inadequacy of sale price, alleging that the land was worth at least $12,000 to $14,000. Testimony was taken by the court on November 26, 1930, as to the value of the 240 acres involved. Witnesses for the plaintiff placed the value at from $7,200 to $8,000; those for the defendants at from $9,000 to $12,000. Gideon B. Hardin testified that a little over a year before a certain man called at his house and offered $12,000 for the land. The court postponed action until 9 o'clock a. m., January 5, 1931, to give the defendant Hardin an opportunity to secure one who would agree to bid not less than $8,500 and who would deposit with the sheriff $500 to insure the carrying out of his offer if a resale was ordered. On January 5, 1931, no such offer having been secured, the court overruled the objections and confirmed the sale. There does not appear any such inadequacy of price, even considering the values set by wit-

nesses for the defendant, as to indicate any fraud or mistake, and for that reason this court is not required to set aside the confirmation of this judicial sale. *First Nat. Bank v. Hunt,* 101 Neb. 743; *Lindberg v. Tolle,* 121 Neb. 25. The trial court heard and saw the witnesses. We find no valid reason for setting aside the judgment of the district court. It is affirmed, with leave to redeem at any time before the issuance of the mandate.

AFFIRMED.

CLIFTON J. WERNER, SPECIAL ADMINISTRATOR, APPELLANT, V. GUY JOHNSON ET AL., APPELLEES.

FILED NOVEMBER 20, 1931. NO. 27957.

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

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

Chambers & Holland and *C. Russell Mattson, contra.*

Heard before GOSS, C. J., DEAN, EBERLY and PAINE, JJ., and REDICK, District Judge.

PER CURIAM.

This action was commenced in the district court for Lancaster county by Clifton J. Werner, as special administrator of the estate of Lucinda O. Drummond, deceased, to recover damages for certain injuries alleged to have been sustained by the decedent in a collision between two automobiles on a highway, on or about August 4, 1929, when the automobile in which the decedent was riding, and which was then being driven by her husband, collided with an automobile being driven by Mrs. Eva Hedglin, but then owned by the defendant firm of Johnson & Strom, dealers in automobiles. The action was dismissed as to Mrs. Hedglin, and the court directed a verdict in favor of the defendants Johnson and Strom. The administrator has appealed.

The record discloses that at the time in question here Mrs. Hedglin was a prospective purchaser of an automobile, but nothing more than this appears in her dealings with the firm. On the day in question, an agent for the defendant firm turned the car over to Mrs. Hedglin merely for trial and, subsequently, while she was driving on the highway, but unaccompanied by an agent or representative of the firm, the accident herein occurred. It appears that two days thereafter, namely, on August 6, 1929, the decedent, in the presence of her husband, signed a statement absolving the defendant firm and Mrs. Hedglin from any liability in the premises and at the same time she accepted $96 from the defendants as satisfaction for any claims that might arise from the accident.

The plaintiff contends that the relationship of master and servant existed between the defendant firm and Mrs. Hedglin at the time of the accident and that the firm is therefore liable for any negligence of Mrs. Hedglin. Upon an examination of the record and the law applicable thereto, however, we conclude that the evidence does not sustain the contention of the plaintiff. Mrs. Hedglin was driving the car, not as an agent of the defendant company, but as a prospective purchaser. The essential elements existing in the relationship between master and servant that go to constitute liability on the part of the defendant firm here are lacking in the facts before us. The trial court did not err in directing a verdict for the defendants.

The judgment is right and is

AFFIRMED.

MINNEAPOLIS-MOLINE POWER IMPLEMENT COMPANY, APPELLANT, V. PAUL HANES, APPELLEE.

FILED NOVEMBER 20, 1931. No. 27964.

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

Hastings & Hastings and *C. D. Ritchie,* for appellant.

Halligan, Beatty & Halligan and *Milton C. Murphy, contra.*

Heard before GOSS, C. J., DEAN, EBERLY and PAINE, JJ., and REDICK, District Judge.

PER CURIAM.

This action in replevin was commenced in the district court for Perkins county by the Minneapolis-Moline Power Implement Company, the plaintiff, wherein Paul Hanes is the defendant, to obtain possession of two tractors on the grounds hereinafter pointed out. The jury found in favor of the defendant. The plaintiff has appealed.

The record discloses that, on or about April 9, 1929, the defendant executed two promissory notes in the sum of $575 each, and both were made payable to Charles H. Clemens & Son, a partnership. The notes bear interest at the rate of 8 per cent. per annum until paid and, to secure their payment, the defendant executed and delivered a chattel mortgage on the two tractors above designated. Subsequently the notes and the mortgage were sold and assigned by Charles H. Clemens & Son to the Minneapolis Steel & Machinery Company and by the latter company sold and conveyed to the plaintiff company. The defendant, as contended by the plaintiff, made default in the payment of the notes and thereupon this suit was begun.

The defendant contends that, on or about May 26, 1930, and as a part of the purchase price of certain combines, he delivered to the plaintiff a "Baldwin" combine, valued at $900, and that, at or about the same time, he paid the plaintiff $160, making a total payment of $1,060 for the combines so purchased. The defendant also contends that the combines were warranted to do satisfactory work and that they were represented by the plaintiff as being capable of doing effective work on the most hilly land. But he contends that the machines were unsuited to the purpose for which they were represented by the plaintiff and that he was unable to use them, and that he therefore returned the combines to the plaintiff or its agent.

The evidence appears to establish the fact that the combines were purchased by the defendant upon false representations made by the plaintiff or its agents and that the combines failed to do the work in the effective manner in which they were represented by the company. Pursuant to our former decisions, in cases wherein a like principle was involved, we conclude that the defendant was well within his rights in returning the combines to the plaintiff's agent. Where the representations in respect of the combines were false, and the jury's verdict so announced the fact to be, the defendant of course was justified in rescinding the contract by a return of the property so purchased. *Sanders v. Nightengale,* 109 Neb. 667; *Advance-Rumely Thresher Co. v. Bartzat,* 114 Neb. 35.

We have examined the instructions complained of, but we do not find reversible error therein. The judgment is

AFFIRMED.

ALICE BRISSEY, APPELLANT, V. WILLIAM A. BRISSEY, APPELLEE.

FILED NOVEMBER 20, 1931. No. 27968.

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

C. E. Walsh, for appellant.

Herman E. Kuppinger and *Patrick W. O'Connor, contra.*

Heard before ROSE and GOOD, JJ., and CHAPPELL and LANDIS, District Judges.

PER CURIAM.

In the district court for Douglas county, Alice Brissey, plaintiff, procured a divorce from her husband, William A. Brissey, defendant, March 25, 1927, and also an order requiring him to pay her $10 a week as alimony. When he was in default to the extent of $60 his wages were garnished for that amount and he filed in the divorce suit February 13, 1931, a petition to vacate the

order for alimony on the ground of changed conditions. Plaintiff by answer to the petition challenged defendant's asserted right to such relief. Upon a trial of the issues the district court found that, owing to changed conditions, defendant was entitled to be released from further payments of alimony, including the $60 for which his wages had been garnished, and entered a judgment accordingly. Plaintiff appealed.

Upon a trial *de novo* the conclusion is that changed conditions and equity required discontinuance of alimony from the date upon which defendant filed his petition to reform the original decree as to alimony, but that he should be required to pay the $60 for which he was then in arrears. As thus modified the judgment of the district court is affirmed.

AFFIRMED AS MODIFIED.

FRANK RENDLA, APPELLEE, V. JACOB FRANZENBURG, APPELLANT.

FILED NOVEMBER 24, 1931. No. 27969.

APPEAL from the district court for Washington county: CHARLES E. FOSTER, JUDGE. *Affirmed.*

Cook & Cook, for appellant.

A. A. Rezac, contra.

Heard before ROSE, GOOD and DAY, JJ., and CHAPPELL and LANDIS, District Judges.

PER CURIAM.

This is a suit in equity to establish a chattel mortgage and to recover the balance of the purchase price on an ice box and other merchandise sold to defendant. The trial court found in favor of plaintiff for $659.50, the balance due on the contract, and that defendant should recover $150 on his cross-petition alleging damages by reason of defective merchandise, and entering a judgment for $509.50. The defendant appealed.

The evidence shows that the machine and equipment were serviceable and have been used continuously since their installation in January, 1929. There is much evidence concerning the expense of installation, but it is clear that the plaintiff did not agree to install the ice box; and that much of it was caused by the defendant changing its character and appearance.

We conclude that the plaintiff should recover from the defendant the sum of $509.50. The judgment of the trial court is

AFFIRMED.

ANNA M. DOYLE ET AL., APPELLANTS, V. EMMA G. PREHN, APPELLEE.

FILED DECEMBER 11, 1931. NO. 27955.

APPEAL from the district court for Thayer county: ROBERT M. PROUDFIT, JUDGE. *Affirmed.*

P. I. Harrison and *J. L. Richards,* for appellants.

Finlayson, Burke & McKie and *Leslie J. Taylor, contra.*

Heard before ROSE, GOOD and DAY, JJ., and CHAPPELL and LANDIS, District Judges.

PER CURIAM.

This is an appeal from a decree of the district court for Thayer county denying partition of certain real estate described in the petition.

We have carefully examined the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

RASSE WHOLESALE GROCER COMPANY, APPELLEE, V. JAMES L. ASHENFELTER, APPELLANT.

FILED DECEMBER 11, 1931. NO. 27960.

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

Loren H. Laughlin, for appellant.

Mockett & Finkelstein and *S. D. Killen, contra.*

Heard before ROSE, GOOD and DAY, JJ., and CHAPPELL and LANDIS, District Judges.

PER CURIAM.

Plaintiff recovered judgment against defendant in the district court for Gage county on an account for goods sold and delivered. Defendant has appealed.

We have carefully examined the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

LAWRENCE J. WOOD, APPELLANT, V. MCGINLEY CREDIT CORPORATION, APPELLEE.

FILED DECEMBER 16, 1931. No. 27973.

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

James A. Hayward, for appellant.

Claude S. Wilson, Roy F. Gilkeson and *Hymen Rosenberg, contra.*

Heard before ROSE and GOOD, JJ., and CHAPPELL and LANDIS, District Judges.

PER CURIAM.

Plaintiff sought by this action to set aside a default judgment entered against him in the municipal court of Lincoln. The trial court found for defendant and plaintiff has appealed.

We have carefully examined the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

MARGARET DUNCAN ET AL., APPELLEES, V. FRANK ROSS ET AL., APPELLANTS.

FILED DECEMBER 16, 1931. No. 27974.

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

D. O. Dwyer and *W. L. Dwyer*, for appellants.

Patrick & Smith, contra.

Heard before GOSS, C. J., DEAN, EBERLY and PAINE, JJ., and REDICK, District Judge.

PER CURIAM.

James Alloway brought this action for the possession of a farm and for rents and profits for the time defendants kept him out of possession. Later the present plaintiffs purchased Alloway's interest and were duly substituted for him. Defendants filed an answer and cross-petition, alleging that, when the action was commenced, they were in possession of the land as owners of certain rights therein to which the rights of plaintiffs were subject, and that there was no consideration for the deed which purported to convey the lands to plaintiffs. By a cross-petition the defendants alleged that the land was purchased at judicial sale by Alloway and defendants for $8,500, subject to a mortgage of $4,500, so that $4,000 in cash was paid, of which Mirth Ross (who is the only daughter of Alloway) paid $3,136 and Alloway $864; that the title was taken in Alloway's name, who held the title in trust for defendants as to 98/125 thereof and for himself as to the other 27/125 thereof; that defendants entered into possession as owners and, under a certain agreement with Alloway, occupied the land and made valuable improvements under the expectation that he would perform all the conditions. The agreement pleaded is that, if the defendants would refrain from moving to Minnesota, as they contemplated, he would join them in the purchase of this land, which they would occupy as their home, and that, at his death, it should belong to said Mirth Ross. They pleaded in detail their performance of the condi-

tions. In reply, plaintiffs denied generally, and pleaded that the defendants went into possession of the land as tenants and continued as such, paying a share of the crops as rent until March 1, 1928, since which time, by reason of nonpayment of rent, they have unlawfully held possession.

A jury was waived and a trial had to the court. The court found that the entire purchase price of the land was paid by Alloway and that the defendants paid or contributed no part thereof; that defendants went into possession merely as tenants of Alloway, under an oral agreement to pay as rent one-half of the annual grain crops; that they paid such agreed rental for 1926 and for a part of 1927, but since that have paid no rent at all; that they are estopped to question the title of plaintiffs, as grantees of Alloway, and are not entitled to recover for repairs or improvements voluntarily made as tenants. Their cross-petition was dismissed. Plaintiffs were adjudged entitled to possession of the land.

Examination of the evidence shows there was sufficient competent evidence to sustain the findings of the district court. "When a jury is waived, and a cause tried to the court, its finding of fact will not be disturbed if there is sufficient competent evidence to sustain the finding." *Dravo-Doyle Co. v. Metropolitan Water District*, 102 Neb. 184. It is unnecessary to cite the many other cases to the same effect.

The judgment of the district court is

AFFIRMED.

HAWKEYE TIRE AND RUBBER COMPANY, APPELLANT, V. E. A. PEGAU, APPELLEE.

FILED DECEMBER 16, 1931. No. 27983.

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

W. A. Ehlers and *H. A. Myers*, for appellant.

Mossman, Anderson & Meissner, contra.

Heard before GOSS, C. J., DEAN and EBERLY, JJ., and CHASE and HASTINGS, District Judges.

PER CURIAM.

Plaintiff brought this action to recover damages under section 20-1030, Comp. St. 1929, for an alleged untrue answer filed by defendant as garnishee. The district court for Douglas county found for defendant and plaintiff has appealed.

We have carefully examined the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

ANDREA PRIMIANO, APPELLEE, V. RUSSELL VENUTO, APPELLANT.

FILED DECEMBER 18, 1931. No. 27984.

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

Kennedy, Holland & De Lacy and *Edwin Cassem,* for appellant.

J. W. McGan and *F. L. Burbridge, contra.*

Heard before GOSS, C. J., DEAN and EBERLY, JJ., and CHASE and HASTINGS, District Judges.

PER CURIAM.

This is a personal injury action brought by Primiano against Venuto and another for injuries sustained by Primiano when he was struck by an automobile then personally operated by the defendant Venuto. There was a trial to a jury resulting in a verdict of $2,500 for plaintiff. From the order overruling the motion for a new trial the defendant Venuto appeals.

But two assignments of error are presented by appellant's brief for the consideration of this court, viz.: The verdict and judgment are not sustained by sufficient evidence; and the amount thereof is excessive. The cor-

rectness of the instructions given by the trial court in submitting the case to the jury are not questioned by appellant, save and except that he contends that the court erred in overruling his motion for a directed verdict at the close of the evidence. It follows that, in all respects and in all essentials, we have here presented as a primary question: Did the jury correctly apply to the evidence presented to them the rules of law contained in the instructions of the court?

The record before us discloses, as is usual in cases of this class, conflicting evidence as to the material facts of the transaction involved. This conflict was, of course, for the jury to resolve and determine. Of the credibility of witnesses the jury necessarily were the proper judges. In this aspect of the case it is plain that there is in the record testimony which, if believed, is ample to establish the defendant's negligence, negative contributory negligence on the part of plaintiff, and to support the amount of the recovery. It would serve no good purpose to detail this evidence at length.

It follows, therefore, that the action of the trial court complained of is amply supported by the record before us, and is, in all things,

AFFIRMED.

E. P. REILLY ET AL., APPELLANTS, V. RICHARD M. LAVERTY: OAKLAND STATE BANK, APPELLEE.

FILED DECEMBER 18, 1931. No. 27994.

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

Rose, Wells, Martin & Lane and *Griffin, Griffin & Griffin*, for appellants.

Gaines, McGilton, McLaughlin & Gaines and *C. O. Stauffer, contra.*

Heard before GOSS, C. J., DEAN and EBERLY, JJ., and CHASE and HASTINGS, District Judges.

PER CURIAM.

This action was begun in the district court for Douglas county by E. P. Reilly and William Sullivan, a partnership, and plaintiffs herein, against the following defendants, namely, Laverty Brothers, a partnership, and the Oakland State Bank. Plaintiffs seek an accounting in respect of certain funds whereof they allege that the above named defendants are trustees and that such funds represent the proceeds from the sale of cattle to Laverty Brothers.

The record discloses that, on or about October 30, 1927, the plaintiffs sold 60 steers to Martin Fredstrom, for which Fredstrom gave to them his promissory note in the sum of $5,425.85, payable April 29, 1928, and as security therefor Fredstrom executed a mortgage wherein the steers were given as security. Plaintiffs contend that, pursuant to the terms of the mortgage, Fredstrom agreed that the steers should not be removed from Burt county without the written consent of the plaintiffs, but that, notwithstanding the agreement, Fredstrom removed the steers from Burt county and shipped them to South Omaha, where they were sold to Laverty Brothers, and it appears that the proceeds of the sale were transmitted by Laverty Brothers to the defendant bank.

The plaintiffs' argument is that the defendants at all times material to this inquiry had full knowledge of the plaintiffs' rights in the premises, but that the defendants utterly disregarded such rights. The plaintiffs' contention is that the defendants became and are now trustees of the proceeds arising from the sale of the steers, but that the defendants have refused to comply with the demand of the plaintiffs for a delivery of such funds.

The bank alleged that any remittances received by Fredstrom were received by him direct from Laverty Brothers, and that any and all money withdrawn by him was in the regular and usual course of business; and that none of the money in question was used to apply on any indebtedness owing by Fredstrom to the bank. The bank denied that it held the funds as trustee at any time for the benefit

of the plaintiffs, and also denied that it at any time had any knowledge or information that the plaintiffs claimed an interest or right or title thereto. After the submission of the evidence the court dismissed the action as to Laverty Brothers. And, in its decree, the court found for the bank and dismissed the plaintiffs' petition on the ground of want of equity. The plaintiffs have appealed.

It appears that, in another action, the plaintiffs obtained a judgment against Fredstrom for $5,425.85, together with interest thereon at 8 per cent. from October 29, 1927, costs, and attorney's fees, but that no part of such judgment has been paid.

Fredstrom sold the mortgaged cattle to Laverty Brothers in March and some in February, 1928, and within a week thereafter the plaintiffs were notified of the sale. And it appears that Fredstrom was willing to pay the amount of his note in the event that a settlement or allowance was made for certain of the cattle which it is alleged were diseased. The proceeds of the sale of the cattle were deposited in the defendant bank. That the plaintiffs knew of such deposit appears from certain correspondence in the record. But the plaintiffs do not appear to have made any claim against such funds for approximately a year and a half thereafter. And where the plaintiffs had knowledge of the sale of the steers and the subsequent deposit of the proceeds thereof in the defendant bank, but made no claim therefor until some time thereafter, we conclude that they are now barred from asserting their right to such funds. The judgment dismissing the petition for want of equity is right and it is

AFFIRMED.

GLENN CALLEN, APPELLEE, V. M. L. RAWLINGS ICE COMPANY, APPELLANT.

FILED DECEMBER 18, 1931. No. 27997.

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

John J. Ledwith and *H. N. Mattley*, for appellant.

Perry, Van Pelt & Marti, contra.

Heard before ROSE, GOOD, DAY and PAINE, JJ., and LESLIE, District Judge.

PER CURIAM.

This is an action to recover $5,310 in damages for negligence causing the collision of an ice truck with a Whippet automobile on Forty-Eighth street in the city of Lincoln September 18, 1930, and resulting in personal injuries to plaintiff who was at the time a passenger in the Whippet car. The petition charges that the negligent operation of the truck was the cause of the collision and of the resulting injuries. The truck was owned by defendant and was driven by his employee, Orval Mutchie, who, according to the petition, was then engaged in the duties of his employment.

The principal defense was that, when the collision occurred, Mutchie was using the truck for his own pleasure or convenience and was not then performing any duty of his employment or acting in any capacity for his employer.

Upon a trial of the issues the jury rendered a verdict in favor of plaintiff for $2,810. From a judgment therefor defendant appealed.

The controlling question presented by the appeal is the sufficiency of the evidence to sustain a finding that the driver of the truck at the time of the collision was then the employee of defendant and was then engaged in operating the truck in the employer's service. Upon consideration of the evidence in its entirety, the unanimous opinion is that on this and on all other issues the verdict of the jury is sustained by sufficient evidence. With this question thus determined, error prejudicial to defendant has not been found in the record.

AFFIRMED.

ARTHUR O. BUTLER, APPELLEE, V. EPHRIAM W. DIXON ET AL., APPELLANTS.

FILED DECEMBER 18, 1931. No. 28012.

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

Kennedy, Holland & De Lacy, for appellants.

Frank L. Frost and *Brome, Thomas & McGuire, contra.*

Heard before GOSS, C. J., DEAN and EBERLY, JJ., and CHASE and HASTINGS, District Judges.

PER CURIAM.

This action was begun in the district court for Douglas county by Arthur O. Butler, plaintiff, against Ephriam W. Dixon, Abraham Cohn, and Thomas E. Hunt, defendants and copartners doing business under the firm name of the Omaha Paper Stock Company, to recover for personal injuries sustained by the plaintiff by reason of the alleged negligence of an employee of the company. The United States Fidelity & Guaranty Company was joined as a party defendant. The jury returned a verdict for $5,000 in favor of the plaintiff. From the judgment rendered thereon, the defendants have appealed.

The plaintiff was engaged as a truck driver for the Storz Brewing Company of Omaha and on March 27, 1929, he drove his truck into an alley to make a delivery. While he was standing at the side of the truck, and engaged in fastening stakes and chains thereon, a team and wagon owned by the defendant company was driven into the alley by an employee. In attempting to pass the truck, the wagon was driven so close thereto that the rear ends of the truck and wagon collided. The record discloses that the driver pulled the team to the left, approximately six feet before it became necessary to do so, to avoid striking a trap door in the alley. The driver of the team failed to look back to observe whether there was sufficient clearance of the truck beside which the plaintiff was standing. And it appears that he failed to stop his

team immediately after the collision. The plaintiff was caught in such position that he was crushed between the wagon and the truck. Both the plaintiff and the driver of the team were familiar with the alley and, under the facts, we think the jury were justified in finding the defendant company's employee guilty of actionable negligence.

The contention of the defendant is that the verdict is excessive. But, in view of the plaintiff's injuries, we do not think so. The evidence fairly shows that the walls of his chest have been thereby weakened; that his right shoulder is lower than his left; and that his general physical strength has been permanently impaired. Plaintiff at the time of the accident was 49 years of age and was earning $30 a week. Since the accident he has resumed work with his former employer, but it appears that it was necessary for him to have assistance in making deliveries.

Complaint is also made in that two jurors in affidavits averred that they had of their own volition visited the scene of the accident. But the affidavits of other jurors are in the record and it does not appear that any of such jurors were in any way influenced in their conclusions by a discussion of the condition of the alley. The alley is only a block from the courthouse and no conflict appears in the evidence in respect of its location, nor does reversible error appear from the fact that the two jurors visited it.

The judgment is

AFFIRMED.

PETER MONFELT ET AL., APPELLANTS, V. WILLIAM T. DAY, APPELLEE.

FILED DECEMBER 31, 1931. No. 27921.

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

Grant G. Martin and *J. A. McGuire,* for appellants.

Hubka & Hubka, contra.

Heard before GOSS, C. J., DEAN, EBERLY and PAINE, JJ., and WRIGHT, District Judge.

PER CURIAM.

This action was begun in the district court for Gage county by the plaintiffs Peter, George, Arthur, and William Monfelt, and Ada Tryner, heirs-at-law of the estate of Henry Monfelt, deceased, against William T. Day to recover on a promissory note for $2,327.65, executed by Day on November 10, 1923, and delivered to Henry Monfelt.

Plaintiffs allege that Day made a payment of $200 on the note August 15, 1925, and that such payment was indorsed thereon by Henry Monfelt, and that, contrary to the contention of the defendant, this action is therefore not barred by the statute of limitations. The plaintiffs alleged that there was due from the defendant on the note $3,444.42, with interest thereon at the rate of 10 per cent. per annum from October 4, 1929. The jury, however, found against the plaintiffs and in favor of the defendant. The plaintiffs have appealed.

The vital question here for determination is whether the payment of $200 on the note by the defendant to Henry Monfelt, August 15, 1925, was a payment upon the note in suit or upon another indebtedness, as defendant contends.

Sophia Monfelt is a daughter of Henry Monfelt and she testified that she was present, on or about August 15, 1925, when the defendant was alleged to have made and executed his check for $200 to apply on the note in suit. She testified, however, that the defendant left the house before the indorsement was written thereon by her father.

The defendant denied that he ever at any time made a payment on the note. He testified that a $200 check, that is noticed in the record, was in payment of a 15-day loan of money by Monfelt to him, but that no note was ever executed therefor. He also testified that the check in question was written for him by his son in their home,

and not by the daughter of Henry Monfelt, as she testified, and that he, the defendant, delivered the check to Monfelt on the street. And the defendant's son, in the presence of the jury, wrote a copy of a notation on the check and the handwriting appears to be practically identical with that on the check. The record of the bank, in which the defendant kept an account, discloses that only one $200 check was charged against his account at or near the time in question and the date thereon is as of August 14, 1925. And Monfelt's daughter testified that the writing on the check in question was not in her handwriting.

Upon submission, as above noted, a verdict was returned that was adverse to the contention of the plaintiffs. And it is elementary in this jurisdiction that the jury, after hearing and observing the witnesses and their demeanor while testifying, are better qualified to judge of the weight of the evidence than is a reviewing court with only the opposing counsel and the record as guidance.

The judgment is

AFFIRMED.

PETERS TRUST COMPANY, APPELLEE, V. JESSE LEWIS ET AL., APPELLANTS: JOHN F. ROBINSON ET AL., APPELLEES.

FILED JANUARY 8, 1932. No. 28030.

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

Simon A. Simon, Edgar B. Zabriskie and *Webb, Kelly & Lewis,* for appellants.

Morsman & Maxwell and *T. B. Dysart, contra.*

Heard before ROSE, GOOD and DAY, JJ., and FROST and MESSMORE, District Judges.

PER CURIAM.

This is a proceeding by mortgagors to set aside a decree foreclosing a mortgage on real estate and to vacate a confirmed judicial sale of the mortgaged premises on the ground that the mortgagee, plaintiff in the foreclosure suit, was not the real party in interest. A defendant herein, to whom the decree of foreclosure had been assigned and by whom the mortgaged real estate had been purchased at the judicial sale, demurred to the petition on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was sustained. Mortgagors elected to stand on their petition and the proceeding herein was dismissed. Mortgagors appealed.

The sufficiency of the petition to state a cause of action is the question presented by the appeal. The petition does not state any defense to the mortgage or to the decree of foreclosure or to the judicial sale, unless it is embodied in the plea that the mortgagee, plaintiff in the foreclosure suit, was not the real party in interest. An examination of the petition herein leads to the finding that it fails to state facts sufficient to show that plaintiff in the foreclosure suit did not have authority to maintain the action. The demurrer, therefore, was properly sustained and the proceeding dismissed.

AFFIRMED.

OCCIDENTAL BUILDING & LOAN ASSOCIATION v. LOUIS F. JOHNSON, APPELLANT: H. P. CONKLIN, INTERVENER, APPELLEE.

FILED JANUARY 8, 1932. NO. 28056.

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

Morrow & Morrow, for appellant.

Clarke & Patterson, contra.

Heard before GOSS, C. J., DEAN, EBERLY and PAINE, JJ., and WRIGHT, District Judge.

PER CURIAM.

October 5, 1929, plaintiff began its suit to foreclose a first mortgage made by Johnson and wife against the necessary parties then interested in the land. Decree was duly entered July 23, 1930, awarding a first lien for the sum of $2,286.92, with costs and with interest at 10 per cent. from the date of the decree. Request for the statutory stay of nine months was seasonably made. On September 11, 1930, the intervener obtained leave to file his petition of intervention and did so on September 16, 1930, seeking foreclosure of a mortgage made by the same parties on the same land, for $3,531.80, dated June 3, 1930. Decree was entered October 30, 1930, on default of all defendants, finding due the intervener $3,789.23, with costs and interest, as a second lien on the property. A sale was had January 12, 1931, on this latter decree and the sheriff reported it sold to H. P. Conklin, the intervener, for $2,550. The Johnsons sought to have the sale confirmed on this bid, and Conklin sought to have the bid set aside and the sale vacated on the ground of mistake in the bid reported; and that it was not his true bid. Evidence was taken by the court and the sale was vacated.

The sheriff, now out of office, was the only witness whose testimony was taken as to the bidding. It seems confusing and inconsistent. At least twice the witness

says it was a bid of $2,550 and in different places in his testimony he also says: "He said he wanted to bid $100 above the first lien;" "I understood it (the bid) was $100 over the first lien;" "He mentioned it several times that he wanted to bid $100 over the first lien." He testified that Conklin and his attorney "figured out" that the first lien and $100 would amount to $2,550. "That is why I made the return the way I did, that is what I got."

The trial court, who saw and heard the witness, found that the bidder did not intend to make the bid as returned by the sheriff, and set the sale aside. We think he did not err. The judgment of the district court is

AFFIRMED.

NATIONAL AUTOMOBILE ASSOCIATION, APPELLANT, V. HARRY D. STRUNK, APPELLEE.

FILED JANUARY 13, 1932. No. 28040.

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

Scott & Scott and *Paul I. Manhart* for appellant.

C. D. Ritchie, contra.

Heard before GOSS, C. J., DEAN, EBERLY and PAINE, JJ., and WRIGHT, District Judge.

PER CURIAM.

Action for damages for libel. Defendant, publisher of a newspaper at McCook, demurred to the petition as not stating a cause of action. The demurrer was sustained. Plaintiff appealed.

The article on which the action is based is set out in full in the petition. It indicated that the Chamber of Commerce of McCook was making a drive against those who were obtaining money by false representations of stock they were selling in the community, and that one Daugherty, selling memberships in plaintiff association, "made his clients believe that membership in the association carried benefits not called for in the contract,"

that he had been prosecuted, pleaded guilty, was fined $10 and costs, and ordered to return a membership fee of $9.50 obtained from a subscriber. The main charge of the pleading arose out of the headline which was: "Fake Association Salesman Fined. Omahan Forced to Return Membership Fees to Subscribers." Plaintiff argues that the word "Fake" modifies the word "Association," whereas defendant argues that the text shows the defendant intended the adjective to apply to the salesman. The only place where plaintiff was named in the publication was in a paragraph in these words: "The National Automobile Association was the firm represented by Daugherty. Daugherty, it was claimed by the Chamber of Commerce, made his clients believe that membership in the association carried benefits not called for in the contract." So the crux of the article was that the salesman was a faker, which means a "petty swindler," in that he falsely represented the coverage of plaintiff's contracts. The implication is that the membership contract was not criticized as bad, but that the plaintiff's salesman perpetrated a fake by making the false representations, on which, when duly charged, he had pleaded guilty. As a syllabus of the text, the headline was a bungle, but we are of the opinion that the published article, as set forth in the petition, afforded no sufficient basis for plaintiff's action against defendant, and that the court did not err in sustaining the demurrer. The judgment is

AFFIRMED.

JAMES M. PARROTT, APPELLANT, V. EUSTIS AGRICULTURAL SOCIETY AND CORN SHOW ET AL., APPELLEES.

FILED JANUARY 28, 1932. No. 28076.

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

Perry, Van Pelt & Marti and *G. E. Simon,* for appellant.

F. J. Schroeder, contra.

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

PER CURIAM.

This is a suit in equity for an injunction enjoining the Eustis Agricultural Society and Corn Show, claimant, and the county treasurer of Frontier county, from selling or paying a 2,000-dollar county warrant drawn in favor of the society named. A claim for $2,000 was presented to the county commissioners and allowed.

James M. Parrott, a taxpayer, is plaintiff herein. He applied for an injunction on the grounds that claimant was not entitled to the proceeds of a tax levy for a county agricultural society because its constitution, articles and by-laws had never been approved by the state board of agriculture as required by statute, and that published notice of the allowance of the claim was not given in time to permit an appeal from the decision of the county commissioners within the statutory period of ten days. Defendants challenged the sufficiency of plaintiff's alleged grounds for an injunction. Upon a trial of the issues the district court dismissed the suit, and plaintiff appealed.

Upon a trial *de novo* a sufficient ground for the granting of an injunction has not been shown or an error found in the proceedings and judgment of the district court.

AFFIRMED.

MOLLIE SOKOLOF, APPELLANT, V. FIRST NATIONAL BANK, APPELLEE.

FILED JANUARY 28, 1932. No. 28112.

APPEAL from the district court for Douglas county: CHARLES E. FOSTER, JUDGE. *Affirmed.*

H. T. White and *Mathilde J. K. Long,* for appellant.

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

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

PER CURIAM.

This is a personal injury action in which defendant had judgment and plaintiff has appealed.

In her petition plaintiff alleged that defendant was the owner and operator of an office building; that, while she was passing through the lobby of the building to the elevator entrance, she slipped, fell and sustained severe injuries; that her fall was "occasioned by the negligence of the defendant and its agents and servants in this that near the entrance of said elevators and within the lobby of said building one of the porters employed by the defendant had spread soap on the floor of said lobby which soap caused said floor to become so slick that plaintiff in the exercise of due care was unable to maintain her footing thereon and fell sustaining the injuries hereinafter set out. That no warning was given to plaintiff that said soap was spread upon the floor and that defendant well knew that said soap so spread upon the floor constituted a dangerous condition and permitted said dangerous condition to exist without warning to any one using said lobby for the purposes for which it was and is maintained." In its answer defendant admitted that it owned and operated the office building and that plaintiff fell and received some injuries, but denied any negligence.

At the conclusion of all the evidence, the trial court, on motion of defendant, discharged the jury and rendered judgment for defendant. The sole question presented by this appeal is whether there was sufficient evidence of negligence by defendant to require the submission of the cause to the jury.

There is no evidence that any servant, or other person acting for or on behalf of defendant, placed, or caused to be placed, any soap on the floor of the lobby; neither is there any evidence from which such fact could be reasonably inferred; nor is there any evidence that, if soap was upon the floor, any officer, agent or employee of defendant had any knowledge thereof until the time of the accident. It follows that there is no evidence from which negligence on the part of defendant could have been found

by the jury. Consequently, there was no occasion to submit the cause to the jury.

On the record presented, no other judgment could have been properly rendered.

AFFIRMED.

BROADWAY BANK OF KANSAS CITY, APPELLEE, V. HARRY SAGER, APPELLANT.

FILED FEBRUARY 5, 1932. No. 27859.

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

A. C. Plantz, for appellant.

Carlyle W. Edgell, contra.

Heard before GOSS, C. J., DEAN and EBERLY, JJ., and RAPER and RYAN, District Judges.

PER CURIAM.

The Broadway Bank of Kansas City sued to recover $1,000 on a promissory note executed June 24, 1927, by Harry Sager and his wife, Lena H. Sager. The note bears interest at the rate of 8 per cent. per annum until paid. In his answer, Harry Sager alleges that the note sued on is a renewal of two notes for $500 each which were executed by him and payable to the Superior Medicine Company of Kansas City and by that company sold to the plaintiff bank. Sager also alleges that he executed an instrument purporting to be a contract with the Superior Medicine Company for the purchase of 1,000 "Superior Medicine Cabinets," and for which he executed the two $500 notes, but he alleges that the cabinets are now and at all times were a fraud and that he has therefore been unable to sell or to dispose of them. He alleges that the company's agent represented the cabinets to him as a merchantable article greatly in demand and that, in reliance upon the representations so made, he purchased the cabinets. The defendant contends that the bank was not an innocent purchaser of the note in suit and that it was

therefore chargeable with knowledge of the fraud that was perpetrated upon the defendant by the company. The defendant also alleges that he has been damaged in the sum of $1,000 by the purchase of the cabinets so delivered to him by the Superior Medicine Company.

The court found that Lena H. Sager did not sign the notes with the intention of binding her separate estate and the court thereupon dismissed the action as to her. But the court rendered a judgment against Harry Sager, pursuant to the prayer of the plaintiff bank, in the sum of $1,273.33, with interest thereon at 8 per cent. per annum. From the judgment so rendered the defendant Harry Sager has appealed.

The evidence tends to prove that, for a valuable consideration, in the usual course of business and without notice of defect in or defense thereto, plaintiff acquired title to two promissory notes executed by defendant to third parties. Some time after their maturity the defendant renewed the notes by executing the note sued on in this action. If plaintiff was an innocent holder for value of the first notes, then the defense of fraud or want of consideration would not have been available as a defense in an action on the original notes; nor would such a defense be available to him in an action on the renewal note.

In a law action, tried without a jury, the findings of the trial court have the same force and effect as a verdict, and will not be disturbed unless clearly wrong.

From the record it appears that no other finding than that made by the trial court could be sustained.

The record is free from error. The judgment is

AFFIRMED.

LAB BRESLOW, APPELLANT, V. CITY OF LINCOLN ET AL., APPELLEES.

FILED FEBRUARY 5, 1932. No. 28120.

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

Bruce Fullerton and *T. R. P. Stocker*, for appellant.

Flansburg & Lee, Frank A. Peterson, Max Kier, Lloyd E. Chapman and *John O. Sheldahl, contra.*

Heard before GOSS, C. J., DEAN and PAINE, JJ., and CARTER and RHOADES, District Judges.

PER CURIAM.

Plaintiff sued the city of Lincoln and the Iowa-Nebraska Light & Power Company for damages for the alleged conversion of a light and power line. At the conclusion of the evidence for plaintiff the court directed a verdict for defendants. From judgment thereon the plaintiff appeals.

In 1925 plaintiff, conducting his grain elevator a short distance outside the village of College View, made an arrangement with the village to extend its light and power line to his place of business. The evidence, as contained in the minutes of the village board, shows that the village built the line at a cost of $634.12, of which it agreed to absorb $200 and plaintiff agreed to pay and did pay $434.12. The village agreed to refund to the plaintiff this amount as service charges of $25 each were paid by users connecting with the line. It seems that no such users have connected with the line since it was built. In 1928 the village sold its light and power system to defendant light and power company, and in 1929 the village was consolidated with the city of Lincoln. These defendants, having succeeded to the rights and liabilities of the village as of these dates, were therefore made defendants.

The elevator burned about two years after the light line was extended to it. Plaintiff never since has desired light or power. To preserve them, the transformers were removed and stored. They can be replaced and service can be resumed in a few hours if desired by plaintiff or any new customers on the line.

While it seems clear from the minutes of the village that the title to the line when it was built was in the village, yet, assuming plaintiff was to have title until the service charges refunded the $434.12 he paid the village

to install the line, the evidence does not show that the line has been converted or destroyed by defendants. The defendant light and power company stands ready to put it in operation whenever plaintiff or other customers need it, as contemplated by the agreement under which it was built.

The judgment of the district court is

AFFIRMED.

STATE, EX REL. HYMAN ZELEN, APPELLEE, V. BOARD OF CONTROL ET AL., APPELLANTS.

FILED FEBRUARY 5, 1932. No. 28157.

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

C. A. Sorensen, Attorney General, L. Ross Newkirk and *Homer L. Kyle,* for appellants.

Mockett & Finkelstein, contra.

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

PER CURIAM.

This is an application by the state on the relation of Hyman Zelen for a peremptory writ of mandamus requiring the members of the state board of control, respondents, to award relator the contract to furnish incandescent lamps for state institutions under their jurisdiction. On competitive bidding conducted pursuant to law, relator offered to sell the lamps at 41 per cent. discount from the list price and the Westinghouse Electric Company made a bid of 29 per cent. discount from the list price. Respondents rejected the lower bid of relator and awarded the contract to his competitor.

The application for mandamus was resisted on the principal grounds that respondents, in calling for bids, reserved the right to reject any and all bids, and that in considering the bids made they exercised a reasonable discretion in rejecting the bid of relator, previous per-

formance of contracts on his part having been unsatisfactory, and his competitor being in the present instance the more responsible bidder.

The trial court heard the evidence on both sides and allowed the writ. Respondents appealed.

An examination of the evidence results in the finding that there was no substantial reason for rejecting relator's bid or for the defense that performance of previous contracts by relator to furnish lamps had been unsatisfactory. There was an abuse of discretion in rejecting the lower bid. The writ was properly allowed.

AFFIRMED.

MERLIN T. PERKINS, APPELLANT, V. JOSEPH S. RATHBUN ET AL., APPELLEES.

FILED FEBRUARY 11, 1932. No. 28106.

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

H. A. Dano, for appellant.

M. M. Maupin, contra.

Heard before ROSE, GOOD and EBERLY, JJ., and BROADY and CHASE, District Judges.

PER CURIAM.

This is an action in ejectment for 3.36 acres of land in section 34, township 17, range 37, Arthur county. Defendants Hood claimed the land, and upon a trial of the issues the district court found that plaintiff did not make a case and directed a verdict in favor of defendants Hood. From a dismissal of the action plaintiff appealed.

Upon a review of the record, error prejudicial to plaintiff has not been found.

AFFIRMED.

ARTHUR F. SCHOENROCK, APPELLEE, V. AMERICAN INDEMNITY ASSOCIATION, APPELLANT.

FILED MARCH 2, 1932. No. 28074.

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

Donelson & Gaughan, for appellant.

Denney & Denny, contra.

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

PER CURIAM.

Plaintiff brought this action in the district court for Jefferson county on a policy of accident insurance. From a judgment in favor of plaintiff defendant has appealed.

We have carefully examined the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

STEPHEN B. MILES, APPELLANT, V. OIL WELL SUPPLY COMPANY ET AL., APPELLEES.

FILED MARCH 2, 1932. No. 28078.

APPEAL from the district court for Richardson county: JEFFERSON H. BROADY, JUDGE. *Affirmed.*

John C. Mullen and *George N. Foster*, for appellant.

Wiltse & Wiltse and *J. H. Foster, contra.*

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

PER CURIAM.

Plaintiff brought this action in the district court for Richardson county by which he sought to obtain a new trial of an action entitled Oil Well Supply Company v. Miles on the ground of newly discovered evidence. The trial court found for defendants and plaintiff has appealed.

We have carefully examined the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

ELIZABETH F. GRANTHAM ET AL., APPELLANTS, V. CITY OF CHADRON, APPELLEE.

FILED MARCH 2, 1932. No. 28123.

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

Allen G. Fisher, Charles A. Fisher and *Samuel L. O'Brien,* for appellants.

G. T. H. Babcock and *J. E. Porter, contra.*

Heard before ROSE, GOOD and EBERLY, JJ., and BROADY and CHASE, District Judges.

PER CURIAM.

Plaintiff brought this action to recover on an alleged contract for arbitration of damages claimed for right of way in the construction and maintenance of a pipe line. Defendant pleaded an ordinance by which the right of way was condemned. The trial court found generally for defendant and sustained the condemnation award. Plaintiffs have appealed.

We have carefully examined the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

JOHN ABBEY, APPELLEE, V. CHARLES POTTER ET AL., APPELLANTS.

FILED MARCH 2, 1932. No. 28152.

APPEAL from the district court for Webster county: J. W. JAMES, JUDGE. *Affirmed.*

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

Howard S. Foe, contra.

Heard before ROSE, GOOD and EBERLY, JJ., and CARTER and CHASE, District Judges.

PER CURIAM.

Plaintiff brought this action in the district court for Webster county to recover damages resulting from an automobile collision. From a verdict and judgment in favor of plaintiff defendants have appealed.

We have carefully examined the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

JOHN A. WEEMS, APPELLEE, V. JOHN O'HARE, APPELLANT: EDNA M. WEEMS, APPELLEE.

FILED MARCH 11, 1932. No. 28202.

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

Joseph E. Daly and *Joseph R. Shields,* for appellant.

Kemp & Brower, contra.

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

PER CURIAM.

The defendant, John O'Hare, appeals from a decree of foreclosure of one mortgage on 800 acres, found to be a first lien in favor of plaintiff, and of another mortgage on the same land in favor of defendant Edna M. Weems, found to be a second lien. Annie O'Hare, wife of John O'Hare, was also a defendant, but the decree absolved her from personal liability on the notes. The answer of the O'Hares and their brief are long and involve many facts which we find not necessary to discuss in detail. They allege that there was no consideration for the notes and mortgages; that plaintiff, to whom they made the second mortgage and notes, and who is the father of Edna M.

Weems, never transferred them to her; that plaintiff by fraud induced O'Hare to purchase from plaintiff 320 acres of other described land at a fraudulently inflated valuation, taking advantage, as an experienced man of shrewd and calculating qualities, of the timid temperament and easy disposition of O'Hare; that then, having confidence in plaintiff, they were fraudulently induced to enter into other contracts with him, to deliver to him securities of value, to sign papers and to pay him money, and the like, the whole recital of which would serve no useful purpose. They prayed for an accounting and for judgment thereon for the amount found due them, for cancelation of notes, mortgages and deeds, and for a decree quieting their title.

An examination of the evidence shows that the allegations of fraud against the plaintiff were not supported by the proofs, and that the mortgagees were entitled to the amounts found due on their respective mortgages. The real source of the trouble appears to be located in the deflation of the market value of real estate beginning about 1920. Mr. O'Hare was familiar with all the land involved, apparently knew what he was doing in the dealings between the parties, and, evidently with knowledge of the facts upon which he now seeks to establish fraud, by his conduct for years up to a time comparatively short before the bringing of this suit, ratified those acts. At least, he has failed to sustain his burden of proving the fraud, misrepresentation and deceit alleged by him as a defense. The district court, with the opportunity to observe the witnesses, reached this conclusion, which is confirmed by our examination of the record. The judgment of the district court is

AFFIRMED.

HARRY EBSEN ET AL. V. STATE OF NEBRASKA.

FILED MARCH 25, 1932. No. 28211.

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

L. A. Sprague, Edward P. Prince, Bernard McNeny and *C. A. Smedol,* for plaintiffs in error.

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

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

PER CURIAM.

The defendants were convicted of bank robbery and were sentenced to the penitentiary for a period of 20 years. Counsel representing plaintiffs in error here did not represent them below.

The errors of law assigned relate to two points: First, handcuffing of the prisoners; second, misconduct of the county attorney.

After the jury were impaneled, just before the attorneys made their opening statements, counsel for defendants requested the court to direct the sheriff to remove the handcuffs from the defendants. The court remarked that the defendants were in the custody of the sheriff and that he was the best judge of whether to keep the handcuffs on or not. Counsel noted an exception to the court referring the matter of his request to the sheriff. Defendants' present counsel argue strongly about the matter here. But, while they allege the fact in the motion for new trial, they do not point out in the record any evidence to indicate that the sheriff did not comply with the request to remove the handcuffs. Even if to leave the handcuffs on the defendants would have been prejudicial, we cannot assume they were so left, and that prejudicial error was therefore committed.

On cross-examination of an alibi witness for Harry Ebsen, the county attorney asked him an improper question. Counsel for Ebsen objected and stated that, "if the county attorney continues this line of cross-examination, we ask for a mistrial." The court sustained the objection and announced that line of questions would no longer be permitted. Defendants did not ask for a mistrial, the county

attorney did not continue that line and it is not shown that the defendants were prejudiced.

The judgment of the district court is

AFFIRMED.

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7. Where an absolute divorce is denied, equity may grant a divorce to the wife *a mensa et thoro* and award her separate maintenance. *Forburger v. Forburger* 705
8. Separate maintenance to the wife should bear an equitable proportion to the husband's income. *Forburyer v. Forburger* 705
9. Permanent alimony is founded upon the wife's right to such support from her husband as she would be reasonably entitled to expect, considering all the circumstances; its amount resting upon the sound discretion of the court. *Swolec v. Swolec* 837
10. Factors determining amount of alimony, stated. *Swolec v. Swolec* 837

Drains.

1. Written notice of claim for damages arising out of negligent construction or maintenance of a drainage ditch *held* a condition precedent to an action therefor. *Bartels v. Drainage District* 340
2. Petition in an action for damages resulting from negligent construction or maintenance of a drainage ditch, which does not allege filing of statutory notice, *held* not to state a cause of action. *Bartels v. Drainage District* 340

Easements.

1. Landowners, through adverse construction and use of a drainage ditch into an irrigation canal for the statutory period, may acquire an easement from the irriga-

tion district. *Central Irrigation District v. Gering Irrigation District* 199
2. The owner of a drainage ditch used continuously for ten years acquires an easement for drainage purposes. *Bures v. Stephens* 751

Equity.

1. Where a court of equity has obtained jurisdiction of a cause, it will retain it and determine all rights of the parties. *Johnson v. Weskamp* 381
2. Public policy may require relaxation of a rule founded on public policy. *Citizens Nat. Bank v. Polski* 658
3. Where equity assumes to act, it must do complete justice, regardless of whether litigants came into court with unclean hands. *Citizens Nat. Bank v. Polski* 658
4. Where it does not violate a right or agreement nor work injustice, a court of equity may issue a writ of assistance to give effect to a decree. *Metropolitan Life Ins. Co. v. Heany* 747
5. Equity may, in exercise of inherent powers, refuse relief sought after undue and unexplained delay, and when injustice would result. *Severson v. McKenzie* 827
6. Equity has inherent power to refuse relief after undue and inexcusable delay independent of the statute of limitations. *Severson v. McKenzie* 827

Evidence.

1. In an action for damages from collision of automobile with a mower on a highway, state rules and regulations applicable to vehicles on highways *held* admissible. *Trussell v. Ferguson* 82
2. The owner of personalty is qualified to testify as to its value. *Folken v. Union P. R. Co.* 193
3. Opinion of counsel of experience respecting title may be considered by the court in determining marketability of title. *Robinson v. Bressler* 461
4. The grantee may deny by parol evidence a recital in his deed that he assumed and agreed to pay certain mortgages. *Shamburg v. Mathiesen* 517
5. Only acts and declarations of a conspirator done and made while the conspiracy is pending, and in furtherance of its object, are admissible against his associates. *Nebraska State Bank v. Citizens State Bank* 522
6. Generally, a presumption is not evidence, but a mere rule of law, and disappears when evidence on the subject is given. *Auld v. Auld* 576
7. A qualified expert may give his opinion as to the speed of an automobile, based on the length of skid marks

made when brakes were applied. *McKinney v. Winterſteen* 679
8. A "presumption" is an inference which may be drawn from a particular fact, unless and until the truth of such inference is disproved. *Smith v. Fall* 783
9. A presumption cannot be indulged in where a particular fact upon which the presumption is based is not shown to exist. *Smith v. Fall* 783
10. The consideration named in a written contract, if merely a recitation of fact, can be varied by parol evidence. *Hartman v. Lipovsky* 823
11. Acknowledgment of receipt of consideration in a written contract *held* a recitation of fact which may be explained or contradicted by parol evidence. *Hartman v. Lipovsky* 823

Execution.

1. A judgment creditor's right to an execution can be taken away only by legal proceeding. *Barry v. Horton* 20
2. Where no goods or chattels subject to execution can be found, the officer must indorse the writ "no goods," and forthwith levy on lands and tenements and sell same subject to prior liens. *Barry v. Horton* 20
3. A motion to confirm an execution sale of lands is properly overruled, where the lands were not sold subject to prior liens. *Barry v. Horton* 20
4. Where a judgment debtor is insolvent, the issuance of execution and a return *nulla bona* are not conditions precedent to other proceedings to satisfy the judgment. *State, ex rel. Sorensen, v. Bank of Crab Orchard* 210

Executors and Administrators.

Where executor was charged with value of property of another estate, less lawful deductions, he was properly discharged, where deductions exceeded value of property. *In re Estate of Freling* 247

Exemptions.

1. Exemption laws will be liberally construed. *State, ex rel. Sorensen, v. Bank of Crab Orchard* 210
2. Dividends from insolvent state bank due judgment debtor *held* exempt. *State, ex rel. Sorensen, v. Bank of Crab Orchard* 210

Fixtures.

1. A boiler installed by tenant to furnish steam for cleaning and pressing business *held* to be a trade fixture. *Rothery v. Dohrse* 259

2. That a boiler installed by tenant to furnish steam for cleaning business is also used for heating *held* not to make it realty. *Rothery v. Dohrse* 259
3. A tenant who installed a boiler in a cleaning plant *held* entitled to remove it at end of his term, though its removal necessitated removal and replacing of a small portion of a brick wall. *Rothery v. Dohrse* 259

Fraud.

1. In an action for fraud, evidence *held* to sustain judgment for defendant. *Johnson v. Hastings & Heyden* 610
2. A petition, to state a cause of action for fraud or conspiracy to defraud, must allege, not only conspiracy and fraudulent acts, but also facts showing damage. *Reed v. Occidental Bldg. & Loan Ass'n* 817

Fraudulent Conveyances.

1. Evidence *held* to sustain finding that deed was made in fraud of creditors. *Clermont Cravat Co. v. Eckhard* 416
2. In a suit to set aside conveyances as fraudulent, evidence *held* to sustain findings for defendants. *Cary v. Reiter* 476

Gifts.

1. Gift by father to son to the exclusion of other children *held* invalid. *Holtman v. Lallman* 183
2. Facts proved *held* to establish presumption of undue influence, and to put burden on donee of gift to overcome such presumption by clear and satisfactory evidence. *Wixson v. Nebraska Conference Ass'n* 771

Highways.

In an action against a county for injuries due to negligence in maintaining a highway, evidence of a similar accident *held* admissible on the question of notice. *Cromwell v. Fillmore County* 114

Homestead.

1. The fact that a husband conveyed to his wife property on which the family had resided for 20 years does not constitute an abandonment of its homestead character. *Berggren v. Bliss* 801
2. A person cannot at the same time have two homesteads, nor can he have two places, either of which he may elect to claim as homestead. *Berggren v. Bliss* 801

Husband and Wife.

Liability of wife for necessaries is not a personal liability, and where no property exists at time of contracting

debt, no liability can arise against the wife. *Dreamer v. Oberlander* 335

Indictment and Information.

1. An information charging offense of abandonment substantially in language of statute is sufficient. *Weber v. State* 369
2. An indictment should contain a plain and concise statement of the charge against accused. *Kirchman v. State* 624
3. An information verified on information and belief *held* sufficient. *Foreman v. State* 619

Infants.

1. A child six years of age *held* not possessed of sufficient discretion to be guilty of contributory negligence. *McKinney v. Wintersteen* 679
2. A seven year old child is not chargeable with contributory negligence. *Siedlik v. Schneider* 763

Injunction.

1. The purpose of a temporary restraining order is to impose judicial restraint until litigants can be heard on application for a temporary injunction. *Meeske v. Baumann* 786
2. In an action on a bond for a preliminary restraining order wrongfully granted, obligees may recover expenses incurred in procuring dissolution of the order, including reasonable counsel fees. *Meeske v. Baumann* 786
3. In an action on a bond for a preliminary restraining order wrongfully granted, and dissolved, obligees need not allege payment of reasonable counsel fees. *Meeske v. Baumann* 786

Insane Persons.

1. An application for the appointment of a guardian for an incompetent is a special proceeding, and not adversary in character. *Hall v. Hall* 228
2. An alleged incompetent seeking to set aside a decree appointing a guardian for his estate need not prove participation by petitioners in alleged fraud. *Hall v. Hall* 228
3. Alleged incompetent *held* entitled to have decree appointing guardian for his estate set aside for constructive fraud. *Hall v. Hall* 228

Insurance.

1. Insurance agent's promise to insured to renew policies *held* not binding on insurer. *Dohlin v. Dwelling House*

Mutual Ins. Co. 47
2. Insurance Code *held* to adopt the New York standard form of fire insurance policy, as existing and construed, except as modified by the Nebraska Code. *Mayfield v. North River Ins. Co.* 63
3. Insured's violation of conditions or breach of warranty under a location clause *held* not to invalidate the policy, unless it contributed to the loss. *Mayfield v. North River Ins. Co.* 63
4. Provision in Insurance Code relating to misrepresentation or warranty becomes a part of an insurance policy. *Mayfield v. North River Ins. Co.* 63
5. An assignment of a fire insurance policy after loss transfers assignor's rights to proceeds. *Newman v. National Union Fire Ins. Co.* 94
6. Where a junior mortgagee has an insurable interest in property at time of loss, insurer, by making an indorsement on policy recognizing his title, cannot thereafter assert that liability was extinguished. *Newman v. National Union Fire Ins. Co.* 94
7. Breach of conditions in fire policy relating to other insurance and to notice of foreclosure proceedings *held* not to preclude recovery, unless the breach contributed to loss. *Newman v. National Union Fire Ins. Co.* 94
8. Six months' limitation after expiration of fidelity bond for giving notice of claim *held* referable only to classification stated in condition of which it is a part, where inconsistent with other conditions. *Queen Incubator Co. v. National Surety Co.* 224
9. A fidelity bond will be most strongly construed against the insurer. *Queen Incubator Co. v. National Surety Co.* 224
10. Evidence *held* to establish that insurer, by its conduct, waived the right to strict enforcement of forfeiture provisions of an extension premium note. *Higgins v. Old Line Ins. Co.* 254
11. A provision in premium note for forfeiture of policy upon default in payment, being for insurer's benefit, may be waived. *Higgins v. Old Line Ins. Co.* 254
12. Judgment for beneficiary, on theory that insurer by accepting premium note waved cash payment, *held* sustained by evidence. *Shurtleff v. Bankers Nat. Life Ins. Co.* 306
13. Answer to question in application for insurance *held* a warranty material to the risk, voiding the policy. *Morrissey v. Travelers Protective Ass'n* 329
14. A fraternal beneficiary association *held* not estopped to

deny liability under its certificate, though the soliciting member knew of false statements material to the risk in the application. *Morrissey v. Travelers Protective Ass'n* 329
15. The general rule which imputes knowledge of an agent to his principal *held* not to apply to a soliciting member of a fraternal beneficiary association. *Morrissey v. Travelers Protective Ass'n*..... 329
16. A chattel mortgagee who procured a fire insurance policy without the mortgagor's knowledge *held* entitled, under mortgage clause, to recover loss in his own name. *State Credit Co. v. National Old Line Life Ins. Co*..... 345
17. Evidence *held* to support judgment for defendant based on provision in insurance policy relating to insured's ownership of realty. *Black v. National Union Fire Ins. Co.* 377
18. When an insurance company having timely notice of loss is sued and denies liability, it waives proof of loss. *Ericson v. Mutual Benefit Health & Accident Co*..... 580
19. Provisions of insurance policies prepared by insurer will be construed most strongly against the insurer. *Woodring v. Commercial Casualty Ins. Co*..... 734
20. A salesman driving his employer's automobile as an incident to his employment in selling and delivering merchandise *held* not a "hired operator," within an exception to liability in an automobile insurance policy. *Woodring v. Commercial Casualty Ins. Co*..... 734

Intoxicating Liquors.

1. Finding liquor on premises of wife creates presumption of her unlawful possession. *Stumpff v. State*..... 49
2. Evidence showing only possession incidental to transportation *held* not to sustain conviction of possession. *Wells v. State*..... 178
3. Evidence *held* to sustain conviction for bootlegging. *Ball v. State*..... 690
4. Under an information charging bootlegging, evidence of intent to sell or dispose of intoxicating liquor kept or carried *held* essential to conviction. *Lentz v. State*.... 693

Judgment.

1. Decree in partition held conclusive, though erroneous. *Schleuning v. Tatro*..... 3
2. The rule of *res judicata* is applicable only where it appears that the same facts were or might have been litigated in a former action. *Omaha Road Equipment Co. v. Thurston County*..... 35
3. The rule of *res judicata* is inapplicable where the court

in a former action determined that it was without jurisdiction. *Omaha Road Equipment Co. v. Thurston County* 35
4. The district court during the same term, on its own motion, may set aside a verdict, and enter judgment for the adverse party. *First Nat. Bank v. Broyles* 414
5. A prior judgment on a different cause of action is, in a subsequent action, *res judicata* only as to matters in issue in the former action. *Williams v. Nutter* 458
6. A judgment debtor consenting to continuance for more than three terms in county court cannot in a collateral proceeding enjoin enforcement of county court judgment as void on account of such continuance. *Staben v. Mehrens* 683
7. Petition in suit to enjoin enforcement of a judgment must allege a meritorious defense to the first cause of action. *Staben v. Mehrens* 683
8. Assignment of judgment *held* an assignment for collection only, and not a sale thereof. *Reed v. Occidental Bldg. & Loan Ass'n* 817
9. Where it appears on the face of the petition that a judgment sued on has become dormant, and has not been revived, the petition fails to state a cause of action. *Reed v. Occidental Bldg. & Loan Ass'n* 817

Judicial Sales.

A judicial sale of land will not be set aside for inadequacy of price, unless it is so gross as to show fraud or mistake. *Metropolitan Life Ins. Co. v. Heany* 747
Federal Land Bank v. Radke 834

Jury.

Denial of jury trial in suit to quiet title *held* proper. *Sittler v. Wittstruck* 452

Landlord and Tenant.

1. Generally, a yearly lease of farm lands begins on March 1 and ends on February 28 of the succeeding year, and rental becomes due at expiration of term. *Holtman v. Lallman* 183
2. Where a life tenant died before expiration of yearly lease, the owner of the fee, who was the tenant, *held* not liable for the year's rental, in absence of proof of rental value up to time of tenant's death. *Holtman v. Lallman* 183
3. Evidence *held* insufficient to establish that son paid rent to father by supporting him. *Holtman v. Lallman* 183
4. Employee of tenant, suing for injury, *held* not contrib-

utorily negligent in using a defective stairway. *Tempel v. Proffitt* 249
5. Interest on annual rental begins at the end of the rental year when the rent is due. *Mast v. Murray* 284

Larceny.

Information charging stealing of cow need not state value of cow. *Cochran v. State* 79

Libel and Slander.

1. Spoken words are actionable *per se* if they impute commission of a crime punishable by imprisonment in the penitentiary. *Cline v. Holdrege* 151
2. Words actionable *per se* are not privileged, unless the person uttering them believes them to be true and has reasonable grounds for such belief. *Cline v. Holdrege* 151
3. A newspaper cannot avoid responsibility in a libel suit by proving that a reporter, by mistake, used the wrong person's name. *Walker v. Bee-News Publishing Co* 511
4. In an action for libel, the law looks at the consequences of the publication, and not at the intention of the publisher, who may be held to answer for negligent wrongs, as well as those that are intentional. *Walker v. Bee-News Publishing Co* 511
5. Words are libelous *per se* when they charge a criminal offense involving moral turpitude. *Walker v. Bee-News Publishing Co* 511
6. To state in error that a wrestling match was held in one's barn does not constitute libel *per se*. *Walker v. Bee-News Publishing Co* 511
7. An article stating that two boys had a wrestling match in plaintiff's barn *held* not libelous *per se*. *Walker v. Bee-News Publishing Co* 511

Liens.

1. A lien is a proprietary interest, a qualified ownership; and actually can only be created by owner of property. *General Motors Acceptance Corporation v. Sutherland* 720
2. All liens are created by law or by contract made with the owner of the property. *General Motors Acceptance Corporation v. Sutherland* 720

Limitation of Actions.

The statute of limitations is applicable to claims against counties. *Bryant v. Cedar County* 853

Mandamus.

1. To warrant mandamus against an officer, there must be a clear, existing duty imposed by law. *State, ex rel.*

Long, v. Barstler 167
2. Mandamus will not lie to compel a county clerk to levy a tax certified to him after he has completed the tax list and delivered it to the county treasurer. *State, ex rel. Long, v. Barstler* 167
3. Mandamus will issue against a public officer to compel performance of a clear, existing duty imposed by law. *State, ex rel. Herbert, v. Anderson* 738

Marriage.
1. To constitute a valid marriage, the parties must obtain a license to marry, and the marriage must be solemnized by a person authorized to solemnize marriages. *Walden v. Walden* 804
Collins v. Hoag & Rollins 805
2. Chapter 40, Laws 1923, making a license and solemnization as therein provided requisites of a valid marriage, *held* constitutional. *Collins v. Hoag & Rollins* 805

Master and Servant.
1. Employee *held* to assume risk of injury from lifting. *Chappell v. Chicago & N. W. R. Co.* 28
2. Employer *held* not liable for injury to employee while on his way to work. *Siedlik v. Swift & Co.* 99
3. Injury to employee from stepping into hole on way to work *held* not to arise "in the course of employment." *Siedlik v. Swift & Co.* 99
4. Where employee, instructed by manager to deliver ice, and to use truck to go home for dinner, was injured when returning the truck, *held* that injury arose "out of and in the course of employment." *Mutchie v. M. L. Rawlings Ice Co.* 297
5. Where injured employee had worked on a weekly salary basis and less than one month prior to injuries was changed to an hourly basis, his earnings during as much of the preceding six months as he worked in the same character of employment constitutes the basis for determining weekly wage. *Mutchie v. M. L. Rawlings Ice Co.* 297
6. Evidence *held* insufficient to establish oral agreement for a bonus to salesman. *Ellis v. Omaha Cold Storage Co.* 567
7. In a proceeding under the workmen's compensation law, the parties are entitled to a final and complete disposition of the cause. *G. A. Steinheimer Co. v. Podkovich* 710
8. In a common-law action for damages for lead poisoning, an instruction on assumption of risk approved. *Grover v. Aaron Ferer & Sons* 755

Monopolies.

Petition in action for damages for restraint of trade under antitrust laws *held* insufficient. *Ploog v. Roberts Dairy Co* 540

Mortgages.

1. One objecting to confirmation of a foreclosure sale for inadequacy of price has the burden to show affirmatively that the judgment confirming the sale is erroneous. *Occidental Building & Loan Ass'n v. Beal* 40
2. Legatees who received a note and mortgage from an executor on final settlement of an estate are proper parties to maintain a foreclosure suit. *Darling v. Darling* 153
3. Where a deed is given to secure an indebtedness owing to the grantee, the legal title passes to the grantee. *Northwestern State Bank v. Hanks* 262
4. Where a deed is given to secure an indebtedness owing to the grantee, equity will regard the grantor as retaining an interest in the premises. *Northwestern State Bank v. Hanks* 262
5. Where a deed was given, and simultaneously a lease was executed giving the grantor an option to repurchase within a year, the grantor's interest is the right to pay the debt within the time limited and receive a reconveyance. *Northwestern State Bank v. Hanks* 262
6. Where a deed was given, and simultaneously a lease was executed giving the grantor an option to repurchase within a year, upon failure to repurchase, equity may decree a strict foreclosure and allow a reasonable time for redemption. *Northwestern State Bank v. Hanks* 262
7. Limiting the time to three days to redeem from a strict foreclosure *held* an abuse of discretion. *Northwestern State Bank v. Hanks* 262
8. Evidence *held* to sustain finding as to priorities of mortgages filed for record at the same time. *Judkins-Davies v. Skochdopole* 374
9. Evidence *held* to sustain decree striking mortgage assumption clause from deed as having been placed there by mistake. *Shamburg v. Mathiesen* 517
10. A mortgagee is not put on inquiry with reference to anything he would not have learned through inquiry from a third person in possession. *Kellogg v. McDonald* 613
11. Mere inadequacy of price will not preclude a confirmation of a foreclosure sale, unless the inadequacy is so great as to evidence fraud. *Lemere v. White* 676

12. There are no restrictions upon the means by which the court may determine whether a fair price was obtained at a foreclosure sale, or whether a subsequent sale would realize a greater amount. *Federal Land Bank v. Radke* 834

Municipal Corporations.

1. Statutory procedure for ordering street improvements in cities of the second class and villages is mandatory and jurisdictional. *Musser v. Village of Rushville*..... 128
2. No valid assessment against property for street improvement can be made, unless the governing board of the municipality acts in accordance with statutory procedure. *Musser v. Village of Rushville*..... 128
3. A defective billboard erected on a building *held* not "a defect in a street or sidewalk" within statute requiring notice to city as condition precedent to liability. *Gilbert v. Welch Restaurant Co*..... 312
4. City of metropolitan class *held* liable to person injured when a defective billboard fell from building, where the city officials could have discovered the defective condition. *Gilbert v. Welch Restaurant Co*..... 312
5. Under the charter, bond issue by city of Omaha for acquisition of land for airport *held* not limited to $50,000. *Bruett v. City of Omaha*..... 779
6. Amendment to Omaha city charter, authorizing bond issue for acquisition and improvement of aviation field, *held* not repugnant to general charter provision. *Bruett v. City of Omaha*..... 779
7. Power given to a city to sue and defend implies power to employ counsel for those purposes. *Meeske v. Baumann* 786
8. A city may employ special counsel when the city attorney is absent, ill, or disqualified. *Meeske v. Baumann* 786
9. Where city attorney is ill, absent, or disqualified, defense in suit pending against city *held* not "duty devolving upon regular city officer" within statute relating to compensation. *Meeske v. Baumann*..... 786
10. Where a salaried city attorney is ill or disqualified, a city may employ special counsel to dissolve a preliminary restraining order against purchase of lighting plant equipment and may incur liability for reasonable counsel fees. *Meeske v. Baumann*..... 786

Negligence.

1. In an action for negligence, plaintiff cannot recover where the evidence shows that he brought the injuries on himself. *Casey v. Chicago, B. & Q. R. Co*..... 11

2. Whether an automobile driver was guilty of more than slight negligence in failing to see an unlighted truck on a highway on a dark misty night *held* a question of fact. *Giles v. Welsh* 164
3. Where the jury may infer that defendant was negligent and that plaintiff was contributorily negligent, an instruction on comparative negligence should be given. *Tempel v. Proffitt* 249
4. Defendant must plead and prove contributory negligence of plaintiff. *Tempel v. Proffitt* 249
5. In an action for injuries to pedestrian by an automobile, negligence and contributory negligence *held* questions for the jury under the comparative negligence statute. *Lustgarten v. Harris* 663
6. The owner of a building is not an insurer against accident to an invitee leaving the building by steps provided for that purpose. *Thompson v. Young Men's Christian Ass'n* 843
7. The owner of a building must exercise reasonable care to keep steps leading from the building reasonably safe for use of invitee. *Thompson v. Young Men's Christian Ass'n* 843
8. The fact that an invitee falls on steps leading from exit of building does not raise presumption of negligence against the owner. *Thompson v. Young Men's Christian Ass'n* 843
9. Facts constituting negligence must be proved and not left to inference. *Thompson v. Young Men's Christian Ass'n* 843
10. Burden is on invitee, suing for personal injury sustained by fall on steps of building, to establish that alleged dangerous condition of steps existed and was known or should have been known to the owner before the accident. *Thompson v. Young Men's Christian Ass'n* 843
11. An invitee assumes open and obvious dangers on premises which can be seen and avoided by the exercise of ordinary care. *Thompson v. Young Men's Christian Ass'n* 843

New Trial.

1. Generally, testimony of jurors will not be considered to impeach their verdict in respect of matters essentially inhering in the verdict and resting alone in the breasts of the jurors. *Glick v. Poska* 102
2. Requiring a remittitur, where there was a controverted issue of fact, and the jury's findings warrant amount of recovery, *held* error. *Loy v. Storz Electric Refrigeration Co* 357

Officers.

The law presumes that a public officer faithfully performed official duty. *Meeske v. Baumann* 786

Parent and Child.

Evidence *held* insufficient to sustain conviction of abandonment. *Weber v. State* 369

Partition.

A *bona fide* purchaser under a decree of partition will be protected, though the decree is thereafter reversed. *Schleuning v. Tatro* 3

Payment.

1. Mortgagor *held* estopped to deny application of payments on chattel mortgage instead of real estate mortgage. *Tresnak v. Paulsen* 71
2. Where a note was renewed in reduced amount, the maker cannot maintain that payments were applied contrary to directions. *Tresnak v. Paulsen* 71

Pleading.

1. An order allowing an amendment of pleading, not changing the issues nor affecting the *quantum* of proof, *held* proper. *Folken v. Union P. R. Co* 193
2. Permitting amendment of petition to conform to proof of damages *held* proper. *Folken v. Union P. R. Co* 193
3. A denial of the very words of the allegations of the petition, without denying their substance and effect, tenders no issue. *Bliss v. Pathfinder Irrigation District* 203
4. An answer denying that a bank "is a corporation duly organized and existing under" state laws is insufficient to put in issue its corporate capacity. *Bliss v. Pathfinder Irrigation District* 203
5. Demurrer for "misjoinder of parties" is not equivalent to demurrer for "defect of parties." *Salisbury v. Berry Motor Co* 605
6. In an action for fraud, the petition must set forth facts showing fraud. *U. S. Theatre Supply Co. v. Creal* 743
7. A demurrer to a pleading admits the truth of facts well pleaded, but does not admit the correctness of conclusions of law drawn by the pleader. *U. S. Theatre Supply Co. v. Creal* 743
8. A petition challenged by demurrer charges what by reasonable and fair intendment may be implied from the facts stated. *Meeske v. Baumann* 786

Principal and Agent.

Where a confidential agent undertakes to invest the prin-

cipal's funds in first mortgage loans, and takes a mortgage to himself and a junior mortgage to the principal, equity will subordinate the agent's lien to that of the principal. *Lake v. Rose* 294

Railroads.

1. An automobile driver approaching a railway crossing where there is restricted vision is required to look and listen. *McQuin v. Missouri P. R. Corporation* 423
2. Contributory negligence *held* question for jury. *McQuin v. Missouri P. R. Corporation* 423
3. Statutes requiring locomotives to give designated signals at crossings *held* to apply to roads in fact used by the public, though not dedicated. *McQuin v. Missouri P. R. Corporation* 423
4. Evidence *held* to establish that road crossed by railroad at place where collision occurred was a road in fact used by the public, requiring train to give statutory signals. *McQuin v. Missouri P. R. Corporation* 423
5. In an action for death at a railroad crossing, negligence and contributory negligence *held* questions for the jury. *McQuin v. Missouri P. R. Corporation* 423
6. In absence of statutory regulation, failure of a railroad company to have a flagman at a crossing will not warrant a finding of negligence. *McQuin v. Missouri P. R. Corporation* 423
7. In an action for death, instruction submitting issue of negligence based on failure of defendant railroad company to have a flagman at a crossing *held* error. *McQuin v. Missouri P. R. Corporation* 423

Rape.

1. In an action for damages for rape, whether plaintiff resisted to the extent of her physical ability *held* question for jury. *Ellig v. Powell* 270
2. In an action for damages for rape, no corroboration of the plaintiff's testimony is necessary. *Ellig v. Powell* 270
3. Damages of $1,250 for rape *held* not excessive. *Ellig v. Powell* 270

Receivers.

A petition positively verified by oath of plaintiff may be considered with supporting affidavits on the hearing of a preliminary motion for appointment of a receiver for a corporation. *Howell v. Poff* 793

Replevin.

1. In replevin, where defendant's right to possession of a truck is based on a lien for repairs, the measure of

damages is the value of the right to possession. *Jackson v. Arndt-Snyder Motor Co*..... 276
2. In replevin, a judgment in favor of plaintiff, who had a lien for repairs, for a return of the truck or its value, instead of the value of defendant's possession, *held* erroneous. *Jackson v. Arndt-Snyder Motor Co*..... 276

Robbery.
1. The offense of robbery from the person may be established by testimony of one credible witness. *Cherpinsky v. State*..... 52
2. To constitute robbery from the person, it is not essential that money or property be actually taken from the person. *Cherpinsky v. State*..... 52

Sales.
1. In action for price of potato picker, evidence *held* to sustain finding for plaintiff. *Linn v. Marshall*..... 252
2. The measure of damages for seller's breach of agreement to sell personalty is the market price on day and place appointed for delivery, less unpaid purchase price. *Loy v. Storz Electric Refrigeration Co*..... 357
3. Vendor's signature to affidavit attached to conditional sale contract need not appear at the end of the affidavit. *General Motors Acceptance Corporation v. Sutherland*.... 720
4. A conditional sale contract may be received in evidence, though the vendor's signature appears only in the body of the attached affidavit, and the seal of the notary is omitted. *General Motors Acceptance Corporation v. Sutherland* 720
5. Provision of conditional sale contract covering automobile requiring vendee to keep property free of liens *held* to negative existence of implied authority in vendee to have repairs made. *General Motors Acceptance Corporation v. Sutherland*..... 720

Schools and School Districts.
1. The state superintendent will not be required by mandamus to recognize a school district as a public school district entitled to share state trust funds created for secular public school purposes, if the only school in the district is sectarian, though organized and certified as a public school district. *State, ex rel. Public School District, v. Taylor*..... 454
2. The word "sectarian," in the constitutional provision respecting educational trust funds, applies to the Catholic church, without any distinction between the original church and later denominations of the Christian religion. *State, ex rel. Public School District, v. Taylor* 454

Statutes.

1. Penal statutes must be strictly construed. *Weber v. State* 369
2. Where the language of a statute is plain and unambiguous, there is no room for construction. *State, ex rel. Sorensen, v. First State Bank of Alliance* 502
3. A grant of official power necessarily implied from a specific provision of statute is part of the legislative act. *Meeske v. Baumann* 786

Taxation.

1. The net income derivable from real estate, prudently used for the purpose for which best adapted, is a proper factor to consider in determining its actual value. *Schmidt v. Saline County* 56
2. Tangible property should be assessed at its actual value. *Schmidt v. Saline County* 56
3. All tangible property should be assessed at the same proportion of actual value. *Schmidt v. Saline County* 56
4. A power plant constructed along the line between two school districts *held* within one for purpose of taxation. *School District No. 142 v. School District No. 13* 132
5. Masonic temple and lots on which temple is situated *held* exempt from taxation as property used exclusively for religious, charitable, and educational purposes. *Ancient and Accepted Scottish Rite v. Board of County Commissioners* 586
6. Continuing to assess a tract of land, from which a part was sold, as one entire tract, *held* not to render the entire tax void. *Haarmann Vinegar & Pickle Co. v. Douglas County* 643
7. Payment of taxes *held* voluntary. *Haarmann Vinegar & Pickle Co. v. Douglas County* 643
8. Taxes irregularly assessed, but not entirely void, may not be recovered when voluntarily paid. *Haarmann Vinegar & Pickle Co. v. Douglas County* 643
9. Taxes levied and computed on an amount in excess of actual assessed valuation are absolutely void so far as based on excess value. *Haarmann Vinegar & Pickle Co. v. Douglas County* 643
10. A void tax, though voluntarily paid, may be recovered. *Haarmann Vinegar & Pickle Co. v. Douglas County* 643
11. Where parties in good faith have settled a will contest and have stipulated for a decree accordingly, inheritance tax should be computed upon the portion received by each beneficiary. *In re Estate of Kierstead* 694
12. Evidence disclosing the effect of a will contest on the

property of the estate *held* admissible as bearing on the question as to whether a stipulation settling the will contest was entered into without intention to evade the inheritance tax. *In re Estate of Kierstead* 694

Tenancy in Common.

1. Generally, possession of realty by one cotenant is the possession of all. *Severson v. McKenzie* 827
2. Before ouster of a cotenant arises, there must be some notice or knowledge of acts causing ouster. *Severson v. McKenzie* 827
3. Notice or knowledge of acts out of which ouster of a cotenant arises may be inferred from acts or circumstances attending adverse possession. *Severson v. McKenzie* 827
4. Where one tenant in common enters upon the entire estate, improves it, pays the taxes, and claims the whole for more than the period of limitations, an actual ouster will be presumed. *Severson v. McKenzie* 827

Torts.

An act wrongfully done by cooperation of several persons, or done contemporaneously by them without concert, renders them liable jointly and severally. *Olson v. Hansen* 492

Trespass.

1. Petition to restrain lessor from interfering with lessee's possession and use of filling station *held* sufficient. *Standard Oil Co. v. O'Hare* 89
2. Failure to instruct jury to return verdict for nominal damages in action for trespass, where defendant admitted the trespass, *held* error. *Kochenthal v. Omaha & C. B. Street R. Co* 244

Trial.

1. Where the evidence is insufficient to sustain a verdict for plaintiff, it is error to overrule defendant's motion for a directed verdict in his favor. *Casey v. Chicago B. & Q. R. Co* 11
2. A verdict should not be set aside as a chance or quotient verdict except on a clear showing that it is the result of chance or a quotient verdict. *Glick v. Poska* 102
3. It is error to submit to the jury an issue not supported by evidence. *Olson v. Hansen* 492
4. Ordinarily, a party who would be defeated if no evidence were given on either side must first produce his evidence and rest. *Olson v. Hansen* 492

5. The trial court is invested with a wide discretion in allowing alteration of rules of practice and procedure regarding introduction of evidence. *Olson v. Hansen*.... 492
6. Cross-examination of defendant as to whether he carried liability insurance and whether he employed attorneys acting for him *held* permissible. *Jennings v. Biurvall* 551
7. Where different minds may reasonably draw diverse conclusions from facts, the issues should be submitted to the jury. *Lustgarten v. Harris*..... 663

Vendor and Purchaser.

1. "Marketable title" defined. *Robinson v. Bressler*..... 461
2. Defects in title *held* to authorize a rescission of contract of purchase. *Robinson v. Bressler*..... 461
3. On award of rescission, decree awarding purchaser a lien on the property for amount of purchase price upheld. *Robinson v. Bressler*..... 461
4. On rescission of land contract, purchasers *held* entitled to difference between amount paid and what they had received from sale of part of the land. *Robinson v. Bressler* 461

Venue.

In an action for fraud service on codefendants outside county of forum *held* void. *Lindeman v. Calamus Irrigation District* 1

Waters.

1. A landowner has no right to drain surface water by artificial means onto land of another to his damage, except as authorized by statute. *Warner v. Berggren*.... 86
2. Evidence *held* to entitle plaintiffs to enjoin defendants from draining surface water onto their lands. *Warner v. Berggren* 86
3. A landowner may construct a ditch to drain a pond into a natural watercourse. *Bures v. Stephens*..... 751
4. A landowner who sells a right of way for a drainage ditch, which empties into a natural watercourse thereon, and settles all damage resulting therefrom, cannot thereafter recover damages. *Bures v. Stephens*..... 751
5. Cleaning out and deepening a ditch sufficient to drain a basin, for which an easement exists, does not increase the use. *Bures v. Stephens*..... 751
6. Damages for use of an easement for a drainage ditch cannot be recovered by the owner of the servient estate against the owner of the easement, unless the latter is negligent in its use. *Bures v. Stephens*..... 751

Wills.

1. A parol contract to devise realty and bequeath personalty can be established only by evidence that is clear, convincing, and satisfactory. *Ward v. Hislop* 15
2. Testatrix' conveyance before death of devised lands *held* to work a revocation *pro tanto* of the will. *In re Estate of Kulp* 157
3. An implied revocation of a will should not be permitted to destroy provisions capable of execution. *In re Estate of Kulp* 157
4. Where testatrix before death sold lands devised to pay legacies, the remaining proceeds *held* not to pass to the residuary legatee, but to constitute property not disposed of. *In re Estate of Kulp* 157
5. Legacies payable out of proceeds of lands devised to executors for sale, where testatrix sold the lands before her death, *held* not payable out of proceeds of such sale. *In re Estate of Kulp* 157
6. Evidence *held* to sustain finding that a proffered written instrument was the will of decedent and was duly executed. *In re Estate of Brown* 274
7. A devise in trust providing that only income thereof be paid devisee during her husband's lifetime *held* to be a valid restriction. *In re Estate of Smith* 352
8. In construing a will, the entire instrument will be considered, and a decree entered giving effect to testator's intention. *In re Estate of Skinner* 438
9. Where two provisions of a will are irreconcilable, the later provision will control. *In re Estate of Skinner* 438
10. In a will contest on the ground of undue influence of testator's wife, an instruction stressing the close relationship between husband and wife *held* improper. *In re Estate of Abts* 714
11. In a will contest involving issues of mental capacity and undue influence, instructions on the provisions made by law for a wife in her intestate husband's estate *held* erroneous. *In re Estate of Abts* 714
12. Will construed, and *held* that the survivor of two residuary legatees took the entire residue. *In re Estate of Zimmermann* 812

Witnesses.

1. Permitting an interested witness to testify to a conversation between deceased and his wife *held* not erroneous in view of testimony of decedent's representative. *Banking House of F. Folda v. Higgins* 279
2. Testimony of a witness who testifies falsely in some re-

spects should be considered as to matters concerning which he is corroborated. *Blochowitz v. Blochowitz*..... 385
3. A purchaser seeking to recover the purchase price of stock from deceased seller's estate for breach of warranty may not testify respecting seller's representations. *In re Estate of Schellenberg*..... 584